Ruling on Standing and Funding

By an Order-in-Council dated February 21, 2003, I was appointed Commissioner of a Commission of Inquiry to inquire into the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan. Appended to the Order-in-Council were Terms of Reference which read as follows:

1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into any and all aspects of the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the province of Saskatchewan. The Commission shall report its findings and make such recommendations, as it considers advisable.

2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, and without interfering in any ongoing police investigation related to the death of Neil Stonechild or any ongoing criminal or civil proceeding.

3. The Commission shall complete its inquiry and deliver its final report containing its findings, conclusions and recommendations to the Minister of Justice and Attorney General. The report must be in a form appropriate for release to the public, subject to *The Freedom of Information and Protection of Privacy Act* and other laws.

4. The Commission shall have the power to hold public hearings but may, at the discretion of the commissioner, hold some proceedings *in camera*.

5. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

Rules of Procedure and Practice were published by the Commission and included guidelines to determine which persons should be allowed to appear before the Commission and which should be allowed funding from the Treasury to assist in their participation in the Inquiry. The standing and funding guidelines read as follows:

> The Terms of Reference provide that the Commission shall have the responsibility to inquire into all aspects of the circumstances that resulted in the death of Neil Stonechild, and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan.

Formal Written Rulings
Standing and Funding

I. Principles

1. Commission counsel has the primary responsibility for representing the public interest at the Inquiry including the responsibility to ensure that all interests that bear on the public interest are brought to the Commission's attention.

2. Parties are granted standing for the purpose of ensuring that particular interests and perspectives, that are considered by the Commission to be essential to its mandate will be presented; these include interests and perspectives that could not be put forward by Commission counsel without harming the appearance of objectivity that will be maintained by Commission counsel and which the Commission believes are essential to the successful conduct of the Inquiry.

3. The aim of the funding is to assist parties granted standing in presenting such interests and perspectives but is not for the purpose of indemnifying interveners from all costs incurred.

II. Criteria for Standing

1. The Commissioner will determine who has standing to participate in Commission proceedings and the extent of such participation. The Commissioner will determine applications for standing based on the following criteria:

   a. the applicant is directly and substantially affected by the Inquiry; or

   b. the applicant represents interests and perspectives essential to the successful conduct of the Inquiry; or

   c. the applicant has special experience or expertise with respect to matters within the Commission's terms of reference.

III. Criteria for Funding

1. The Terms of Reference provide that the Commissioner shall determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commissioner to have their legal counsel paid for by the Commission, and further, determine at what rate such counsel shall be paid for their services. The Commissioner will determine applications for funding based on the following criteria:

   a. the applicant has been granted standing or is a witness whose counsel has been granted standing for the purpose of that witness's testimony;

   b. the applicant has an established record of concern for and has demonstrated a commitment to the interest they seek to represent, they are directly or substantially affected by the Inquiry, or they have

special experience or expertise with respect to matters within the Commission's terms of reference;

c. the applicant does not have sufficient financial resources to enable them adequately to represent that interest and require funds to do so; and

d. the applicant has a clear proposal as to the use they intend to make of the funds, and appears to be sufficiently well organized to account for the funds.

IV. Applications

1. Applications for standing shall be made in writing and shall include a statement of how the applicant satisfies the criteria for standing set out in these Guidelines.

2. Applications for funding shall be made in writing, supported by affidavit, and shall include the following:

   a. a statement of how the applicant satisfies the criteria for funding set out in these Guidelines;

   b. an explanation as to why an applicant would not be able to participate without funding;

   c. a description of the purpose for which the funds are required, how the funds will be disbursed and how they will be accounted for;

   d. a statement of the extent to which the applicant will contribute their own funds and personnel to participate in the Inquiry; and

   e. the name, address, telephone number and position of the individual who will be responsible for administering the funds and a description of the controls put in place to ensure the funds are disbursed for the purposes of the Inquiry.

Written applications for standing and funding should be submitted to the Commission of Inquiry by delivering a copy to the Inquiry's offices in Saskatoon, at the address set out below by no later than 4:00 p.m. on the 24th day of April, 2003.

The Commission of Inquiry Into Matters Relating
to the Death of Neil Stonechild
1020 - 606 Spadina Crescent East
Saskatoon, SK
S7K 3A1

A party granted full standing has the following rights:

1. access to documents relevant to the Inquiry collected by the Commission subject to the Rules of Procedure and Practice;

2. advance notice of documents which are proposed to be introduced into evidence;
3. advance provision of statements of anticipated evidence;
4. a seat at counsel table;
5. the opportunity to suggest witnesses to be called by Commission counsel, and if Commission counsel declines to do so, the opportunity to apply to me to call such witness;
6. the opportunity to apply to me to lead the evidence of a particular witness if the Commission counsel declines to do so;
7. the opportunity to cross-examine witnesses on matters relevant to the basis upon which standing was granted;
8. the opportunity to review transcripts at Commission offices (a copy of the transcript may be purchased from the court reporter), (the transcript will be posted on the Commission's web site and will be available to the public);
9. the opportunity to make closing submissions; and
10. the opportunity to apply for funding.

In order to obtain standing an applicant is required to satisfy the following criteria:

a. the applicant is directly and substantially affected by the Inquiry; or
b. the applicant represents interests and perspectives essential to the successful conduct of the Inquiry; or
c. the applicant has special experience or expertise with respect to matters within the Commission's terms of reference.

In order to obtain funding an applicant must satisfy the following criteria:

a. the applicant has been granted standing or is a witness whose counsel has been granted standing for the purpose of that witness's testimony;
b. the applicant has an established record of concern for and has demonstrated a commitment to the interest they seek to represent, they are directly or substantially affected by the Inquiry, or they have special experience or expertise with respect to matters within the Commission's terms of reference;
c. the applicant does not have sufficient financial resources to enable them adequately to represent that interest and require funds to do so; and
d. the applicant has a clear proposal as to the use they intend to make of the funds, and appears to be sufficiently well organized to account for the funds.

Applications for standing are required to be made in writing and to establish how the applicant satisfies the criteria for standing. Applications for funding must be made in writing supported by an affidavit and include the following requirements:

a. a statement of how the applicant satisfies the criteria for funding set out in these Guidelines;

b. an explanation as to why an applicant would not be able to participate without funding;

c. a description of the purpose for which the funds are required, how the funds will be disbursed and how they will be accounted for;

d. a statement of the extent to which the applicant will contribute their own funds and personnel to participate in the Inquiry; and

e. the name, address, telephone number and position of the individual who will be responsible for administering the funds and a description of the controls put in place to ensure the funds are disbursed for the purposes of the Inquiry.

Notice of the standing and funding hearing was published in various newspapers in the Province of Saskatchewan and required that applications be submitted in writing to the Inquiry offices by April 24, 2003.

Seven applications for standing were filed. Six of the applicants also sought funding in the event they were given standing. The applications were supported in all but one case by affidavit. The RCMP filed a very brief two-page memo noting its role in the investigation which followed Mr. Stonechild's death. Counsel indicated that the focus of the Royal Canadian Mounted Police interest in this matter related to its investigation. I understood him to say that it was not anticipated he would participate in that portion of the Inquiry related to the circumstances surrounding the death of Mr. Stonechild and the subsequent investigation by the Saskatoon Police Service. He noted, however, and quite properly, that questions may arise which relate to the earlier events and which might necessitate a request that he be allowed to ask questions in addition to those that would normally apply to the RCMP role.

All of the applicants are represented by counsel. Each made a brief submission and answered questions. Each appeared to be well informed as to the issues and the objectives of the Inquiry.

The Standing Applications

1. Stella Bignell, the mother of the late Neil Stonechild.

2. Constable Larry Hartwig. Constable Hartwig is a member of the Saskatoon Police Service. It is suggested he had contact with Mr. Stonechild on the evening of November 24, 1990.

3. Constable Bradley Raymond Senger. He is a member of the Saskatoon Police Service. It is suggested he had contact with Mr. Stonechild on the evening of November 24, 1990.

4. Saskatoon Police Service. This is the municipal police force which serves the City of Saskatoon.
5. Saskatoon City Police Association. The Association is a trade union and represents the rank and file uniform members of the Saskatoon Police Service.
6. Royal Canadian Mounted Police.
7. Federation of Saskatchewan Indian Nations. The Council of the Federation comprises the aboriginal chiefs in the Province of Saskatchewan. It is actively involved in Justice matters affecting aboriginal persons and particularly in advocating for its members where allegations have been made of mistreatment of aboriginal persons by law enforcement agencies.

Rulings on Standings

1. Stella Bignell. Ms. Bignell should clearly have standing at the Inquiry in light of her relationship to the deceased and her role as representative of the Stonechild family. She is granted full standing.
2. Constable Hartwig. Constable Hartwig is vitally interested in this matter having been considered at one juncture a suspect in the earlier investigation of Mr. Stonechild's death. He is granted full standing.
3. Constable Senger. The same comments apply to Constable Senger. He is granted full standing.
4. Saskatoon Police Service. The Service has a very obvious interest in this matter affecting as it does two of its members and the administration of justice in the City of Saskatoon. It is granted full standing.
5. Saskatchewan City Police Association. I am satisfied that the Association should, similarly, have full standing. The Association represents the interests of the bulk of the Police Service membership. Constables Hartwig and Senger are members of the Association. It acts as a mediator and advocate for its members. It will have full standing.
6. Royal Canadian Mounted Police. The interest of the RCMP is directed to its subsequent investigation of the circumstances outlined above. It will have standing limited to the date it was appointed to investigate the Stonechild matter. If it appears earlier events have relevance to the RCMP's role then I will consider allowing it a broader mandate.
7. Federation of Saskatchewan Indians. The Federation has a sufficient interest in this matter to participate fully in the Inquiry. It will have full standing.

Rulings on Funding

The Terms of Reference contain the following provision:

> 5. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

Funding shall be allowed as follows:

1. Stella Bignell. I expect Ms. Bignell will be a witness at the Inquiry and certainly I anticipate she will be present throughout the Inquiry. She does not have any resources to retain and instruct counsel. She lives in northern Manitoba and must travel by public transportation for some distance. The fees and disbursements of her counsel, Mr. Worme, will be provided at no cost to her. I fix Mr. Worme's hourly rate at $192.00. Mr. Worme's compensation will apply on the basis of one hour's preparation for each hour of attendance at the Inquiry. Counsel will submit an invoice to Commission counsel on a monthly basis, the invoice to set out the nature of the work done and disbursements.

   Time spent by counsel at the request of the Commission including Commission counsel or in attending with his client while the client is being interviewed by Commission counsel may also be billed as preparation time. I am not disposed to allow funding for second counsel for any of the applicants.

   Ms. Bignell will be allowed her expenses for travel, accommodation and meals for the days she chooses to attend the Inquiry.

   Ms. Bignell asked that travel expenses of her daughters in Manitoba be paid. I am not disposed to grant such a request as she has a son living in Saskatoon.

2. Constable Hartwig. Constable Hartwig is entitled to funding for one counsel. Constable Hartwig disclosed his financial affairs including his assets and liabilities and I am satisfied that he does not have the resources to retain counsel. I fix Mr. Fox's hourly rate at $192.00. If an alternate counsel appears in his place that person's rate will be set at $125.00. Counsel will invoice the Commission in the same fashion as counsel for Ms. Bignell.

   Time spent by counsel at the request of the Commission including Commission counsel or in attending with his client while the client is being interviewed by Commission counsel may also be billed as preparation time. I am not disposed to allow funding for second counsel for any of the applicants.

3. Constable Senger. The comments I have made about Constable Hartwig will apply equally to Constable Senger.

4. Saskatoon Police Service. Mr. Rossmann made an eloquent plea for funding citing the burden the Inquiry will place on Saskatoon and the Saskatoon Police Service. It is true the Police Service did not initiate the Inquiry and that the Inquiry may have some implications for the Province overall. The Service is acutely interested in this matter as

two of its members feature prominently in it. Be that as it may, the legal costs of the Service will not be significant save for the fact that they fall on the taxpayers of the City generally. That is so because the Service engaged a city solicitor to act for it. In the circumstances I am not disposed to grant funding.

5. The Saskatoon City Police Association. The Association has retained its regular counsel in this matter. It is apparent he has had a long standing connection with the Stonechild investigation and a good deal of knowledge about the circumstances surrounding it. The Association's desire to assist two of its members is understandable. The cost of doing so should not be borne by the provincial treasury particularly as Constables Hartwig and Senger are represented by counsel funded by the Commission. Funding is denied.

6. Royal Canadian Mounted Police. The RCMP do not seek funding.

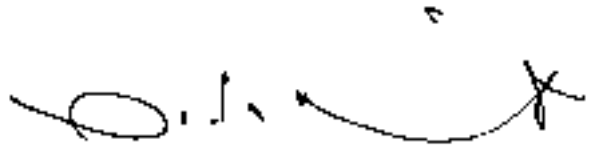
7. Federation of Saskatchewan Indian Nations. It appears from the Federation brief that the funds it receives from government will not be available to assist in its participation here and that it will not likely be able to appear if it does not have funding. Funding is granted. Counsel's hourly rate is set at $192.00. The directions as to payment for one hour preparation for each hour of participation in the Inquiry hearings applies also, and invoicing will be provided in the same manner as directed above. My comments as to alternate counsel also apply and that person's rate is set at $125.00 an hour.

   Time spent by counsel at the request of the Commission including Commission counsel or in attending with his client while the client is being interviewed by Commission counsel may also be billed as preparation time. I am not disposed to allow funding for second counsel for any of the applicants.

Conclusion

I appreciate that not every eventuality can be anticipated. Circumstances may require that the bases for funding be re-visited at a later date. Counsel will have leave to apply for directions as they may be advised. Any such application shall be in writing and the other parties shall be served with copies of it. My thanks to counsel for their thorough and well prepared briefs and for their submissions on April 30, 2003.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 13th day of May, 2003.



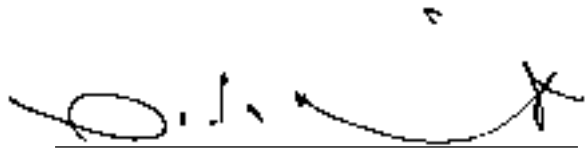
Mr. Justice David H. Wright
Commissioner

Addendum

Mr. Worme advised me during the course of the standing and funding applications on April 30, 2003 that he represented the Stonechild family and a Mr. Jason Roy. It has been suggested that Mr. Roy has personal knowledge of Mr. Stonechild being involved with the members of the Saskatoon Police Service on November 24. He apparently brought this information to the attention of Mr. Worme in December soon after Mr. Stonechild's body was discovered. Mr. Worme asked for some guidance in determining whether it would be appropriate for him to continue to act for the Stonechild family and represent Mr. Roy. I understand Mr. Roy will be a significant witness during the Inquiry hearings. I indicated to him, as I do now, that in my respectful view, it would not be appropriate for him to represent both parties. In light of his appearance for the Stonechild family I gather that Mr. Roy will likely be advised that he should retain other counsel. I hope this answers Mr. Worme's question to his satisfaction.

Mr. Worme may wish to advise Mr. Roy that the Rules of the Commission allow for the appointment of counsel for a witness in the appropriate case and that the Rules may also allow for funding of such counsel. Any such request, of course, would have to be made by a formal application to the Commission.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 13th day of May, 2003.



Mr. Justice David H. Wright
Commissioner

Application of Jason Roy

The applicant will appear as a witness at the Inquiry. He has indicated, on several occasions, that he has personal knowledge of Neil Stonechild's involvement with members of the Saskatoon Police Service on November 24, 2000.

He has retained counsel. He now applies for funding for his legal representation as a witness. He also seeks standing as a party in the Commission hearings.

Mr. Roy is unemployed and has no financial resources. Given the potential importance of his evidence his presence as a witness before the Commission is essential. He meets the criteria set by the Commission for funding in his capacity as a witness. I refer to the Terms of Reference and in particular, paragraph 5:

> 5. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

Ruling as to Funding

Mr. Roy is entitled to funding with respect to his legal representation as a witness. The funding will apply to the days when Mr. Roy appears as a witness at the Inquiry. Counsel's compensation will apply on the basis of one hour's preparation for each hour of attendance at the Inquiry. Time spent by his counsel at the request of the Commission including Commission counsel or in attending with his client while the client is being interviewed by the Commission counsel may also be billed as preparation time.

I have reviewed Mr. Winegarden's material and his submission with respect to his hourly rate. Given counsel's experience and length of time at the, Bar, it is appropriate to set his hourly rate at $145.00. If alternate counsel appears for Mr. Winegarden that person's hourly rate will be fixed at $125.00.

Counsel will submit an invoice to Commission counsel on a monthly basis, the invoice to set out the nature of the work done and disbursements.

Ruling as to Standing as a Party

In his affidavit Mr. Roy, after dealing with his role as a potential witness makes these statements:

> 4. THAT I have come to believe that the Justice system in Saskatchewan is designed to control First Nations people and not to work on our behalf. I believe there is no avenue for people like myself to inform and direct the actions of the justice system in Saskatchewan.
>
> 5. THAT since the information I have has come to public light, I have spoken with many other First Nation people about the incident in question and about the justice system in general. It is my conclusion that there are many First Nations people like myself who feel alienated from the justice system and who feel that the authorities would rather incarcerate First Nations people than act in their behalf.

6. THAT I am committed to offer all my personal knowledge and experiences as a First Nations person to help in any investigation into the death of Neil Stonechild and to aid this Commission in drawing its conclusions.

Mr. Roy's offer of assistance is welcome. It appears he can assist the Commission significantly by appearing as a witness.

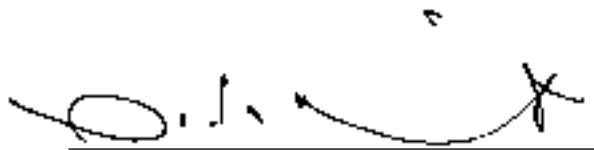
With respect, there is no evidence he represents, officially or unofficially, First Nations people beyond himself. There are those who do, including the Federation of Saskatchewan Indian Nations. Mr. Roy is not qualified to investigate the circumstances surrounding the death of Neil Stonechild or the subsequent investigation.

It is not necessary or appropriate to add Mr. Roy as a party to the inquiry.

Conclusion

I appreciate that not every eventuality can be anticipated. Circumstances may require that the bases for funding be re-visited at a later date. Counsel will have leave to apply for directions as they may be advised. Any such application shall be in writing and the other parties shall be served with copies of it.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 13th day of June, 2003.



Mr. Justice David H. Wright
Commissioner

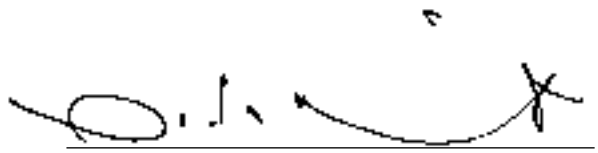
Application for Funding for Alternate Counsel for Stella Bignell

Ruling

Ms. Bignell sought funding initially for two counsel, Mr. Worme and Mr. Curtis. I did not allow two counsel. There was no request for funding for alternate counsel although other parties to the inquiry did make such a request. In some instances I set rates of compensation for such persons.

Ms. Bignell now makes formal application through her counsel, Mr. Worme, to set compensation for alternate counsel with respect to her participation in the hearing. The request is a reasonable one especially in light of the directions I have given as to other parties. The hourly rate for alternate counsel is set at $125.00 and the directions that were granted with respect to other parties will apply to Ms. Bignell's counsel as well.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 25th day of June, 2003.



Mr. Justice David H. Wright
Commissioner

Ruling as to Removal of Counsel for the FSIN

Introduction

This is an application to remove Robertson Stromberg and Chris Axworthy, Q.C. particularly, as counsel for the Federation of Saskatchewan Indian Nations. The Federation is a party to the inquiry established to investigate the death of Neil Stonechild and the investigation which followed.

The Facts

Neil Stonechild, an aboriginal youth, was found dead on the outskirts of Saskatoon on November 27, 1990.

On February 21, 2003, an order-in-council was passed establishing a judicial inquiry into the Stonechild matter. The terms of reference set out in the order read as follows:

1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into any and all aspects of the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into the death of Neil Stonechild for the purpose of making findings and recommendations with respect to the administration of criminal justice in the province of Saskatchewan. The Commission shall report its findings and make such recommendations, as it considers advisable.

2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, and without interfering in any ongoing police investigation related to the death of Neil Stonechild or any ongoing criminal or civil proceeding.

3. The Commission shall complete its inquiry and deliver its final report containing its findings, conclusions and recommendations to the Minister of Justice and Attorney General. The report must be in a form appropriate for release to the public, subject to *The Freedom of Information and Protection of Privacy Act* and other laws.

4. The Commission shall have the power to hold public hearings but may, at the discretion of the commissioner, hold some proceedings *in camera*.

5. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

Certain individuals and organizations applied for standing at the inquiry. Some also sought funding. The Saskatoon City Police Association (the Association) represents uniform members of the Saskatoon Police Service below the rank of inspector. It was granted standing as was the Federation of Saskatchewan Indian Nations on May 13, 2003. The latter organization is represented by Robertson Stromberg and Ralph Ottenbreit, Q.C., in particular.

The material filed by Robertson Stromberg on the application for standing and funding on April 24, 2003 contained the following statement (Appendix A):

> 8. Chris Axworthy, Q.C. will be responsible for administering the said funding.

The application was followed by a letter of April 28, 2003 from Mr. Ottenbreit to Commission counsel. It attached the curriculum vitae of Messrs. Axworthy and Ottenbreit and contained this information:

> I can advise that I will be counsel at the Inquiry if standing is granted. **Chris Axworthy will be assisting the process by helping to prepare for the Inquiry and any daily testimony.** He will not appear as counsel. My regular hourly rate is $220.00. Chris Axworthy's regular hourly rate is $250.00. I expect that a maximum of two hours of preparation time will be required for each hour of inquiry time if funding for one counsel is approved… (emphasis added)

Mr. Axworthy's curriculum vitae indicates that he held the office of Minister of Justice and Attorney General from 1999 to 2003, Minister of Aboriginal Affairs from 2001 to 2003, and was a member of the Legislative Assembly for Saskatoon-Fairview from 1999 to 2003.

On May 1, 2003 Mr. Plaxton, counsel for the Association, wrote to Robertson Stromberg. The letter reads as follows:

> I am writing at this time to make certain inquiries concerning your firm's representation of the FSIN at the above-noted inquiry. These are not only my concerns but also concerns of Messrs. Watson and Fox.
>
> Our concerns arise out of the association of Mr. Chris Axworthy, Q.C. with both your firm and this file. These concerns relate most specifically to the Stonechild matter, which of course was actively under consideration by the Department of Justice while Mr. Axworthy was Minister of Justice.
>
> In order for us to make a determination as to how to deal with the matter, I would ask you [to] (sic) provide us with the following information:
>
> 1. The nature of Mr. Axworthy's association with your firm and how long the same has been in place.
> 2. What involvement Mr. Axworthy has had with this client and this matter and how long he has been so involved.
> 3. What involvement you anticipate he will have with this client and this matter in the future.
>
> Our concern of course is the perception of a conflict of interest not only by individual clients, but also the public at large. I would suggest this is especially pertinent in a matter such as the one at hand.
>
> I would appreciate your early advice so that we are able to deal with this issue if necessary without delaying any of the Inquiry's proceedings.
>
> I thank you for your attention.

On May 2, 2003, he followed with a second inquiry. It reads as follows:

> Further to our telephone conversation yesterday, I would be obliged if you could get back to me with a written response to the questions posed in our 1st of May correspondence. As mentioned, I would like to have the same at hand to discuss the matter with other counsel and my clients.
>
> From our conversation, I understand the fact to be Mr. Axworthy was originally going to act on behalf of the FSIN at the Stonechild Inquiry. From this, I assume he has acted on the file and/or offered advice concerning same. Please correct me if I am wrong.
>
> I further have your advice that although you are seeking funding for senior and junior counsel, you would not be asking for Mr. Axworthy's time to be compensated by the Commission. From this, it would appear you intend to have Mr. Axworthy continue his involvement in this matter, although not actively at counsel table. Please correct me if I am wrong.
>
> Again, I would appreciate you getting back to me as soon as you can and thank you in advance for your consideration.

On May 2, 2003, Mr. Ottenbreit forwarded two fax communications to Mr. Plaxton. The first reads as follows:

> Thank you for your fax of May 1, 2003.
>
> I have several observations.
>
> The inquiry is not an adversarial proceeding. It is inquisitorial. The issues raised by you should be taken in this context. Moreover, the object of the inquiry is not to find fault. Your clients' concerns should also be taken in this context.
>
> I expect that the evidence that the Commission will hear will come primarily from the Department of Justice and that there will be full disclosure by them. This will happen in any event whether Mr. Axworthy was the Minister or not. Every party will therefore have access to the same information from the Department of Justice. The fact that Mr. Axworthy is associated with our firm should therefore not prejudice your clients and those of Messrs. Watson and Fox.
>
> At one point prior to the standing hearing, we believed that Mr. Axworthy may be able to assist in the preparation for the inquiry after disclosure was given, although it was not contemplated he would appear as counsel before the inquiry. After further consideration we determined that Mr. Axworthy should have no part in this proceeding. Consequently at the hearing on April 30th I indicated to Justice Wright that we sought funding for only two lawyers, David Bishop and me. I confirmed then that only two of us would be working on this matter. I reiterate this and assure you that Mr. Axworthy will not be involved in any preparation for or appearance before the inquiry nor assist either Mr. Bishop or me in any other way with respect to our representations before the inquiry.
>
> I also point out that Mr. Axworthy having been a Minister has a ministerial obligation of confidentiality related to his duties as Minister. This obligation is a

continuing one which he takes seriously. He and the other members of our firm are mindful of this and I can advise that this obligation has been met and will continue to be met.

Insofar as the three questions set out in your letter are concerned, you know that I cannot provide you answers to all of these because of confidentiality obligations with respect to our client. However, I can advise that Mr. Axworthy joined our office in early February, 2003. He is not a partner. He had resigned as Minister around January 21, 2003.

Our office has only very recently been retained on this matter.

I also observe that Justice Wright is an experienced Judge who is highly regarded. I do not believe that Mr. Axworthy's association with our firm will make a bit of difference as to how he conducts this inquiry and subsequently makes findings. I have the utmost confidence that he will be objective, impartial and fair.

Mr. Axworthy did not sign the Order in Council for this inquiry nor did he set the terms of reference. That was done by Mr. Nilson.

It is my belief that it would be in everyone's interest that the parties are able to have the counsel they have chosen represent them. To do otherwise would arguably impose an actual prejudice in order to avoid a perceived one and an actual interference in the conduct of the inquiry.

Lastly, I understand your clients' concern with the upcoming inquiry. I'm sure that it is very stressful for their members. I often represent police officers who are the subject of investigations, criminal or otherwise and I know first hand the emotional toll these difficult matters take on them.

I trust this addresses your concerns.

The second fax states this:

Thank you for your fax letter of May 2nd. I enclose my letter response to your letter of May 1st.

You have our conversation of May 1st wrong. I specifically told you yesterday that Mr. Axworthy would not be acting as counsel at the Inquiry. What I did tell you yesterday is set forth in the third large paragraph of my enclosed letter.

Insofar as Mr. Axworthy offering advice on the Stonechild matter, I believe that the only work done to date is in respect of the standing and funding application and I prepared that. The actual submission text was prepared by FSIN in house. Mr. Axworthy has acted to facilitate my communications and instructions with respect to that application.

The nature of Mr. Axworthy's further involvement on this matter is set forth in the third large paragraph of my enclosed letter.

I trust this answers your inquiries.

Mr. Plaxton wrote to Mr. Ottenbreit on May 6, 2003, and made these comments:

> Thank you for yours of the 2nd of May. I have had an opportunity to discuss this issue further with my clients.
>
> The Department of Justice is not a party or a proposed party to the Inquiry. Further, we have no guarantee that all parties will have access to the same information from the Department of Justice.
>
> Above and beyond this however, we believe your firm finds itself in an insurmountable conflict of interest, both actual and perceived. Accordingly, we must request your firm generally, and Mr. Axworthy specifically, cease acting for the FSIN, directly or indirectly in the Stonechild Inquiry or any other matters pertaining thereto.
>
> We believe the FSIN will be able to retain alternate counsel at this early date without any real inconvenience as not much has yet taken place on the file.
>
> My client makes this request on its own behalf and on behalf of its members.
>
> I would ask the favour of an early reply so that we may apply to the Commissioner for a ruling, if necessary.
>
> I thank you for your attention.

Ultimately, Mr. Ottenbreit replied on May 14, 2003. His reply reads as follows:

> I have now had an opportunity to consult with my client. Our client wants our office and specifically me as their counsel for the inquiry. Accordingly, we will not be stepping back from this matter.
>
> We disagree with your comments that our firm has an insurmountable conflict of interest on this matter.
>
> Conflicts in the legal sense usually arise in two fashions. A conflict results in relation to confidential information or loyalty to a client. In either of these senses, there is no conflict on this matter.
>
> Any information which Mr. Axworthy's officials or he would have received on this matter would have come as a result of various police investigations pursuant to a public duty respecting this matter rather [than] (sic) any direct or indirect solicitor/client relationship which he or anyone else in Justice had with the two police officers, your client or any other party at the inquiry. Although there is always the risk that the Department of Justice has some information which will not for some reason be given to the inquiry, this is highly unlikely and I am assured by the Department that any disclosure they make to anyone will go through Mr. Hesje. Presumably then any information gleaned from any of the investigations done by or at the request of the Department of Justice will at some point become public at this inquiry.
>
> It is disingenuous to raise the alarm about the use of information which Mr. Axworthy may or may not have as a result of his being Minister where the very inquiry in which your clients will participate will presumably bring all that information

to light for the public to see. Nevertheless we can assure that none of any information which Mr. Axworthy would have had access to while he was Minister has been disclosed to us or our client nor will it be disclosed to us or our client.

One of your co-counsel raised the issue of Chinese walls being put up with respect to confidential information. We are prepared to take steps that are reasonable to allay any of your concerns in this regard notwithstanding our earlier comments and notwithstanding the fact that we believe it would be overkill to do so. Mr. Axworthy comes to our office with none of the regular risk factors which would accompany lawyers transferring from one firm to another and which would have a bearing on disclosure of confidential information. He comes with none of the Justice files or material. He comes with no staff who would have worked on any of the Justice files on this matter. In short he comes only with what he can remember and he is already bound not to disclose that pursuant to his ministerial duty.

With respect to the obligation of loyalty, it has often been stated that the relationship of counsel and client requires clients typically untrained in the law and lacking the skill of advocates to entrust the management of their cases to counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case. Mr. Axworthy while he was Minister had no a (sic) duty of loyalty to your client or the two police officers who seek to be parties or to the R.C.M.P. or to the FSIN or to any other party or potential party. In short, his loyalty was a public one to carry out his ministerial duties for the public good. In that sense we believe that Mr. Axworthy has not breached any duty of solicitor's loyalty to anyone. Mr. Axworthy's public duty as Minister ceased on January 21, 2003.

We fail to understand how his public duties prior to January 21, 2003 can somehow circumscribe our involvement with the inquiry because of his present association with our firm.

Your comments suggest that you perceive some unfairness to your clients as a result of our acting for our clients. We point out again that Mr. Axworthy played no favourites with any party to the inquiry nor did he shepherd the Order in Council setting up the Inquiry through Cabinet. Accordingly, he did not set the terms of reference for the inquiry. That was done by Mr. Nilson who as acting Minister had the final decision. The inquiry was in fact publicly announced by Eric Cline, Q.C.

Presumably your complaint is that Mr. Axworthy's actions as Minister of Justice, i.e. his public duty, somehow conflicts with or is inimical to your clients' interests. This also presumes that the performance of his public duty is adversarial to your clients and their interests. This is not so. Moreover, if I follow your logic, our firm is now visited with this supposed conflict because of his association. We do not see this as a valid argument.

A party should not be deprived of his or her choice of counsel without good cause. The concepts of conflict of interest and the countervailing value that a litigant should not be deprived of their counsel of choice are really two aspects of

> protecting the integrity of the legal system. If a party could achieve an undeserved tactical advantage over an opposing party by bringing a disqualification motion or seeking other "ethical relief" using "the integrity of the administration of justice merely as a flag of convenience" fairness of the process would be undermined. Your suggestion that our firm has an insurmountable conflict despite Mr. Axworthy's stringent confidentiality obligations and despite the fact that neither I nor Mr. Bishop have any personal knowledge whatsoever of your clients or any party or their particular affairs, promotes form at the expense of substance and tactical advantage instead of legitimate protection.
>
> I point out again that the process of the inquiry is inquisitorial rather than adversarial. Our client is concerned as your client's (sic) are to determine what happened with Neil Stonechild.
>
> Accordingly, we will proceed to act on our client's behalf.

The Association counsel then wrote to Commission counsel on May 23, 2003 as follows:

> Due to what the Association perceives to be a conflict of interest I have requested the Robertson Stromberg firm generally and Mr. Chris Axworthy, Q.C. specifically cease acting for the F.S.I.N. directly or indirectly in the within matter or any matters pertaining thereto. Mr. Ottenbreit has declined my request, accordingly I wish to make application for an order removing them as counsel.
>
> I would ask you seek the Commissioner's directions as to whether this application should be made to the Commissioner or the Court of Queen's Bench. If the application should be made to the Commission please advise as to dates that would be acceptable for same.
>
> I thank you for your attention.

Mr. Ottenbreit replied briefly on the same day as follows:

> I have received Mr. Plaxton's letter of May 23, 2003 asking for directions from the Commissioner as to his application to have us removed from the Inquiry. In view of his request, we may have representations to make with respect as to what the proper forum would be. We will get back to you early next week.

Mr. Ottenbreit delivered a more detailed response on May 26, 2003. It reads:

> Respecting Mr. Plaxton's letter of May 23, 2003, I can advise as follows:
>
> 1. I believe the terms of reference on this inquiry are wide enough to allow Mr. Justice Wright to determine who may appear at the inquiry and conduct the case. In that sense, I take the view that the alleged conflict as it is presented is within his jurisdiction and should be heard by him.
>
> 2. I view with some dismay the apparent inaccuracy contained in Mr. Plaxton's letter to the effect that Chris Axworthy continues to act for the FSIN on this matter or that we have declined Mr. Plaxton's request in this regard. The letter is misleading in that it leaves the impression that Mr. Axworthy continues to act on this matter and that I have declined Plaxton's request that he cease to

act. We made it clear that Mr. Axworthy was not going to be involved in this matter on a number of occasions as follows:

(a) on April 30, 2003 at the standing and funding hearings when I indicated Mr. Bishop and I would act on this matter;

(b) on May 1, 2003 in a telephone conversation with Mr. Plaxton where I indicated unequivocally Mr. Axworthy would not be involved in this matter;

(c) on May 2, 2003 by letter to Mr. Plaxton where I indicated unequivocally that Mr. Axworthy would not be involved in this matter.

3. In our view the only issue with respect to Mr. Plaxton's complaint is whether our firm as opposed to Mr. Axworthy specifically may appear on this matter. In this regard at the time of the funding application it was no secret that Mr. Axworthy was associated with our firm. Although the proposal for funding originally made reference to Mr. Axworthy, none of the parties objected at the funding application to the association of Mr. Axworthy and our firm.

I am under separate cover sending back the completed Undertaking of Counsel.

I would be pleased therefore to appear before the Commissioner at a convenient time to address this matter.

Mr. Plaxton then wrote again on May 27, 2003 to Commission counsel and stated:

I have received a copy of Mr. Ottenbreit's 26th of May correspondence to yourself. As indicated in the correspondence our request was both the Robertson Stromberg firm and Mr. Axworthy cease acting for the FSIN directly or indirectly concerning this matter. This was not a disjunctive but a conjunctive request in that from our perception, it is necessary to mitigate the harm caused that both the firm and Mr. Axworthy discontinue any association. By way of reference, I believe whether or not Mr. Axworthy is actually handling the file, he being a member of the firm is legally deemed to be acting for the client.

It appears the proposed participation of Mr. Axworthy in this matter has changed dramatically from the outset to present. It does appear though he has had some actual involvement in same prior to the standing applications. The timing and full extent of same is not known to us. Mr. Ottenbreit in correspondence after the conflict issue was raised mentioned the possibility of separation walls concerning Mr. Axworthy, this however is too little, too late and, in any event, in no way addresses the issue of a cabinet minister and/or his law firm appearing at an Inquiry so soon after he left his post.

I will be forwarding my materials as soon as possible in relation to our application.

I thank you for your attention.

I have reproduced the particulars of Mr. Axworthy's history as Minister and the entire correspondence passing between counsel for the Association and the Federation and the Commission to provide a full understanding of the many complex issues raised in this application.

The Association ultimately advised that it wished to make a formal application to the Commission to remove Robertson Stromberg and Mr. Axworthy. That application was argued before me on June 9, 2003. The application was supported by counsel for Constables Hartwig and Senger and the Saskatoon Police Service. Counsel for Stella Bignell opposed the application for removal supporting the position of Robertson Stromberg and Mr. Axworthy.

Code of Professional Conduct

A Code of Professional Conduct was adopted by the Law Society of Saskatchewan. It does not have the effect of law but it is a highly persuasive set of guidelines with respect to the conduct of solicitors and a solicitor's duty to the client, fellow solicitors and the public.

The following provisions appear to be material to the present application if even only tangentially:

> **CHAPTER IV**
> **CONFIDENTIAL INFORMATION**
>
> **RULE**
>
> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code.
>
> **COMMENTARY**
>
> …
>
> Confidential Information Not to be Used
>
> …
>
> 6. The lawyer shall not disclose to one client confidential information concerning or received from another client and should decline employment that might require such disclosure.
>
> …
>
> Disclosure Required by Law
>
> …
>
> 14. The lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

CHAPTER V
IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN CLIENTS

RULE

The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

COMMENTARY

…

Acting Against Former Client

8. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person.

9. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and client. However, the term "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. It also includes the client of a lawyer who is associated with the lawyer in such a manner as to be perceived as practising in partnership or association with the first lawyer, even though in fact no such partnership or association exists.

CHAPTER VA
CONFLICTS OF INTEREST

A. Definitions

(1) In this Rule:

"client" includes anyone to whom a member owes a duty of confidentiality, **whether or not a solicitor-client relationship exists between them**; (emphasis added)

"confidential information" means information obtained from a client which is not generally known to the public;

"law firm" includes one or more members practising:

(e) in a government, a Crown corporation or any other public body, and…

…

COMMENTARY

1. …

b. Government employees and in-house counsel

The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same. Subrule (3) was included to reflect the particular employment structure of the federal government, but is not meant to alter the general principle that internal transfers within the government are not subject to review under the Rule.

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

…

B. Application of Rule

(2) This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client"),

(b) the interests of those clients in that matter conflict, and

(c) the transferring member actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a member employed by the federal Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by the federal Department of Justice.

Firm Disqualifications

(4) Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless:

(a) the former client provides written consent to the new law firm's continued representation of its client, or

(b) the new law firm establishes, in accordance with subrule (8), that:

(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy of the measures taken under (ii),

(B) the extent of prejudice to any party,

(C) the good faith of the parties,

(D) the availability of alternative suitable counsel, and

(E) issues affecting the national or public interest, and

(ii) it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

Transferring lawyer disqualification

(5) Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client:

(a) the member should execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall:

(i) notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

(ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a), and

(iii) notify its client and former client that if they have any objection to the new law firm's continued representation of its client that they may apply to the Law Society or a court of competent jurisdiction under subrule (8) within thirty (30) days of receipt of the material provided under this Rule and if no objection is taken within thirty days, they lose the right to apply to the Law Society under this Rule.

(6) A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents:

(a) participate in any manner in the new law firm's representation of its client in that matter, or

(b) disclose any confidential information respecting the former client.

(7) No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4)

or (5) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

CHAPTER X
THE LAWYER IN PUBLIC OFFICE

RULE

The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

COMMENTARY

Guiding Principles

1. The Rule applies to the lawyer who is elected or appointed to legislative or administrative office at any level of government, regardless of whether the lawyer attained such office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure on the lawyer's part to observe its professional standards of conduct.

Conflicts of Interest

2. The lawyer who holds public office must not allow personal or other interests to conflict with the proper discharge of official duties. The lawyer holding part-time public office must not accept any private legal business where duty to the client will or may conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but must nevertheless guard against allowing the lawyer's independent judgement in the discharge of official duties to be influenced by the lawyer's own interest, or by the interests of persons closely related to or associated with the lawyer, or of former or prospective clients, or of former or prospective partners or associates.

3. In the context of the preceding paragraph, persons closely related to or associated with the lawyer include a spouse, child, or any relative of the lawyer (or of the lawyer's spouse) living under the same roof, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which the lawyer or some closely related or associated person holds or controls, directly or indirectly, a significant number of shares.

…

Disclosure of Confidential Information

7. By way of corollary to the Rule relating to confidential information, the lawyer who has acquired confidential information by virtue of holding public office

should keep such information confidential and not divulge or use it even though the lawyer has ceased to hold such office. (As to the taking of employment in connection with any matter in respect of which the lawyer had substantial responsibility or confidential information, see Commentary 3 of the Rule relating to avoiding questionable conduct.)

…

Note 3 to this provision reads as follows:

3. Cf. generally the Rule relating to conflict of interest between lawyer and client. "When a lawyer is elected to ... (a) public office of any kind, or holds any public employment...his duty as the holder of such office requires him to represent the public with undivided fidelity. His obligation as a lawyer...continues; ...it is improper for him to act professionally for any person...[who] is actively or specially interested in the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment." from Brand, *Bar Associations, Attorneys and Judges* (Chicago, 1956) p. 179.

CHAPTER XIX
AVOIDING QUESTIONABLE CONDUCT

RULE

The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.

COMMENTARY

Guiding Principles

1. Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided.

…

Duty after Leaving Public Employment

3. **After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving, because to do so would give the appearance of impropriety even if none existed.** However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority by which the lawyer had formerly been employed. As to confidential government information acquired when the lawyer was a public officer or

employee, see commentary 14 of the Rule relating to confidential information. (emphasis added)

…

Standard of Conduct

10. The lawyer should try at all times to observe a standard of conduct that reflects credit on the legal profession and the administration of justice generally and inspires the confidence, respect and trust of both clients and the community.

The Legistlation

The Members' Conflict of Interest Act, S.S. 1993, c. M-11.11

The Act contains the following provisions:

4 A member shall not use information that is gained in the execution of his or her office and is not available to the general public to further or to seek to further the member's private interest, his or her family's private interest or the private interest of an associate.

8(1) The Executive Council, a member of the Executive Council or an employee of a department, secretariat or office of the Government of Saskatchewan or a Crown corporation, including a corporation in which the Government of Saskatchewan owns a majority of shares, shall not knowingly award a contract to or approve a contract with, or grant a benefit to, a former member of the Executive Council or to any of the former member's family until 12 months have expired after the date on which the former member ceased to hold office.

(2) Subsection (1) does not apply to contracts of employment with respect to further duties in the service of the Crown.

(3) Subsection (1) does not apply if the conditions on which the contract or benefit is awarded, approved or granted are the same for all persons similarly entitled.

Law

The issue of disqualification of counsel by reason of conflict of interest has been addressed many times in Canada. The seminal decision is that of the Supreme Court of Canada in *MacDonald v. Martin*, [1990] 3 S.C.R. 1235. Mr. Justice Sopinka set down the law at p. 1243:

> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. …

He then identified two basic approaches to determine whether a disqualifying conflict of interest exists: (1) the probability of real mischief, or (2) the possibility of real mischief. He described these two approaches at p. 1246:

> …The first approach requires proof that the lawyer was actually possessed of confidential information and that there is a probability of its disclosure to the detriment of the client. The second is based on the precept that justice must not only be done but must manifestly be seen to be done. If, therefore, it reasonably appears that disclosure might occur, this test for determining the presence of a disqualifying conflict of interest is satisfied.

After an extensive review of the authorities, Mr. Justice Sopinka concluded that the appropriate test is the possibility of real mischief. He stated the test, with respect to confidential information, at p. 1260, as follows:

> …the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. …

Mr. Justice Cory, concurring in the result, reiterated the three competing values identified by Mr. Justice Sopinka and stated, at p. 1265, as follows:

> Of these factors, the most important and compelling is the preservation of the integrity of our system of justice. The necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. Reasonable mobility may well be important to lawyers. However, the integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies it must be the predominant consideration in any balancing of these three factors.

In *Martin*, the Supreme Court was dealing with the disqualification of a lawyer in civil proceedings. The issue arises as to whether the competing values are different with respect to a public inquiry. The second and third values as identified by Mr. Justice Sopinka, would appear to be the same. The first value, the integrity of our system of justice, is not necessarily the same.

The interest at issue in a public inquiry was recently addressed by the Ontario Superior Court in *Aboriginal Legal Services of Toronto v. Shand Inquest*, [2003] O.J. No. 1117 (S.C. Div.Ct.). In that case, O'Driscoll J. adopted the following statements made by a coroner in disqualifying counsel at a coroners inquest, which disqualification was upheld by the Ontario High Court in *Cook v. Young*, unreported, November 8, 1989, at para. 5:

> …
> "Mr. Speid has a right to counsel. He has a right to professional advice, but he has no right to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so acts, the client is denied professional services. …
> …
> "Does this situation apply to inquests? As we heard in submissions, inquests are different, in focus, scope and rules from any other proceeding. But the same rules of fundamental or natural justice and fairness must be observed and must

> be seen to be operating at an inquest. Quite rightly it has been pointed out that inquests do not find fault or legal responsibility, rather they are fact-finding exercises. However, disputes regarding evidence, which might impact, for example on the reputation of an individual, can arise at an inquest. Therefore, it seems to me that a potential conflict in a lawyer's position is a valid consideration, although because of the non-fault-finding and unique nature of an inquest, the test to remove such lawyer might well be of a higher nature.

The court went on to adopt the following statement by the coroner in the case at issue at para. 6:

> …
> "In my opinion the most appropriate test is the proper functioning of the process and the maintenance of public confidence. An inquest is a public process in which the administration of justice and the fairness of the process will be closely scrutinized.

The court upheld the disqualification of the lawyer and stated its conclusion as follows at para. 7:

> This is one of those occasions where reality does not govern but the governing factors are perception and optics. It is a matter of the maintenance of public confidence in the administration of justice and the avoidance of an appearance of impropriety. …

In *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Gen. Div.), it was argued that because, there was no legal or monetary interest involved in a coroner's inquest, the rules of conflict of interest need not apply. In addressing this argument Moldaver J. stated at p. 536, the following:

> Secondly, I consider the proposed interpretation of the word "interest" to be somewhat naive and unrealistic. I have already touched upon the reasons for concluding that each of the Board and the officers has a very real and significant interest in the proceedings. The integrity, reputation, competence and professionalism of each had been placed under the spotlight of public scrutiny. To somehow suggest that such matters do not constitute interests worthy of preservation is to take a myopic view of the situation. One need only look at the laws of libel and slander to realize the importance of a person's reputation within our society. Here, the reputations of the officers and the Board are, in no small measure, under scrutiny.

The court also referred to the fact that the parties had been granted standing based on the separate interests they represent (p. 539).

I have been unable to find any case in which conflict of interest was alleged with respect to a former minister of the Crown.

Application

It is appropriate to quote from the language of the application:

> This is an application by the Saskatoon City Police Association to have the firm of Robertson Stromberg generally and Mr. Chris Axworthy, Q.C. specifically removed as counsel to the Federation of Saskatchewan Indian Nations in the matter within as well and matters pertaining to same. The applicant believes a number of other parties to the Inquiry will support it in this application.
>
> The applicant advances in support of its application a conflict of interest in Mr. Axworthy and the firm due to Mr. Axworthy's membership in same. The primary grounds for this submission lie in the fact Mr. Axworthy was the Minister of Justice for a number of years during which matters relevant to this inquiry were being considered by the department. During this period he would be privy to information, policies and decisions not known to the public. It is suggested the public would perceive this information could be available, advertently or otherwise, to the firm's clients.
>
> In addition to this the applicants submit Mr. Axworthy and the firm are again in a conflict of interest due to him or his firm accepting employment in connection with the matter with which he had substantial responsibility or confidential information prior to leaving his cabinet post.
>
> The applicants rely not only on the real possibility of conflict of interest but the appearance of conflict and circumstances that would lead the public to question the appropriateness of the firm continuing to act.

The applicant refers to a number of circumstances in support of its position:

- 30 September 1999 – Mr. Axworthy appointed Minister of Justice and Attorney General (News Release 30 September 1999)
- 16 February 2000 – Justice Minister Axworthy makes formal request to the RCMP to investigate circumstances of the deaths of Messrs. Naistus and Wegner and to review allegations concerning the complaint from Mr. Knight
- 24 February 2000 – It is reported the RCMP Task Force would also consider the Stonechild matter in due course (24 February 2000 Globe and Mail and StarPhoenix news reports)
- Spring 2000 – FSIN's leadership calling for a public inquiry into the justice system in Saskatchewan. These demands made in light of the deaths of Messrs. Wegner and Naistus (The Saskatchewan Indian – Spring 2000)
- 19 September 2000 – Justice Minister Axworthy directs an inquest into the death of Mr. Ironchild (Executive Council News Release 19 September 2000)
- 2 February 2001 – Justice Minister Axworthy directs an inquest into the death of Mr. Dustyhorn (Executive Council News Release 2 February 2001)

- 20 June 2001 – Justice Minister Axworthy questioned in the House concerning FSIN's demands for public inquiry into the justice system based primarily on the deaths of First Nations persons outside Saskatoon. Mr. Axworthy reports there have been discussions with FSIN and other groups. Mr. Axworthy reports there have been coroner's inquiries into the deaths of Messrs. Ironchild and Dustyhorn and that the reports out of these inquests have been well received by the First Nations and Métis communities (Hansard 20 June 2001)
- 27 June 2001 – Justice Minister Axworthy orders inquest into the death of Mr. Naistus (Executive Council News Release 27 June 2001)
- 26 July 2001 – Justice Minister Axworthy orders inquest into the death of Mr. Wegner (Executive Council News Release 26 July 2001)
- 12 October 2001 – Mr. Axworthy also named Minister of Aboriginal Affairs (Executive Council News Release 12 October 2001)
- 15 November 2001 – Mr. Axworthy announces commission on First Nations and Métis injustice reform (Executive Council News Release 15 November 2001)
- 22 February 2002 – RCMP receive Saskatoon Police Service records concerning Mr. Stonechild (Mr. Hesje's correspondence 30 May 2003)
- 21 January 2003 – Mr. Axworthy announces his resignation from cabinet and advises "I am currently exploring career opportunities in private life, including teaching law and work with an established Saskatchewan law firm". Mr. Nilson appointed acting Attorney General and Minister of Justice (Executive Council News Release 21 January 2003)
- 17 February 2003 – Mr. Cline appointed Minister of Justice (Executive Council News Release 17 February 2003)
- 20 February 2003 – Justice Minister Cline announces inquiry into the death of Mr. Stonechild and advises public prosecutions division has determined there is not sufficient evidence to lay charges in relation to the death of Mr. Stonechild (Executive Council News Release 20 February 2003)
- Robertson Stromberg announces Mr. Axworthy has joined their firm and advises: "Chris brings a deep understanding of intergovernmental and aboriginal law to our team" (advertisement from Saskatoon StarPhoenix 20 February 2003)
- 19 February – Order in Counsel signed establishing inquiry

The respondents do not dispute the correctness of any of these statements.

Mr. Axworthy swore an affidavit on June 5, 2003. I quote from the material portions:

2. On January 21, 2003 I resigned as Minister of Justice of Saskatchewan, a position which I had held for some years prior to that.
3. When I became Minister of Justice I considered my duties to be public ones. I swore an oath to keep confidential any information which I received in the course of my public duties.

4. I have not divulged either to the Federation of Saskatchewan Indian Nations, any lawyers or staff of Robertson Stromberg or anyone else the details of any information that I have received in my capacity of Minister of Justice either in respect of the subject matter of this inquiry or otherwise.

5. I joined the Robertson Stromberg firm in the first week of February, 2003. When I joined the firm I did not bring to the firm any files or other documentation or employees which had any connection with my duties as the Minister of Justice.

Lawrence Joseph, an officer of the Federation, swore an affidavit indicating his organization's desire that their present counsel continue to act. He concludes his deposition with this statement:

4. If the Robertson Stromberg firm is disqualified from acting on this Inquiry, this will be prejudicial to the FSIN.

Mr. Joseph does not say what prejudice there will be nor does he suggest that other competent and experienced counsel could not serve the Federation as effectively.

Analysis

It is appropriate that I repeat, at the outset, the statement which I made at the commencement of the application on June 9, 2003. In the event that I am persuaded that present counsel for the Federation should be removed, that will not impact upon the participation of the Federation of Saskatchewan Indian Nations. The Federation will be as fully a party to these proceedings as it has been to this point and will be entitled to retain and instruct counsel if other counsel is required. The application is not about diminishing or affecting the participation of the Federation. The narrow issue is whether in the circumstances prevailing here the Federation would be more appropriately represented by other counsel.

Res Judicata (Preliminary Objection)

The respondent Federation raised a preliminary objection to the application. Its contention is that the matter of the Robertson Stromberg/Axworthy engagement in this matter is *res judicata* inasmuch as no objection was raised to the participation of either during argument presented to me on the applications for standing and funding. With respect the objection is not tenable. I note also that standing and funding were granted to the parties not their counsel. In any event the defence of *res judicata* does not fit the circumstances prevailing here. In my view the objection is really that the applicant is estopped from complaining now when it said nothing at the hearing. As I have noted the objection is answered by the evidence of the Association's prompt request for clarification of Mr. Axworthy's role and the timeliness of its application. It did not rest on its oars. There is still abundant time for the Federation to find new counsel if that is necessary.

Shortly stated the Association says that when Mr. Axworthy moved to Robertson Stromberg he would have inevitably taken with him confidential information received while Minister of Justice and Attorney General respecting the death of Mr. Stonechild and other aboriginal persons in Saskatoon. It is not appropriate therefore that he be associated with any of the parties in this inquiry.

It is also suggested that the early references to Mr. Axworthy's involvement in the Robertson Stromberg file reinforce the theory that his value to the law firm arose from his involvement as Minister and Attorney General. One may ask what qualifications or expertise did he have as counsel that led to his participation in the inquiry. As a consequence, it is argued, I should infer an actual conflict of interest exists and that taints the involvement of Mr. Axworthy and Robertson Stromberg as Federation counsel.

Mr. Plaxton also argues that members of the public presented with Mr. Axworthy's history as Minister and Attorney General would question his involvement and that of his firm in this matter. The second prong to the Association's argument is that of public perception.

The applicant suggests that if steps had been taken at the outset to ensure Mr. Axworthy was removed from any involvement in the Federation file such as a Chinese Wall there would be much less concern. In fact, his role in the inquiry was emphasized from the beginning. It was only later that his involvement was minimized.

Counsel for the respondent prefaced his submissions on conflict of interest by referring to a number of cases that canvass a client's right to choose counsel. I refer to one in particular.

In *Manville Canada Inc. v. Ladner Downs* (1992), 88 D.L.R. (4th) 208, aff'd 100 D.L.R. (4th) 321, Esson C.J. states, at p. 223:

> …Such a remedy necessarily imposes hardship and, given that the party deprived of its representative is an innocent bystander in an issue between its lawyer and the opposite party, some degree of injustice on the innocent party. **The imposition of such hardship and injustice can only be justified if it is inflicted to prevent the imposition of a more serious injustice on the party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of "real mischief", not a mere perception.** (emphasis added)

Chief Justice Esson continues at p. 224:

> …No doubt, some of those applications are brought to prevent a risk of real mischief. **But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation.** If that becomes a regular feature of our litigation it would not likely do much to improve the profession's standards in an area in which there seem to have been few serious problems. But it could do much to further reduce the court's ability to get to judgment in a timely way. (emphasis added)

Robertson Stromberg argues there can be no conflict of interest as Mr. Axworthy never acted for any of the parties now seeking to disqualify it. Ordinarily a conflict of interest arises where a lawyer who has represented a client then seeks to act against that client in the same or related matter. This situation often arises as a result of a lawyer transferring to a new law firm. The Code of Professional Conduct suggests, however, that conflict of interest may go beyond this specific situation. Commentary 8, "Acting Against Former Client", of Chapter V, Impartiality and Conflict of Interest Between Clients, provides as follows:

> A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, **or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information.** … (emphasis added)

This commentary suggests that a lawyer can breach the Code of Professional Conduct, relating to conflict of interest, without actually acting against a former client. The emphasized words suggest that a conflict of interest may arise between a lawyer's duty of confidentiality owed to a former client, and duty of loyalty to another client. This commentary refers to appearances. The lawyer may be in a conflict of interest by placing himself in a position where he might appear to be tempted to breach the rule relating to confidential information.

Commentary 1 of Chapter V is instructive in this regard. It states:

> A conflicting interest is one that would be likely to affect adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client.

Mr. Dufour contends that inasmuch as the applicant is unable to say what confidential information, if any, reposes with Mr. Axworthy, it cannot be said there is any potential for conflict of interest. He concedes that if Mr. Axworthy had such information he could not divulge it as a former Minister. In the absence of any information as to what he knows, I am obliged to assess what is known. That is, what appears publicly about his activities as Minister and Attorney General.

"Confidential information" has been defined a number of cases. I refer to *Ott v. Fleishman*, [1983] 5 W.W.R. 721 (B.C.S.C.) at 723 (last paragraph):

> …for practical purposes any information received by a lawyer in his professional capacity concerning his client's affairs is prima facie confidential unless it is already notorious or was received for the purpose of being used publicly or otherwise disclosed in the conduct of the client's affairs.

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) sets out these principles at p. 202:

> …the following [is considered] as an elaboration of the formulation by Jerome A.C.J., in [*Montana Indian Band v. Canada (Minister of Indian & Northern Affairs)* (1988), 26 C.P.R. (3d) 68 (Fed. T.D.)], that whether information is confidential [within the meaning of the term "confidential information" in the *Access to Information Act*, R.S.C. 1985, c. A-1, s. 20 (1)(b)] will depend upon its content, its purpose and the circumstances in which it is compiled and communicated, namely:
>
> (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own.
>
> (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

> (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

It is defined, of course, in the Code of Professional Conduct.

The respondent argues that in any event Mr. Axworthy is not in possession of any confidential information. The assertion is based on a very narrow interpretation of "confidential information". Counsel suggests that only information emanating from the applicant (ordinarily a former client) should be treated as confidential for the purpose of disqualifying a lawyer. At para. 22 of the respondent's brief, counsel suggests that at the very least:

> …the Applicant would have to show that confidential information was imparted by it to Mr. Axworthy in the context of a previous relationship that is akin to a solicitor/client relationship. …

The position taken by Robertson Stromberg is untenable for a number of reasons. First of all, it should be noted that Mr. Axworthy, in his brief affidavit, does not state that he has no confidential information with respect to matters within the terms of reference of the public inquiry. Rather, he deposes that he has sworn an oath to keep confidential any information which he received in the course of his public duties. He goes on to depose that he has not disclosed to FSIN or Robertson Stromberg or anyone else:

> …the details of any information that I have received in my capacity of Minister of Justice either in respect to the subject matter of this inquiry or otherwise.

Mr. Axworthy, clearly recognizes that he is under a duty of confidentiality to his former client.

I observe also that a disqualifying conflict of interest can arise without proof of actual misuse or possession of confidential information. The issue was dealt with in *Martin*. The court noted, as did the applicant in this application, that it would be very difficult to know what confidential information is possessed by another lawyer.

Mr. Justice Sopinka noted that in cases where disqualification of a lawyer is sought with respect to the confidential information there are two questions to be answered: (1) Did the lawyer receive confidential information attributable to solicitor/client relationship relevant to the matter at hand? (2) Is there a risk that it would be used to prejudice the client? With respect to the first question Mr. Justice Sopinka stated at p. 1260:

> …In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. …

On this issue, Mr. Justice Sopinka adopted a test of a rebuttable presumption of receipt of confidential information.

The only evidence offered by Robertson Stromberg to rebut this presumption is the statement in Axworthy's affidavit that he has not divulged the details of any information.

It should be noted, that in propounding these two questions, Mr. Justice Sopinka was dealing with an application by a former client to disqualify a lawyer based on conflict of interest. *Martin* did not deal with the issue as to whether a disqualifying conflict of interest could arise where the former client was not objecting, and the application was not brought by a current client. However, the presumption of possession and misuse of confidential information arising from the establishment of a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, applies to this situation.

The applicant countered that Mr. Axworthy, as Minister of Justice and Attorney General was **the** Lawyer to the Government of Saskatchewan. If support for this proposition is required, it can be found in *The Department of Justice Act*, S.S. 1983, c. D-18.2. Section 9 sets out the powers and duties of the Minister of Justice. These duties include advising the Crown:

> (d) …upon all matters of law referred to him by the Crown;
>
> (e) advise the heads of the several departments of the government upon all matters of law connected with those departments.

The act also sets out the powers and duties of the Attorney General. Section 10 provides that the Attorney General is the official legal advisor of the Lieutenant Governor.

It seems clear that Mr. Axworthy was in a solicitor/client relationship with the Government of Saskatchewan. As a lawyer, advising on matters of law, it seems clear that he is bound by the Code of Professional Conduct.

In any event, a lawyer in public office must avoid conflicts of interest and the appearance of conflicts of interest even if there is no solicitor/client relationship. Chapter X of the Code of Professional Conduct deals specifically with a lawyer in public office. The rule provides as follows:

> The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary 6 states:

> The lawyer should not represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity. …

I appreciate that this chapter applies to a lawyer while in public office.

The disqualification under this rule does not appear to be predicated on any prior solicitor/client relationship. The test is two-fold: (1) was the lawyer concerned in an official capacity with the person or interest which he now seeks to represent; and (2) is it the same or a related matter? The applicant's material establishes that Mr. Axworthy, in his capacity as Minister of Justice, dealt with FSIN with respect to the establishment of a public inquiry into the matters relating to the terms of reference.

Even more instructive is Chapter XIX, Avoiding Questionable Conduct. The rule states as follows:

> The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.

Commentary 3 provides as follows:

> After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving, because to do so would give the appearance of impropriety even if none existed. …

This rule appears to be directly on point. Mr. Axworthy, as Minister of Justice, had substantial responsibility with respect to the matter before the Commission of Public Inquiry. His retainer with the FSIN is in connection with the same matter. It can be argued that Mr. Axworthy was not "employed" by the Department of Justice. Strictly speaking Mr. Axworthy was a public officer rather than a public employee. I conclude that a public officer would be held to an even higher standard. The Supreme Court in *Martin* commented that courts are not bound to apply a code of ethics. However, Mr. Justice Sopinka stated at p. 1246:

> Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. …

The Department of Justice has not objected to Mr. Axworthy's involvement. Does that mitigate against the position of the applicant? In *Booth v. Huxter, supra*, the court there considered the issue of waiver of conflict of interest. It concluded there had been no express waiver notwithstanding the fact that several parties were seeking joint representation. However, the court did make the following statement at p. 538:

> In this regard, dealing only for the moment with the private interests of the clients, I might well have come to a different conclusion had mutual waivers been executed, particularly in view of the nature of the interests of each; the nature of the proceedings; the general right of the parties to counsel of their choice and the fact that the motion to disqualify emanated from third parties.

The court went on to suggest that this waiver was restricted to the private interest of the parties. The court suggested that public interest could not be waived. In doing so it quoted the following statement from *Goldberg v. Goldberg* (1982), 141 D.L.R. (3d) 133 (Ont.Div.Ct.): "Furthermore, when the public interest is involved, the appearance of impropriety overrides any private interest claimed by waiver." (at p. 538-39)

The absence of any express waiver of any duty of confidentiality owed by Mr. Axworthy to the Government of Saskatchewan is not determinative. The disqualifying factor relates to the appearance of impropriety and the maintenance of public confidence as *Shand* suggests. The interest cannot be waived.

Mr. Axworthy, in acting for FSIN with respect to the subject matter of the public inquiry, put himself in a position where his duty of confidentiality to his former client, the Government of Saskatchewan, creates a conflict with his duty of loyalty to FSIN.

The next issue is that if Mr. Axworthy is disqualified, does that necessarily disqualify Mr. Ottenbreit and his firm? This is the issue which divided the Supreme Court in *Martin*. Mr. Justice Sopinka, speaking for the majority held that the firm is not automatically disqualified. He held that the concept of imputed knowledge – knowledge of one member of the firm being knowledge of all was "overkill". In this regard he stated as follows at p. 1262:

> Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. …

He went on to outline institutional measures which might rebut the inference, such as Chinese Walls and cones of silence.

Chapter VA of the Code of Professional Conduct was adopted after, and apparently in response to, the Supreme Court decision in *Martin*. It deals with reasonable measures to ensure nondisclosure of confidential information. However, there is no evidence on this application that any measures were put in place by Robertson Stromberg. The only "evidence" in this regard is Mr. Axworthy's statement in his affidavit that he has not:

> divulged either to the Federation of Saskatchewan Indian Nations, any lawyers or staff of Robertson Stromberg or anyone else the details of any information that I have received in my capacity of Minister of Justice either in respect to subject matter of this inquiry or otherwise.

As noted by the applicant, this statement provides little comfort particularly in light of the narrow interpretation that counsel of Robertson Stromberg has placed on the term "confidential information".

The following statement by Mr. Justice Sopinka in *Martin* is also directly on point, at p. 1263:

> A *fortiori* undertakings and conclusary statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica, supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.

Conclusion

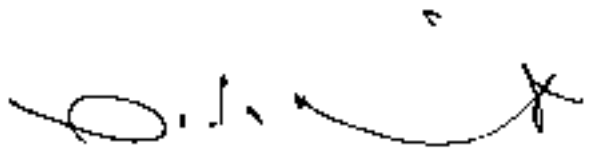
The evidence as to Mr. Axworthy's activities as Minister of Justice and Attorney General and his suggested role in this inquiry is not in issue. It raises the strongest possible inference that a conflict of interest exists. I am also satisfied that a reasonably informed member of the public viewing the circumstances outlined in this application would reach the same conclusion.

Furthermore, the involvement of Mr. Axworthy or his firm in this inquiry does, at a very minimum, give rise to the appearance of impropriety, and, if allowed to continue, could adversely impact on the public's confidence in the process.

Disposition

Robertson Stromberg and its members are disqualified from acting for the Federation of Saskatchewan Indian Nations in the inquiry.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 2nd day of July, 2003.



Mr. Justice David H. Wright
Commissioner

Ruling on Polygraph Evidence

Introduction

I have been asked to decide two preliminary questions:

(a) Should the results of a polygraph test be admitted as evidence before the Inquiry?

(b) Should the refusal to take a polygraph test be admitted as evidence before the Inquiry?

The Facts

A commission of inquiry was created by order-in-council dated February 21, 2003 to inquire into the circumstances that resulted in the death of Neil Stonechild and the conduct of the investigation into his death that followed for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan. I was appointed as commissioner for the inquiry. I appointed Joel Hesje as Commission counsel.

Following his appointment Commission counsel began gathering evidence of the events leading up to the Stonechild death and the investigation that followed. In the course of doing so Commission counsel identified two issues which he recommended, wisely, be dealt with as preliminary matters in order that the participants would know what course I would follow.

Counsel filed briefs which addressed, very helpfully, the issue surrounding the use of polygraph evidence. I also had the assistance of Commission counsel.

Commission Rules of Procedure and Practice

The rules of procedure and practice contain the following provisions:

> III. EVIDENCE
>
> (i) General
>
> 2. The Commission is entitled to receive any relevant evidence that might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.
>
> 4. Commission counsel have a discretion to refuse to call or present evidence.

I have substantial latitude in deciding what should properly come before the Commission. The need for flexibility and discretion has been the subject of judicial comment on a number of occasions.

The following quotations from the decision of the Ontario Court of Appeal in *Re The Children's Aid Society of the County of York*, [1934] O.W.N. 418, will illustrate. Mr. Justice Mulock states at p. 419:

> …in answering the questions submitted it might be advisable to point out the nature of the inquiry in question. It is one to bring to light evidence or information touching matters referred to the Commissioner. …The Commissioner **should avail himself of all reasonable sources of information, giving a wide scope to the**

> **inquiry**. If, for example, some person were to inform the Commissioner where useful documents or other evidence could be obtained, it would seem reasonable that he avail himself of such a source of information. …It is for the Commissioner, from all available sources, to bring to light such evidence as may have a bearing on the matters referred to him. … (emphasis added)

Mr. Justice Riddell at p. 420:

> …A Royal Commission is not for the purpose of trying a case or a charge against any one, any person or any institution–but for the purpose of informing the people concerning the facts of the matter to be inquired into. Information should be sought in every quarter available. …
>
> Everyone able to bring relevant facts before the Commission should be encouraged, should be urged, to do so.
>
> **Nor are the strict rules of evidence to be enforced; much that could not be admitted on a trial in Court may be of the utmost assistance to the Commission.** … (emphasis added)

Mr. Justice Middleton at p. 421:

> …**It is an inquiry not governed by the same rules as are applicable to the trial of an accused person.** The public, for whose service this Society was formed, is entitled to full knowledge of what has been done by it and by those who are its agents and officers and manage its affairs. What has been done in the exercise of its power and in discharge of its duties is that which the Commissioner is to find out; so that any abuse, if abuse exist, may be remedied and misconduct, if misconduct exist, may be put an end to and be punished, not by the Commissioner, but by appropriate proceedings against any offending individual.
>
> **This is a matter in which the fullest inquiry should be permitted.** All documents should be produced, and all witnesses should be heard, and the fullest right to cross-examine should be permitted. Only in this way can the truth be disclosed. … (emphasis added)

The decision of the same court in *Re Bortolotti and Ministry of Housing et al.* (1977), 76 D.L.R. (3d) 408 (Ont. C.A.), confirms these observations. I refer in particular to the decision of Mr. Justice Howland at pp. 415-417:

> The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties. *Re Ontario Crime Com'n*, [1963] 1 O.R. 391. …It is quite clear that a commission appointed under the *Public Inquiries Act, 1971* is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* [(1975), 10 O.R. (2d) 113] at p. 124 …; *Re Children's Aid Society of County of York*, [1934] O.W.N. 418 at p. 420. …

> The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry. …
>
> The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendation and report.
>
> **If evidence is reasonably relevant to the subject-matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts**, other than the rule as to privilege which is made expressly applicable by s. 11 of the *Public Inquiries Act, 1971*. If this were not so, it would be possible, as Morden, J., pointed out in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra*, p. 121, …for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. … (emphasis added)

I agree fully with the philosophy expressed in this language.

It is clear the Commission has very wide powers in receiving and considering the evidence to be presented during this inquiry.

Evidence of Polygraph Tests

It is trite to say that polygraph evidence and its use have been the subject of widespread and ongoing debate, some of it heated and partisan.

Counsel refer to a number of decisions and commentaries on the subject. I have reviewed them and identified those that appear most representative of current Canadian jurisprudence.

The first significant decision is *R. v. Phillion*, [1978] 1 S.C.R. 18, (1977), 33 C.C.C. (2d) 535 (cited to C.C.C.). In that case the accused, charged with murder, had submitted to a polygraph test. The accused declined to testify but sought to call the polygraphist to attest as to his veracity at the time of the test. The trial judge refused to allow the evidence. The accused appealed to the Ontario Court of Appeal. The accused's appeal to the Ontario Court of Appeal was dismissed as was his appeal to the Supreme Court of Canada. The court's opinion is summarized in the headnote at p. 536:

> The evidence of a polygraph operator consisting of answers given by an accused to certain questions and his opinion that such answers are true is hearsay and inadmissible as self-serving evidence; the mere fact that the answers are given in the presence of a polygraph machine or that the operator has a certain expertise in the use of the machine does not render the evidence admissible. The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath, but rather to rely instead on the results provided by a mechanical device in the hands of a skilled operator relying

> exclusively on its efficacy as a test of truthfulness. It is contrary to the basic rules of evidence to permit such a course. Moreover, there exists no exception to the hearsay rule based on the trustworthiness of the polygraph which would allow the admission of this type of evidence.

The court expanded on these comments in what may be described as the principal decision on the question: *R. v. Beland and Phillips*, [1987] 2 S.C.R. 398. Two accused were charged with conspiracy to commit murder. At trial both accused stated they were willing to undergo a polygraph test, and at the completion of evidence defense applied to have their case reopened so that the accused could undergo polygraph tests and submit the results in evidence. The motion was denied and both the accused were convicted. On appeal, the Court of Appeal overturned the trial judge by holding that in light of all the circumstances the polygraph evidence was admissible. The Crown appealed this verdict to the Supreme Court of Canada. The only issue before the Supreme Court was the admissibility in evidence in a criminal trial of the results of a polygraph examination of an accused. The court reversed the ruling of the Court of Appeal.

Mr. Justice McIntyre, speaking for the majority, set down two principles:

(i) the admission of polygraph evidence would run counter to the well established rules of evidence;

(ii) the admission of polygraph evidence will serve no purpose which is not already served, and, further, if allowed would disrupt proceedings, cause delays, and lead to numerous complications.

He then proceeded to discuss each in detail.

(i) The admission of polygraph evidence would run counter to the well established rules of evidence

(1) the rule against oath-helping;

(2) the rule against past consistent statements;

(3) the rule relating to character evidence; and

(4) the expert evidence rule.

(1) The rule against oath-helping

This rule is intended to prohibit a party from presenting in chief evidence that has, as its sole purpose, the bolstering of the credibility of that party's own witness. Such evidence offends this rule because the only purpose it would serve would be to add support to the accused's testimony. In effect, the polygraph operator would be telling the court that the accused was not lying.

(2) The rule against past consistent statements

This rule encompasses two separate types of evidence:

(i) The rule which precludes an accused from eliciting from witness self-serving statements which he has previously made.

(ii) A witness, whether a party or not, may not repeat his own previous statements concerning the matter before the court, made to other persons out of court, and may not call other persons to testify to those statements.

The purpose of the rule is to prevent the courts from being diverted from the real issues in the case. An example is the presentation of evidence that witnesses said that the accused made statements to them that were similar to the ones the accused made in court. Repetition of the accused's statements by another witness adds nothing to the weight and reliability of the accused's testimony. Thus, the testimony of a polygraph operator would, in effect, be merely corroboration of the accused's testimony, and, thus, offend the rule against past consistent statements. Mr. Justice McIntyre applied the above reasoning for the exclusion of past consistent statements to polygraph evidence in the following statement:

> …Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at bar, that the evidence sought to be adduced would not fall within any of the well-recognized expectations to the operation of the rule – where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition – it should be rejected. To do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. … (para. 69)

(3) The rule relating to character evidence

The rule relating to character evidence holds that an accused may adduce evidence of his general reputation, but he cannot relate specific acts which might tend to establish his character. The court held that the testimony of a polygraph operator would offend this rule because, in effect, his testimony would be that on a specific event the accused did not lie. This might lead the trier of fact to the inference that the accused is of sound moral character. Mr. Justice McIntyre applied the rule relating to character evidence to the testimony of a polygraph operator when he wrote:

> …Where such evidence is sought to be introduced, it is the operator who would be called as the witness, and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident, and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph test would violate the character evidence rule. (para. 72)

(4) The expert evidence rule

The expert evidence rule holds that the testimony of an expert is only admissible if it will aid the court in understanding something that is outside the experience or understanding of the court. Thus, if on the proven facts of the case the court can form its own opinion, then the testimony of experts is inadmissible due to the fact that it is unnecessary. In applying this rule to polygraph evidence, Mr. Justice McIntyre held that such evidence would relate only to the issue of the accused's credibility and this issue is well within the domain and

understanding of the court. In excluding polygraph evidence under the expert evidence rule he stated the following, "Here, the sole issue upon which the polygraph evidence is adduced is the credibility of the accused, an issue well within the experience of judges and juries and one in which no expert evidence is required. It is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence." (para. 75)

(ii) The admission of polygraph evidence will serve no purpose which is not already served, and, further, if allowed would disrupt proceedings, cause delays, and lead to numerous complications.

The same judge once again pointed out that issues of credibility are well within the ambit of the courts. Further, he added the concern that if admitted such evidence could receive undue emphasis due to the mystique of science surrounding it. Finally, he stated that the admission of such evidence would raise many difficult evidential issues. He articulated some of the evidential problems that would arise as follows:

> …What would the result be, one may ask, if the polygraph operator concluded from his test that witness "A" was lying? Would such evidence be admissible, could it be excluded by witness "A", could it be introduced by the Crown? These are serious questions, and they lead to others. Would it be open to the opponent of the person relying upon the polygraph to have a second polygraph examination taken for his purposes? If the results differed, which would prevail, and what right would there be for compelling the production of polygraph evidence in the possession of a reluctant party? It is this fear of turmoil in the courts which leads me to reject the polygraph. … (para. 78) (emphasis in original text)

I found the comments of Ian Freckelton and Hugh Selby in the recent text, *Expert Evidence: Law, Practice, Procedure and Advocacy*, 2d ed. (Lawbook Co., 2002), quite helpful. The authors note at p. 200 that polygraphy was developed late in the 19th century by the Italian criminologist Lombroso who postulated that changes in blood pressure and pulse accompany lying.

They then make the following observations:

> For its effectiveness, it has been suggested that polygraphy depends on implanting into the subject a belief in the infallibility of the machine and on the design of effective control questions. "The whole fragrant stew of imposition, trickery and downright lying (by the examiner, not the subject) is reminiscent of a certain type of hard police interrogation of subjects whom the interrogators 'know' to be guilty": Elliott (1982, pp. 104, 108).
>
> The use of the polygraph is based upon the assumption that a person who is lying will exhibit indicative answers. The risk that was isolated early in the development of the polygraph was that innocent but anxious people could be labelled as a liar and so as guilty: see Raskin (1989, p. 252). The means adopted by researchers to address this risk was the "control question test", designed to settle the person being tested and to enable the operator to gauge when the person is telling the truth and when he or she is lying. Supporters of the polygraph assert laboratory studies reporting accuracy of polygraph examination of between 93 and 97 per cent: see, eg. Raskin (1989). However, as Kapardis (1997, p. 217)

> noted, a number of the apparently supportive studies suggest that at best a polygraph examination risks labelling 20 per cent of suspects as liars who are later found to be innocent. In a disturbing study, Parrick and Iacono (1989) offered prison inmates, half of them psychopaths, $US20 to beat the polygraph. The psychopaths did little better than the non-psychopaths but the significant finding was that, using the control question technique, the polygraph examiners wrongly classified 45 per cent of the innocent subjects as guilty of crimes. In a later experiment, conducted with the polygraph division of the Royal Canadian Mounted Police (Parrick and Iacono (1991)) the experimenters found further evidence to support the contention that the control question technique misidentifies nearly half of innocent suspects as liars. This has led supporters of the polygraph to develop a further technique called the "directed lie test": see Honts and Raskin (1988); see also Raskin (1989). The polygraph's reliability remains controversial with passionate opponents of its reliability (see the discussion in Kapardis (1997, pp. 216-223)) remaining probably in the ascendancy **in relation to its forensic, as against its investigative, use**. (pp. 200-01) (emphasis added)

They then mention the sole decision where such evidence was allowed: *R. v. Wong*, [1977] 1 W.W.R. 1 (B.C.S.C.), and conclude the case was wrongly decided. It has not been followed anywhere in Canada as far as I can determine, nor, with respect, should it. They point out that *R. v. Phillion* and *R. v. Beland* have settled the issue in Canada. They refer (at p. 202) particularly to this statement from *R. v. Beland* as to the use of polygraph evidence, "It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists."

The second issue, the decision not to take a polygraph test has also attracted a good deal of judicial comment. I refer to *R. v. Hebert* (1990), 77 C.R. (3d) 145 (S.C.C.). Mr. Justice Sopinka had this to say at p. 157:

> However, it cannot be denied that, apart altogether from the privilege, the right to remain silent – the right not to incriminate oneself with one's words – is an integral element of our accusatorial and adversarial system of criminal justice. As Cory J.A. (as he then was) noted in *R. v. Woolley* (1988), 63 C.R. (3d) 333, 40 C.C.C. (3d) 531 at 539, 37 C.R.R. 126, 25 O.A.C. 390 (C.A.): "The right to remain silent is a well-settled principle that has for generations been part of the basic tenets of our law." (See also *R. v. Hansen* (1988), 46 C.C.C. (3d) 504 (B.C.C.A.).) In a different context, Lamer J. pointed out in *R. v. Collins*, [1987] 1 S.C.R. 265 at 284, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, 28 C.R.R. 122, 74 N.R. 276, that the acquisition of a self-incriminatory admission from an accused following a Charter violation "strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination". I take Lamer J.'s words to mean that the full range of an accused's right to stand mute in the face of an accusation by the state is not exhausted by reference to the privilege against self-incrimination as that privilege has been defined by this court. It follows, it seems to me, that the basic principle underlying the right to remain silent must be a "principle of fundamental justice" within the meaning of s. 7 of the Charter. In other words, the right to remain silent is truly a right.

> I find evidence of the existence of this principle in the courts' historical solicitude for an accused's silence. It is settled law that silence in the face of an accusation by or in the presence of the police cannot serve as evidence against an accused: …

He continued at pp. 158 and 159 as follows:

> In *Stein v. R.*, [1928] S.C.R. 553 at 556, 50 C.C.C. 311, [1929] 1 D.L.R. 143 [Man.], this court held, on the basis of *Christie* [[1914] A.C. 545], that a trial judge had erred in failing to direct the jury that, "in the absence of any assent by the accused either by word or conduct to the correctness of the statements made in his presence, they had **no evidentiary value whatever** as against him and should be **entirely disregarded**". … (emphasis added)
>
> …As the cases referred to earlier indicate, the mere silence of a criminal accused in the presence of a person in authority is not capable in law of supporting an inference of consciousness of guilt. The essence of the *Christie* rule is that, **even if** the circumstances of an accusation cry out for an explanation or denial, the accused's silence, without more, is not evidence against him: there must be "word or conduct, action or demeanour" pointing to an adoption of the statement by the accused. (emphasis in original text)
>
> It is sometimes argued in this connection that an accused's silence in the face of a police accusation is nothing more than a particular example of the liberty we all enjoy to do that which is not prohibited, embodied in the maxim "nulla poena sine lege". Since the law does not positively require a response, silence is allowed: see *R. v. Esposito* (1985), 53 O.R. (2d) 356, 49 C.R. (3d) 193, 24 C.C.C. (3d) 88 at 94, 20 C.R.R. 102, 12 O.A.C. 350 (C.A.), per *Martin* J.A., citing Lamer J. in *Rothman v. R.* [[1981] 1 S.C.R. 640], at p.683. …

The question was also addressed in *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530, by the Ontario Court of Appeal. They had this to say at paras. 41 and 42 of the judgment:

> 41 …Nothing in these reasons should be taken as touching on the admissibility of evidence that an accused or suspect refused to cooperate with the police.
>
> 42 There are policy concerns and fundamental constitutional principles at play where the Crown seeks to tender evidence of a refusal to cooperate which are not engaged when the defence tenders evidence of an accused's cooperation with the police. Our criminal justice system accepts as a basic tenet the proposition that persons cannot be required to supply evidence which may assist in their ultimate conviction: *R. v. Chambers* (1990), 59 C.C.C. (3d) 321 at 340 (S.C.C.). Put differently, people are free to choose whether they will assist the police in their investigation. This fundamental liberty becomes a constitutional right when a person is detained or arrested: *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.). The freedom to choose whether to assist the state in the investigation of an alleged crime would be illusory if the failure to render assistance could, standing alone, be used as evidence against a person at trial. Similarly, the right to maintain the integrity of one's body against unauthorized state intrusion would lose its force if the exercise of that right could take on an incriminatory connotation at trial.

Counsel points out that the evidence of a polygraph refusal is totally unnecessary in this inquiry inasmuch as the person who refused the request will be required to testify and will be subject to cross-examination. His credibility will be assessed on the basis of his *viva voce* testimony.

Analysis

In my respectful view the issues raised in these applications can be resolved fairly easily.

The principles set down in *R. v. Beland and Phillips* have general application to the evidence of experts. They are not confined to criminal cases. While it is clear that exclusionary rules of evidence do not apply in the context of commissions of inquiry, a tribunal should be no less vigilant to ensure that notwithstanding the very wide powers it has to receive and consider evidence only evidence that is reasonably relevant and material to the subject matter of the inquiry should be allowed.

Evidence as to the results of a polygraph test is not reasonably relevant to the issue of credibility of a witness, particularly where the examinee testifies at the inquiry. It chiefly offends the rule as to expert evidence. As the Supreme Court of Canada pointed out the credibility of the examinee is an issue well within the experience of the trier of the facts. Indeed the essential function of the Commission is to hear the facts and reach conclusions on those facts. To allow a polygraph operator to usurp that function flies in the face of the long and well established jurisprudence in this country. I refer also to the decision in *R. v. Marquard*, [1993] 4 S.C.R. 223 and the comments at p. 248:

> …Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter: see *R. v. B.* (G.) (1988), 65 Sask. R. 134 (C.A.), at p. 149, *per* Wakeling J.A., affirmed [1990] 2 S.C.R. 3. Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict. …

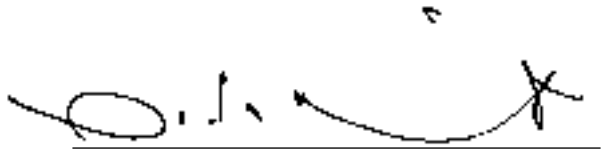
Similarly, evidence of a refusal to submit to a polygraph test is not reasonably relevant as no proper inference can be drawn from the exercise of the right to remain silent in the course of a criminal investigation. Again, this is particularly so where such person does testify at the inquiry.

I am mindful always of the need to have any evidence material and reasonably relevant to this Inquiry brought before me. I am not entitled however, to accept evidence that offends the principles set out in the above decisions. In the final analysis I must determine the credibility of the witnesses. The two questions posed at the commencement of my ruling must be answered in the negative.

I have considered the use of polygraph evidence in relation to the first branch of the Commission's terms of reference: the inquiry into the circumstances that resulted in the death of Neil Stonechild. The second branch of the terms of reference relate to the conduct of the investigation into the death of Neil Stonechild. Polygraph testing is a widely used

investigative tool. Evidence of polygraph testing may be reasonably relevant to the extent it touches on the conduct of the investigation. This ruling should not be taken as a determination of that issue.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 4th day of September, 2003.



Mr. Justice David H. Wright
Commissioner

Application of Keith Douglas Jarvis

The applicant will appear as a witness at the Inquiry. He now applies for full standing and funding.

Ruling on Standing

The Terms of Reference provide that the Commission has the responsibility to inquire into all aspects of the circumstances that resulted in the death of Neil Stonechild, and the conduct of the investigation into the death of Neil Stonechild. The evidence to date has focused on the first branch of the Terms of Reference. The focus will now shift to the conduct of the investigation of the death of Neil Stonechild.

In 1990 Keith Jarvis was a Sergeant in the Saskatoon Police Force. He was charged with the investigation of the death of Neil Stonechild, the first formal investigation to follow the discovery of Mr. Stonechild's body on November 29, 1990. Mr. Jarvis's conduct of the investigation will be central to this branch of the Inquiry. As such, he is directly and substantially affected by the Inquiry. The findings of the Commission may have important implications for him. I have concluded he should be granted full standing at the Inquiry.

Ruling on Funding

Mr. Jarvis has retained counsel. He applies for funding for his legal representation. He is retired and has limited financial resources. He meets the criteria set by the Commission for funding as a party. I refer to the Terms of Reference and in particular, paragraph 5:

> 5. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

Mr. Jarvis is entitled to funding with respect to his legal representation as a party. Counsel's compensation will apply on the basis of one hour's preparation for each hour of attendance at the Inquiry. Time spent by his counsel at the request of the Commission including Commission counsel or in attending with his client while the client is being interviewed by the Commission counsel may also be billed as preparation time.

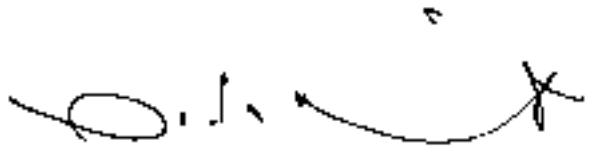
I have reviewed Mr. Stevenson's material and his curriculum vitae. Given counsel's substantial experience and length of time at the Bar, it is appropriate to set his hourly rate at $192.00. If alternate counsel appears for Mr. Stevenson that person's hourly rate will be fixed at $125.00.

Counsel will submit an invoice to Commission counsel on a monthly basis, the invoice to set out the nature of the work done and disbursements.

Conclusion

I appreciate that not every eventuality can be anticipated. Circumstances may require that the bases for funding be re-visited at a later date. Counsel will have leave to apply for directions as they may be advised. Any such application shall be in writing and the other parties shall be served with copies of it.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 26th day of September 2003.



Mr. Justice David H. Wright
Commissioner

Ruling on Applications on Behalf of the Saskatoon Police Association

The Saskatoon Police Association have served two notices of application. The applications were heard on October 6, 2003. The first application sought three orders.

Firstly, an order is sought directing Commission Counsel to answer inquiries concerning an interview made by Mr. Robert Martell of Mr. Keith Jarvis. It is my understanding that this information has been provided, and an order is no longer necessary.

Secondly, an order is sought that the original of a tape recording of the Martell/Jarvis interview be made available for a review by an independent laboratory. This request was not pursued.

Thirdly, an order is sought authorizing release to Mr. Bernie Eiswirth of certain Documents. In light of the fact that Mr. Stevenson, Counsel for Keith Jarvis, joined in the application, and Commission Counsel is not objecting to the order sought, I authorize disclosure of the following information to Mr. Bernie Eiswirth by Counsel for the Saskatoon Police Association, subject to Mr. Eiswirth providing the required Undertaking:

a) Investigative Summary prepared by RCMP;

b) Saskatoon Police service reports relating to the death of Neil Stonechild;

c) All interviews of Keith Jarvis;

d) All reports prepared by Keith Jarvis with respect to the death of Neil Stonechild, the tape recording of the Martell/Jarvis interview; and the transcript of that tape recording.

In a second notice of application the Saskatoon Police Association seeks two further orders. Firstly, an order is sought allowing Counsel on behalf of the Saskatoon Police Association to make full disclosure of documents and information in the within matter to all members, past and present, of the Association presently listed as witness as who may appear to be possible witnesses in the within matter to such extent that Counsel feels appropriate.

The Rules of Practice and Procedure (Access to evidence) sets out clearly to whom documents and information can be disclosed and on what basis. Paragraph three provides as follows:

3. Counsel to parties and witnesses will be provided with documents and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents or information to their respective clients only on terms consistent with the undertakings given, and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document or information once it has become part of the public record. The Commissioner may, upon application, release any party in whole or in part

from the provisions of the undertaking in respect of any particular document or other information, or authorize the disclosure of documents or information to any other person.

These rules were circulated to all Counsel who were invited to comment or suggest revisions. None did with respect to the requirements for disclosure. No one questioned the requirements with respect to disclosure to non-clients.

Mr. Plaxton acknowledges that he does not represent individuals members past or present. He represents the Police Association. Accordingly, he is subject to the requirement that he obtain authorization from me to make disclosure to any past or present member of the Association.

I instructed Commission Counsel as to how such applications for authorization would be dealt with. Commission Counsel sent a letter to Counsel dated July 25th, 2003 indicating that applications for authorizations to disclose to non-clients could be made through a letter setting out the name of the person, the documents sought to be disclosed, and the purpose for such disclosure. My ruling as to such applications was also done informally by letter from Commission Counsel. Several applications were dealt with in this manner.

Mr. Plaxton indicates that a small number of persons may be affected by the requirements for authorization, which includes some persons on the witness list.

I can see no prejudice or significant hardship on the Association in complying with the requirements. I am not prepared to grant the blanket authorization sought in this application.

Secondly an order is sought authorizing disclosure to Counsel for Mr. Jarvis. An order in this regard is unnecessary in light of the fact that Mr. Jarvis has been granted Standing and full disclosure has been made to his Counsel in accordance with the Rules of Practice and Procedure.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 7th day of October, 2003.

Commissioner David H. Wright

Various Applications for Additional Funding

The Saskatoon Police Association makes a second application for funding. Cst. Senger, Cst. Hartwig, Stella Bignell, Federation of Saskatchewan Indian Nations, and Keith Jarvis each apply for additional funding. In my original ruling on standing and funding, dated May 13, 2003 I did acknowledge that the circumstances may require the basis for funding be revisited at a later date. I granted Counsel leave to apply for directions as they may be advised. All Counsel have agreed that these applications may be determined without a hearing.

In general, these applications are made on the grounds that preparation for the hearings has involved more work than was anticipated.

Counsel for FSIN and Stella Bignell make a further point in support of their applications for additional funding. They point to the fact that six of the eight parties that have been granted standing represent police interests. Only two parties, FSIN and Bignell, can be said to represent first nation interests. This is not to suggest that the hearings to date have been adversarial. However, they point to the inequality of resources available to them as compared to the resources available to the parties representing police interests.

Counsel for Keith Jarvis request additional funding to cover the costs associated with reviewing the evidence to date.

I am not satisfied that a compelling argument has been made to revisit my ruling on funding on the grounds that preparation has involved more work than anticipated. In my view, the hearings have proceeded as expected, and without any major issues which should not have been anticipated from the outset. In this regard, I would refer to the Standing and Funding Guidelines established for the Inquiry. The principles applicable to funding are stated as follows:

> "The aim of the funding is to assist parties granted standing in presenting such interests and perspectives but is not for the purpose of indemnifying interveners from all costs incurred."

I do find some merit in the argument that there is some inequality in resources as between the police interests and the first nation's interest. Accordingly, I will allow one additional hour of preparation time for each hour of hearing time to each of the FSIN and Stella Bignell. The additional hour of preparation time will be at the rate established for alternate counsel of $125.00 per hour.

I also agree that Keith Jarvis should have some additional funding to cover costs of reviewing the evidence to date. In light of the fact he only recently obtained standing, his legal counsel was not present for the first three weeks of the hearings. I will allow an additional twenty hours of preparation time to Keith Jarvis.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 8th day of October, 2003

Mr. Justice David H. Wright
Commissioner

Ruling on Jason Roy's Second Application for Standing and Funding

Jason Roy was granted funding for legal counsel to represent him while he gave testimony before the Inquiry. He also applied for standing as a full participant. In written reasons dated June 13th, 2003 I concluded that it was unnecessary and inappropriate to add Mr. Roy as a party to the Inquiry and dismissed the application for full standing. Jason Roy now applies to vary my ruling as to his standing and funding. He does so on the basis that he was extensively cross-examined and that other witnesses may cast doubt on his account of events surrounding the death of Neil Stonechild. That possibility was entirely foreseeable in June.

Mr. Parsons also argues that Mr. Roy's position is "analogous" to Mr. Jarvis. I do not agree. Mr. Jarvis was granted standing because of the possibility that, after hearing all of the evidence, I may make findings which impact negatively on his role in the investigation. Procedural fairness dictates that a person in such position be allowed to fully prepare for and respond to any possible adverse findings. Mr. Roy is not in the same position. The fact that his account of Mr. Stonechild's activities may be contradicted goes to the question of credibility. There are many other witnesses subject to the same scrutiny and whose evidence may not ultimately be accepted. To grant witnesses full standing on this basis would render the Inquiry unworkable.

This point has been raised by The Federal Court of Appeal in *Morneault v Canada* [2001] 1 F.C. 30. In that case it was argued that the Commission of Inquiry was required to give prior notice of a potential adverse finding as to the credibility of a witness. The Federal Court of Appeal concluded that the requirement of prior notice in such case "could well impose on a Commission of Inquiry an unduly onerous standard of procedural fairness."

Mr. Parson's requested that I stay the Inquiry. What he means by this I assume is that I adjourn the Inquiry. I understand that his client has a particular concern about the evidence of Mr. Jarvis. Commission Counsel has offered to delay calling Mr. Jarvis to the week commencing October 20th, 2003 in order that the other witnesses can be heard and work of the Inquiry can continue. Mr. Parsons stated he is still unwilling to proceed. I adjourned the Inquiry until 2:00 p.m. today in order that I could reduce my rulings to writing and advise Counsel before we resume. I am instructing Commission Counsel to circulate this ruling prior to the resumption of the hearings. Mr. Parsons, is of course free to take such steps as he may think appropriate.

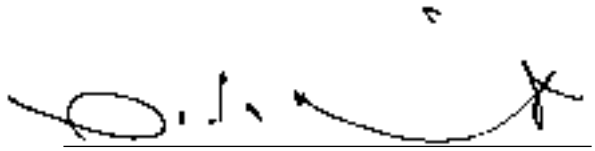
For the reasons outlined above I can see no basis for revising my original ruling as to Mr. Roy's request for standing and funding, nor to adjourn the Inquiry. I must add that I do not understand why the application was not made months ago. I did not receive a satisfactory explanation for this from Mr. Parsons.

The application for disclosure is essentially an element of the application for standing and funding and similarly fails. However, Commission Counsel will disclose to Mr. Roy's legal counsel, summaries of anticipated evidence with respect to future witnesses who may impact directly on Mr. Roy's account of events.

I have no indication as to what future evidence may be called. Commission Counsel has the initial obligation to interview witnesses and determine if they should be called. If a witness is identified who directly attacks Mr. Roy's testimony, Mr. Roy's counsel will be informed in

advance if that person is to testify in order that he can attend the hearing. My previous ruling provides for funding for legal counsel for Mr. Roy for time spent at the request of Commission Counsel.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 8th day of October, 2003



Commissioner David H. Wright

Application for Standing and Funding by Gary Pratt

The applicant will appear as a witness at the Inquiry. He now applies for full standing and funding.

Ruling on Standing

I grant full standing to Mr. Pratt. I do so in recognition of the allegations against Mr. Pratt, which have been referred to repeatedly in the hearings. There is also some indication that he has been considered a suspect in the investigation of Mr. Stonechild's death. As such he is directly and substantially affected by the Inquiry.

In granting full standing to Mr. Pratt, I would note that there is no requirement that his counsel attend all of the hearings. It is up to his counsel to determine when his attendance is required at the hearing in order to properly represent Mr. Pratt's interest.

Ruling on Funding

Mr. Pratt has retained counsel. His Counsel should have the opportunity to participate fully in the balance of the Inquiry. Mr. Pratt has limited financial resources and meets the criteria set by the Commission for funding as a party. Counsel's compensation will apply on the basis of one (1) hours preparation for each hour of attendance at the Inquiry. Time spent by his Counsel at the request of the Commission, including Commission Counsel, or in attending with his client while his client is being interviewed by Commission Counsel may also be billed as preparation time. Mr. Pratt's Counsel, Mr. Brayford, has substantial experience, and I set his hourly rate at one hundred and ninety two ($192.00) dollars per hour. If alternate counsel appears for Mr. Brayford that person's hourly rate will be fixed at one hundred and twenty five ($125.00) dollars per hour.

I recognize also Mr. Brayford will have to familiarize himself with evidence called to date and the material which has been disclosed. I will allow an additional forty (40) hours for such familiarization.

Counsel will submit an invoice to the Commission office on a monthly basis, the invoice to set out the nature of the work done and any disbursements. I expect Mr. Brayford to keep a separate record of the time allowed for familiarization with the evidence and materials disclosed from his record of preparation for and attendance at the hearings.

As I have indicated in past rulings, circumstances may require that the basis for funding be revisited at a later date. Counsel shall have leave to apply for directions as he may be advised. Any such application shall be in writing and shall be served on the other parties.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 28th day of November, 2003.

Mr. Justice David H. Wright
Commissioner

Application for Additional Funding

I have received two applications for additional funding. I also wish to deal with funding for closing submissions.

I. Application on Behalf of Stella Bignell

Counsel for Stella Bignell applies for additional compensation for their services as her counsel.

On May 16, 2003 I granted Ms. Bignell full standing at the Stonechild Inquiry and set Mr. Worme's compensation as follows:

> **Stella Bignell.** I expect Ms. Bignell will be a witness at the Inquiry and certainly I anticipate she will be present throughout the Inquiry. She does not have any resources to retain and instruct counsel. She lives in northern Manitoba and must travel by public transportation for some distance. The fees and disbursements of her counsel, Mr. Worme, will be provided at no cost to her. I fix Mr. Worme's hourly rate at $192.00. Mr. Worme's compensation will apply on the basis of one hour's preparation for each hour of attendance at the Inquiry. Counsel will submit an invoice to Commission counsel on a monthly basis, the invoice to set out the nature of the work done and disbursements.
>
> Time spent by counsel at the request of the Commission including Commission counsel or in attending with his client while the client is being interviewed by Commission counsel may also be billed as preparation time. I am not disposed to allow funding for second counsel for any of the applicants.

On June 25, 2003 I provided for alternate counsel for Ms. Bignell as I had done for other parties.

I subsequently made a further order amending the compensation to be paid to her counsel to allow two hours of preparation time for each hour of attendance at the inquiry. I point out that only one other party, FSIN, was granted this additional compensation.

By December 2003 Mr. Worme's firm had submitted accounts for their fees totalling $117,843.26. This figure included fees the solicitors anticipated they would earn for future preparation and appearances before the Commission. The fees alowed for the January and March hearings of the Commission were calculated as follows:

Hearing Date	Hearing hrs	Prep hrs	Total	Rate of Pay	Total Allowed
05-Jan	6	6	12	192	2,304
		6	6	125	750
06-Jan	6	6	12	192	2,304
		6	6	125	750
07-Jan	6	6	12	192	2,304
		6	6	125	750
08-Jan	6	6	12	192	2,304
		6	6	125	750
09-Jan	6	6	12	192	2,304
		6	6	125	750
08-Mar	6	6	12	192	2,304
		6	6	125	750
09-Mar	6	6	12	192	2,304
		6	6	125	750
10-Mar	6	6	12	192	2,304
		6	6	125	750
11-Mar	6	6	12	192	2,304
		6	6	125	750
12-Mar	6	6	12	192	2,304
		6	6	125	750
15-Mar	6	6	12	192	2,304
		6	6	125	750
16-Mar	6	6	12	192	2,304
		6	6	125	750
17-Mar	6	6	12	192	2,304
		6	6	125	750
18-Mar	6	6	12	192	2,304
		6	6	125	750
19-Mar	6	6	12	192	2,304
		6	6	125	750

The total amount which would be allowed to counsel to the last day of the March hearings was $130,304.00.

Ms. Candace Congram is the Executive Director to the Inquiry. She is responsible for reviewing and authorizing, initially, the claims submitted by various counsel funded by the Commission.

On December 8, 2003 Ms. Congram wrote to Ms. Bignell's counsel as follows:

> This is to advise you of the current status of the funding arrangement granted to Ms. Stella Bignell by the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild.
>
> In his ruling on Standing and Funding, Commissioner David Wright set your hourly rate at $192.00 and an alternate counsel hourly rate of $125.00. Compensation applies on the basis of two hours of preparation time for each one hour of attendance at the Inquiry. The first hour of preparation time is to be billed at

> $192.00 per hour and the second hour of preparation time is to be billed at $125.00 per hour.
>
> The Commission has allowed you a maximum billable amount of $125,214.00, plus disbursements, based on the attached anticipated schedule of hearings. To date, invoices submitted by you to the Commission have totalled $117,843.26 before tax and disbursements. Thus, your remaining allowable billable amount based on the current anticipated schedule is $7,370.74.
>
> Any questions regarding this matter should be directed to Candace Congram, Executive Director of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild.

Ms. Congram pointed out that she had, in effect, authorized the prepayment of Mr. Worme's legal fees in anticipation of his attendance at the hearings in January and March. By pre-billing and obtaining payment counsel had exhausted virtually all of the funds to which they would have been entitled to the end of the March 2004 hearings.

Mr. Worme's partner, Mr. Curtis, wrote to the Commission on February 16, 2004. I refer to that letter:

> We write further to the above noted matter and the correspondence from Ms. Congram recently received.
>
> Kindly take this to be our application to amend or dispense with all together the so called "funding cap". While we find that such cap allows for sufficient preparation time insofar as reviewing the disclosure materials and preparing for examination of witnesses, we find that the time required to attend to the blizzard of correspondence received from other counsel, who are not constrained by any funding cap, and matters relating to the calling of new witnesses and attending to controversial issues, most specifically the polygraph issue exceeds the arrangement allowed under the cap.
>
> We would suggest the cap be dispensed with all together and that any issue that the Commission has with our billing can be addressed through other means. Having said that, we are open to suggestions regarding alternate arrangements.
>
> We trust this matter can be addressed in a prompt fashion.

On March 2, 2004 Commission counsel advised Mr. Curtis, on my instructions, that I was not disposed to grant additional funding in light of the particular circumstances. Counsel was advised, however, that he could make a formal application to me at the Inquiry to the same end. He did so.

The material filed by Mr. Curtis contained these observations:

> As well, we have reviewed the various rulings on funding handed down by Mr. Justice Wright and note that the gist of such decisions is that the funding should be satisfactory and sufficient to provide for any matters that might be anticipated during the course of the inquiry. We would suggest that such a phrase, "might be anticipated" is somewhat deceptive, given obviously that not all things can be anticipated. We would suggest that this was acknowledged at some time during

the course of the hearing in November by Mr. Justice Wright when, in referring to the length the hearing was appearing to run, stated that "my life is not my own any more", which we suggest is confirmation that the hearing is proceeding much longer than anticipated and in fact has taken on a life of its own.

We would suggest the reasons extending the length of the hearing cause a somewhat geometrical extension of the time for preparation for each hour of hearing. Such reasons are, *inter alia*, as follows:

– the blizzard of correspondence and applications, primarily emanating from counsel for the Police Association, who are funded by their client and obviously have no cap in that regard that we are aware of, and which correspondences and applications are invariably concurred in by counsel for the City of Saskatoon, and Constables Hartwig and Senger. It is quite evident all such counsel and their clients have common interests. While we acknowledge that all such counsel and clients are stakeholders in the inquiry, (albeit the granting of standing to the Police Association remains somewhat curious), they are no more so in this regard than the family of Neil Stonechild;

– an inordinate amount of time was devoted to advocacy with respect to the issue of whether or not polygraph evidence was to be admitted at the inquiry. This required a tremendous amount of research some of which had to be contracted out by this office;

– the number of expert witnesses applied for by police lawyers to counter any expert evidence that suggests police involvement in the death of Neil Stonechild. Primary examples of this are Dr. Arnold and Dr. Lew wherein a considerable amount of time has been spent and will be spent yet assessing such witnesses' credentials and conducting background research. This is nothing more or less than a battle of experts with which the courts are all too familiar and which could be an endless process given that there can always be found an expert to contradict that of another;

– the veritable blizzard of disclosure which has certainly expanded markedly since the initial disclosure provided prior to the commencement of the proceedings in September. Noteworthy in this regard is the disclosure provided prior to the hearing dates in January where counsel were compelled to scrutinize interviews with numerous witnesses coming forth with new evidence, primarily setting out evidence adverse to any police involvement with Neil Stonechild's death and primarily from witnesses who had obvious and suspicious self interests at heart in coming forward with their information. Applications were made by the counsel for the Police Association, supported by counsel for Constables Hartwig and Senger and the City of Saskatoon, which applications were denied. Nevertheless, all such witness interviews and applications had to be carefully reviewed and researched by counsel;

– more recently the receipt of considerable disclosure received from your office March 2, 2004, being a "vetted" document bundle relating to what can be viewed as a Saskatoon police shadow investigatory team. Undoubtedly, this

disconcerting information will trigger further controversy and will require further time of the Commission. Furthermore recent receipts of disclosure compact discs containing voluminous materials will result in our further expenditure of preparatory time;

– the prolonged cross-examination of Jason Roy, which admittedly was not unanticipated. However, the seemingly endless parade of expert witnesses that we now face in relation to Mr. Roy's testimony and any expert evidence that has been called in that regard are requiring an inordinate and unanticipated amount of scrutiny and research;

– noteworthy as well is the inordinate amount of correspondence surrounding document SI-88. Such document was proposed by the counsel for the Police Association to be put into evidence through a witness other than the maker of such document, a proposal which required considerable resistance, which resistance was well placed given that the maker of such document, Mr. Harker, admitted that the document was in error only when pressed to come to the inquiry to testify with respect to such document and to bring with him supporting documents which would verify his testimony. This is a rather classic example of the adversarial nature of this inquiry and the effort being made by certain counsel to supply the inquiry with any and all evidence which would tend to obfuscate the process and minimize the possibility of police involvement in Neil Stonechild's death, however without substance such evidence might be.

…

We submit that we have made our best efforts to work within the confines of the funding cap but have found such to be impossible. We could not reasonably have been expected to anticipate the range and depth of evidence and explanations summoned for and provided to this inquiry by counsel for the police.

We submit that it is unreasonable to expect counsel for Stella Bignell to participate in 2, 3 more weeks of this inquiry without funding and, as previously stated, expect our client to subsidize this very public proceeding. While we appreciate that some funding limit is required, and while we are not asking that the cap be removed entirely, we are requesting that it be modified at this very crucial stage of the proceedings in order to provide funding for the balance of the inquiry at the same rate as previously allowed.

The conundrum faced by Messrs. Worme and Curtis does not, with respect, result from the additional work they have had to do. Rather it flows from the fact that they applied for and received payment in advance for their services. In retrospect it would have been better perhaps if Ms. Congram had refused their request. I appreciate, however, that she has some flexibility in dealing with solicitors' accounts.

I am not prepared to amend or abandon the funding guidelines I have established for the hearings. The funding formula was determined at the outset of the Inquiry and adhered to by all counsel.

II. Application on Behalf of Larry Hartwig

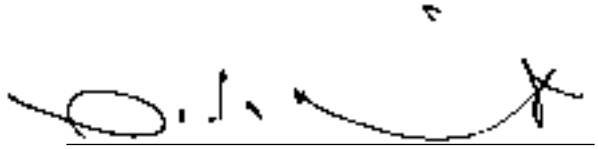
Counsel for Larry Hartwig has also applied for additional funding for his representation of Constable Hartwig. This application was made to me in writing and Mr. Fox has indicated that he is satisfied to have his application determined on the written material without the necessity of a hearing. Briefly stated, Mr. Fox's submission is that the funding guidelines have not provided for adequate compensation for time spent on various applications including the standing applications, the application to remove Mr. Axworthy as counsel for FSIN, the application with respect to polygraph evidence, and other various interim applications. As I have indicated, I am not prepared to amend or abandon the funding guidelines I have established for the hearings. Accordingly, I also dismiss this application.

III. Funding for written submissions

I have invited counsel to provide written submissions in advance of hearing closing or oral submissions. In light of the length of the Inquiry and the number of additional issues that emerged as the hearings proceeded, I recognize that the funding formula established for the hearings would not adequately compensate counsel for the considerable work that may be involved in preparing written submissions. This is particularly so as I intend to impose time limits on the oral submissions. All parties with full standing and funding will be allowed up to forty hours for preparation of written and oral submissions. Counsel for Jason Roy, who has limited standing, will be allowed twenty hours of preparation time on the understanding that his submission should be restricted to issues directly impacting on Jason Roy.

Invoices for this preparation time, and attendance at the hearing of closing submissions should be submitted as a final invoice at the conclusion of the hearing of submissions.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 18th day of March, 2004.



Mr. Justice David H. Wright
Commissioner

Application for Standing and Funding by Deputy Chief Daniel Wiks

Deputy Chief, DANIEL WIKS, of the Saskatoon Police Service has applied for standing to allow his counsel to make closing submissions on his behalf. He also applies for funding.

Ruling on Standing

I grant standing to Deputy Chief Wiks for the purpose of allowing counsel to make closing submissions on his behalf. Deputy Chief Wiks testified on behalf of the Saskatoon Police Service. The Saskatoon Police Service is represented by counsel. I am advised, by his counsel, that Deputy Chief Wiks is subject to *The Police Act* proceedings relating to the Stonechild matter. As such, it is contended, the interests of the Saskatoon Police Service and Deputy Chief Wiks could potentially diverge. Counsel also asserts that Deputy Chief Wiks could be prejudiced in *The Police Act* proceedings, and damaged in his reputation, in the event an adverse finding is made against Deputy Chief Wiks. I am satisfied that he is directly and substantially affected by the Inquiry.

Counsel for Deputy Chief Wiks may file written submissions on or before May 14th, 2004. Oral submissions by his counsel shall be restricted to one-half hour.

Ruling on Funding

I grant limited funding to Deputy Chief Wiks. His counsel shall be allowed ten hours to familiarize himself with the evidence and prepare written submissions. He will also be entitled to compensation for the time he is in attendance at the Inquiry for presentation of closing submissions.

Deputy Chief Wik's counsel, Mr. Danyliuk, has substantial experience, and I set his hourly rate at One Hundred and Ninety-Two ($192.00) dollars per hour. Counsel shall submit an invoice to the Commission Office following conclusion of closing submissions.

DATED at the city of Saskatoon, in the province of Saskatchewan, this 11th day of May, A.D. 2004.

Mr. Justice David H. Wright
Commissioner