

**SUBMISSIONS ON BEHALF OF THE
ESTATE AND FAMILY OF BRIAN SINCLAIR**

TO THE INQUEST INTO THE DEATH OF BRIAN SINCLAIR

June 15, 2009

Your Honour, I am Vilko Zbogar of Orkin Barristers in Ontario. I am representing the Estate and Family of the late Brian Sinclair. [HAND UP BRIEF of documents I will be referring to]

The Sinclair Family's participation/circumstances

I am joined today by Brian Sinclair's cousin, Robert Sinclair (and...?)

Brian Sinclair's siblings are living on the street in the same poverty and marginalization that Brian Sinclair suffered in his life and during his death. They are unable to join us.

Mr. Sinclair's other surviving nearest relatives are in poor health and/or living several provinces away, and of very modest means. They are unable to join us.

None of Brian Sinclair's nearest relatives are able to participate in this inquest personally, or have the resources to retain legal counsel to represent them.

Correspondence with Judge

We wrote to Your Honour in this regard in March 2009 [TAB 2]. You graciously referred us to the Manitoba Ministry of Justice [TAB 2, p.6].

Initial correspondence with Schnoor

So we wrote to Deputy Minister of Justice Jeffrey Schnoor regarding this matter on March 30, 2009 [TAB 3, p.7-8]. We advised him that: “We hope to be able to reassure the Sinclair family as a matter of some urgency..., that it will indeed be possible for them to have legal counsel participate fully in this important inquiry on their and their late brother’s behalf.”

We further indicated to Deputy Minister Schnoor that: “Judges conducting previous inquests (including the Pediatric Cardiac Surgery Inquest [TAB 1] and the Donald Miles inquest) have noted the fundamental importance of families having legal representation in inquest proceedings. In their reports, these judges have strongly recommended that public funding be provided to pay for legal representation of the deceased’s family and for travel costs, where the costs to the family of being involved in the proceedings would be prohibitive. There can hardly be a more compelling case for public funding for legal representation of a deceased’s family than the present circumstances, where the Sinclair family faces insurmountable barriers to accessing the proceedings and will be entirely unable to participate in the inquest unless it has paid legal representation.”

The Deputy Minister said they would consider the matter and respond promptly. Then six weeks passed, with no word at, and with no effort to consult with the Family as the Family had requested – even though we had sent follow-up correspondence [p.10 and 12] and even though the issue of funding would determine whether or not the Family would be able to participate in this inquest at all.

The waiting was excruciating – especially in these circumstances. Brian Sinclair died waiting.

Correspondence with Chomiak

Finally, on May 29, just two weeks before this standing hearing, the Deputy Minister called and said they'd provide an answer within a week. But he said that it would “not be possible” for our clients to give any input about criteria for funding. To translate, the government of Manitoba intended to determine these matters unilaterally.

In spite of this, we submitted a letter [TAB 3, p.15] “in a spirit of helpful diplomacy” to outline some of the minimum essential considerations that would enable the Sinclair Estate and Family to participate fully, fairly, and equitably in the inquest.

The key criteria was that counsel fee rates be equal to those rates ordinarily paid by the Regional Health Authority and other official parties for external counsel. This was essential to ensure that the

Sinclair Estate and Family could participate on an equitable, non-discriminatory and level field vis-a-vis the other parties.

All the Sinclair Family was requesting, was exactly what Associate Chief Judge Murray Sinclair (as he then was) had recommended in his Pediatric Cardiac Surgery Inquest report [TAB 1], and I quote: “the families [of the deceased victims] are entitled to have *all their legal costs* associated with this Inquest paid. *The role of all counsel for the families was of fundamental importance in these proceedings... It is recommended that the Government of Manitoba pay the entire legal costs of the families involved in these proceedings.*” (End of quote.)

The Government’s unilateral decision

Just a few days ago, the Government of Manitoba informed us of its unilateral decision in this context [TAB 3, p.18].

It never acknowledged, responded to, or engaged with the principled proposals for equitable participation.

It also ignored, and therefore presumably rejected, our proposal to the Government that the question of funding be mediated.

The Government of Manitoba simply determined, arbitrarily as far as we can see, that the Sinclair family and estate should accept legal aid rate funding of \$80 per hour for its representation, capped to a maximum of \$40,000 no matter how long the inquest lasts, with

undue restrictions on how and on what those funds can be spent (for example no travel or investigation costs).

In doing so, the Deputy Minister of Justice stated that the government was making an exception to its usual rules, implying that the Government was being charitable and doing this victim and his family some kind of special favour.

Role of counsel for the family

In addition, he suggested that because the inquest would have Counsel representing the public interest, the participation of legal counsel for the victim and his family is really optional.

According to the Deputy Minister of Justice [p.19], the government's policy is that (and I quote) "While members of a family and other participants may seek and be granted permission to examine and cross examine witnesses, they do so at their own expense." (End of quote.)

Well, in the case of Brian Sinclair at least, that policy is patently unjust. While we trust that Mr. Frayer will perform his tasks admirably as counsel in this Inquest, it is not his role to represent or advocate for the Estate and Family.

As stated by Associate Chief Judge Sinclair [TAB 1]: "The role of all counsel for the families was of fundamental importance... While both

counsel for the Inquest performed their tasks admirably, their role was not that of advocate for the families, but to bring forward the evidence as best they could. Given the active role of counsel for the other parties under scrutiny, having counsel whose sole responsibility was that of advocating for the families was essential for a fair and proper proceeding.”

Allow me to repeat that last phrase: “...having counsel whose sole responsibility was that of advocating for the families was **essential** for a **fair and proper** proceeding.”

Judge Swail in the Donald Miles inquest said much the same thing 5 years later, urging “that... the Government of Manitoba pay for legal representation of such family members at the deceased’s inquest.”

This must be so, as Justice Sinclair appeared to recognize, so that the families are not participating with one hand tied behind their backs, especially when there are likely to be matters that are contentious as between the victim and the institutions responsible for his death.

Discriminatory rate / cap

Associate Chief Judge Sinclair also stated that counsel for victims’ families should be remunerated at the same rate as the government normally pays external legal counsel retained to represent the Crown. As he stated: “The rates paid to outside counsel retained by the

Government should be used as a guideline.” (End of quote.) In short, he affirmed the principle of non-discrimination and equality in the room.

Instead, the Government of Manitoba here is proposing that Mr. Sinclair’s family should accept the government unilaterally and arbitrarily applying the lowest presentable standard – one that discriminatorily limits and caps the Sinclairs’ ability to fully and effectively participate in this process, while official parties seeking standing in this inquest such as the Regional Health Authority will surely not be subject to the same caps or limitations.

The offer of limited and discriminatory funding that has been proposed by the Government has the effect (if not the purpose) of limiting or marginalizing the Estate and Family’s participation in the Inquest by capping and limiting their role. As pointed out by Mr. Justice Sinclair, such an approach results in an inquest that is not fair and proper.

It would appear that the government did its public relations calculations, and guessed that the average Manitoban would say to him- or herself, “Well, \$80 per hour and \$40,000 sounds like a lot of money to me... it’s way more than I earn.” In an online article in Friday’s Winnipeg Free Press, it was clear that this was the government’s strategy, because a government spokesperson publicly extolled exactly how many dollars the Sinclairs were being offered

(while remaining conspicuously silent about how much the government parties were paying for their own legal counsel).

Your Honour, our clients were not taken in or intimidated, and we are sure that the good citizens of Manitoba will not be either. Our clients, and all Indians, recognize the old governmental tactic of fingering them as greedy freeloaders when they are demanding non-discriminatory and fair treatment.

And fundamentally, Your Honour, this issue *is* about inequity, unfairness and discrimination.

The Health Authority's learned legal team is from one of Manitoba's largest law firms. We asked the Health Authority to disclose the rates it pays its external counsel in the normal course from public funds. They refused to do so. We can only infer it is paying the usual rates, on an open-ended basis for the duration of this inquest.

Villanueva inquest

Your Honour, recently, Quebec Court Judge Robert Sansfaçon suspended the inquest into the death of Fredy Villanueva, declaring that justice would not be served where there were procedural inequities arising from the Province of Québec's refusal to cover the legal bills of the family and other witnesses. [p.14]

In that matter, the coroner's chief counsel, François Daviault, stated there was an (and I quote) "unprecedented situation of unequal forces." I would adopt Mr. Daviault's words here as they are entirely applicable (and again I quote): "Your inquest must be credible in the eyes of the public. What will their perception be when the three parties most interested by what happened don't participate because they don't have money to hire a lawyer?" (End of quote.)

This inquest provides one important opportunity for justice to be done and to be seen to be done. It will be most unfortunate if (as appears to be the case in the Québec situation) substantive issues are overshadowed by inequities standing in the way of the proper, non-discriminatory, publicly funded participation of the party that is most interested in what happened, namely the Sinclair estate and family.

Not about the money

Mark Twain once said, "When they say it's not about the money, it is about the money." Allow me to state for the record that it is not about the money. Orkin Barristers has never avoided doing pro bono work to prevent an injustice where there has been no source of funding available. That is not the case here. There is funding available. The Government just is not distributing it equitably, and that discriminatory and inferior treatment is something the Sinclair Family cannot accept as a matter of fundamental principle.

I should note also that our clients in this case did approach a number of local firms and were asked for large and impossible up-front retainers before we agreed to be retained. It is not easy for the poor to get good legal representation, and it wasn't been easy for the Sinclair family.

What is notable here, though, is that the only reason the Sinclair family needs legal representation at all is that Brian Sinclair died wrongfully under the care of a government institution, and the family wants to make sure that the same kind of thing never happens to anyone else.

It has been acknowledged by all that Brian Sinclair did not cause his own death. He did what he was supposed to. He sought treatment at a hospital when he got sick, and waited patiently when he was asked to do so. A government health care institution let him down grievously.

Discrimination

In the late 1980's and early 1990's, the Government of Manitoba undertook its historic Aboriginal Justice Inquiry. The Final Report of that Inquiry stated:

For more than a century the rights of Aboriginal people have been ignored or eroded . . . Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada. Discrimination against Aboriginal people has

been a central policy of Canadian governments since Confederation” (End of quote.)

The experiences of Brian Sinclair and many other aboriginal people in Manitoba and especially those who are also poor, disabled, sick and living on the street, appears to be representative of the entrenched discrimination and intolerance referred to by the Aboriginal Justice Inquiry.

At the core of this Inquest must be the issue of Brian Sinclair’s marginalization as an Aboriginal, homeless, mentally and physically disabled man who was unable to advocate for himself as he sat in a hospital waiting room, ignored, for 34 hours. It seems that this marginalization and discrimination made Brian Sinclair invisible in his last hours and contributed to his grossly inferior treatment and neglect.

A funding decision that repeats and perpetuates the marginalization and inequity suffered by Brian Sinclair and his Family in the context of this Inquest cannot, therefore, be accepted.

The Sinclair Family does not believe an inquest into Brian Sinclair’s death can be full, fair, thorough, just, or equitable if it is denied the full opportunity to participate on a non-discriminatory basis

Any limits to the Family’s participation or other parties’ participation in this inquest should be within the procedural and other framework that

Your Honour may determine – not within the limits arbitrarily and discriminatorily defined by another interested party, directly or indirectly.

There may be overall circumstances in which legal aid rates and caps are justifiable, even if they are inferior. This is manifestly not such a legal aid case. For example, Mr. Sinclair was not accused of any crime. He was not, in some perverse way, undeserving. He was only sick, and he received grossly marginal and inferior care that cost him his life. This is a special matter, one of broad, major public interest concern. It is not acceptable to fund the Sinclairs' participation on a discriminatory and inferior basis. This would be insensitive and would perpetuate existing systemic injustice.

Suspending proceedings

Your Honour, we are aware that you do not have jurisdiction to **order** the government to ensure the full, non-discriminatory, and equitable participation of the Sinclair estate and family in this inquest.

However, if such participation is not under all of the compelling circumstances made possible, we respectfully submit that you do have the jurisdiction to decline to continue proceedings until discriminatory impediments to the fair and proper functioning of this inquest are removed.

We submit that if you became aware there was a separate and inferior entrance that Indians, the disabled and victims must use to gain entry into this inquiry hall; and an inferior table at the back at which they must sit; and a rule that made it likely that they alone would have to stop participating half way through the proceedings and leave; and other discriminatory external constraints on their participation, you would have inherent jurisdiction to decline to be complicit in such arrangements and to refuse to commence the proceedings as though everything were fair and proper.

We respectfully submit that this is the case in the present context. The discrimination is there. It may not be intentional. But the clear effect of this discriminatory Government policy and practice, is to starve, cap, and ultimately freeze out Brian Sinclair's representatives' proper participation in this inquest concerning Brian Sinclair's own death.

In short, the marginalization that killed our client is being compounded in this room by the Government of Manitoba.

Your Honour, our clients are simply not willing to accept discriminatory treatment as a condition of coming into this room. As their counsel, we are in conscience unable to advise them to do so.

The cycle of entrenched discrimination against aboriginal people, and against homeless people, and against people in wheelchairs, and against persons whose limbs froze off on a Winnipeg street, and

against persons who are or were addicted, and against people enduring poverty, and against people with speech impediments, *must be broken somewhere*.

We submit that this inquest into how and why Brian Sinclair was ignored to death in a Winnipeg hospital is a good place to start.

For all these reasons the Brian Sinclair Estate and Family are not now requesting standing to participate. This inquest as it is currently structured cannot be proper and cannot be fair.

Your honour, we have tabled with this Inquest the record of our correspondence on this issue with the Government of Manitoba. In the same bound volume [at TAB 4] is a copy of one of four Communications that were tabled last week with four UN Special Rapporteurs on human rights in Geneva. In those Communications we indicate that the Estate and Family of Brian Sinclair are still hoping that a thorough, broad, fair and proper inquest can be held. The only question now is whether the Government of Manitoba will do what is necessary to assure the Sinclair Estate and Family's participation on a non-discriminatory, non-inferior basis.

Thank you.