

In the Matter of the Inquest Into The Death  
Of Brian Lloyd Sinclair

Re: Public funding for the Sinclair Estate and Family's  
participation in the inquest

An independent report to Legal Counsel  
For the Estate and Family  
Of Brian Lloyd Sinclair

Paul L.A.H. Chartrand, I.P.C.

Email > [pchartrand43@yahoo.ca](mailto:pchartrand43@yahoo.ca)

22 October, 2009

22 October, 2009

To:

Orkin Barristers  
Attn: Andrew Orkin  
103 Glenfern Ave.  
Hamilton, Ontario  
Canada L8P 2T9

Legal counsel for the Estate and Family of Brian L. Sinclair

Dear Mr. Orkin:

I submit to you, in response to your request on behalf of the Sinclair Family and Estate, my report on the issue of public funding to enable the Sinclair Family and Estate "full, meaningful and influential participation" in the inquest into the death of Brian Sinclair.

Sincerely yours,

A handwritten signature in black ink, appearing to read "P. Chartrand". The signature is fluid and cursive, with a distinct flourish at the end.

Paul L.A.H. Chartrand, I.P.C.

PUBLIC FUNDING FOR THE SINCLAIR  
ESTATE AND FAMILY'S PARTICIPATION IN THE  
INQUEST INTO THE DEATH OF BRIAN SINCLAIR

---

*The estate and family of Brian Sinclair have the right to full participation in this inquest... It's desirable that they be represented by legal counsel, so that their full participation can be meaningful and influential.*

- Chief Judge Raymond Wyant, 15 June 2009

*I believe that the families are entitled to have all their legal costs associated with this Inquest paid. ... 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.*

- Associate Chief Judge Murray Sinclair, December 2000
- 

## **SUMMARY**

The Estate and Family of Brian Sinclair and the government of Manitoba have, to date, been unsuccessful in resolving the terms of public funding for the Estate and Family's participation and legal representation in the upcoming inquest into the death of Brian Sinclair.

The inquest judge, Chief Judge Raymond Wyant strongly recommended that an independent mediator or arbitrator be appointed to assist the parties in resolving this matter, but in the absence of mutual agreement to engage in such a process, the Sinclair parties have asked me to review the existing written record and prepare an independent report concerning the matters in dispute.

It is a matter of public interest that the Sinclair Estate and Family's participation in the inquest be full, meaningful and influential. This can only occur by means of public funding that is adequate and equitable, especially given the social and financial situation of the late Brian Sinclair and his family.

The participation of the representatives of the Sinclair Estate and Family will be essential to the integrity and legitimacy of this inquest and to its ability to

establish the full facts concerning Brian Sinclair's death and determine in as comprehensive a way as possible how to avoid similar deaths in the future. This is particularly so in this case where the deceased is a vulnerable Aboriginal person because it is notorious that in Canada Aboriginal people are not only the poorest of the poor and the least influential on public decision-making, but also suffer disproportionately poor health compared to other Canadians.

There is no policy in Manitoba concerning funding for families of deceased persons in inquests under the *Fatality Inquiries Act*, though a number of Manitoba judges have urged the government to develop such a policy. In the absence of any such policy, this report sets out what is proposed to be a principled approach to resolving the matters in dispute. It is hoped that this report may provide some measure of assistance in enabling the "full... meaningful and influential" participation of the Sinclair Estate and Family in the inquest, as their participation and legal representation in the inquest is essential for a "fair and proper proceeding." I also offer this report, which was prepared on a *pro bono* basis, as a possible contribution, however minor, to the public interest of Manitobans on a significant policy issue.

Based on my review of the written record relevant to this dispute that was provided to me by the Sinclair Estate and Family representatives, it appears that the substantive dispute concerns the appropriate principles to apply in this case. The government relies on comparisons to past practice in Manitoba and elsewhere, whereas the Estate and Family rely on applicable judicial recommendations, human rights principles, and comparisons to what funding will be provided for the legal representation of other publicly-funded parties in this inquest.

While this dispute may appear on its face to be about payment for lawyers, it seems to be more fundamentally about the relevance and application of certain principles:

- meaningful access to justice for a vulnerable aboriginal victim's family;
- the integrity of an important inquest into a death that has shocked the conscience of ordinary Manitobans; and
- whether there should be two different standards for participation by publicly-funded interested parties in this Inquest, one of them being an Aboriginal victim's family and the other being a non-Aboriginal governmental institution.

The written record of this dispute indicates that the Sinclair Estate and Family have attempted, without success, to engage the government of Manitoba in discussions based on principle on matters of both process and substance. The government representatives instead presented funding offers that were received

with the view that they were less than adequate, inferior, and subject to arbitrary funding caps. The final funding offer that is described in the record does not have a readily discernable basis in equity or fairness, and it may not enable the Sinclair parties' "full, meaningful and influential" participation in the inquest.

The object of this report is to make recommendations in a specific case in the absence of an applicable official policy. This report identifies certain principles or bases that appear to me to be useful guides in the making of specific recommendations in this specific case, including:

- a) Public policy ought to be designed with the participation of its ostensible beneficiaries;
- b) Economics and other realities of legal representation tend to favour the better-paying party and thereby create imbalance, unfairness, and inequitable participation in the judicial process;
- c) Equal pay for equal work;
- d) Policies and practices ought to be designed to enhance the equitable access and participation of Aboriginal people in all proceedings involving the judicial arm of the government;
- e) The promotion of the participation of Aboriginal people in the public life of Canada;
- f) Comparative analysis and evaluation of policies (although arbitrary and morally indefensible policies and practices must be distinguished from principled and defensible policies); and
- g) The strong and consistent view from inquest judges in Manitoba that proper public funding must be provided for impecunious participants who are granted standing at inquests.

This report concludes that the government of Manitoba ought to provide adequate, fair, and equitable funding to meet the costs of full, meaningful and influential participation of the Sinclair Estate and Family in the inquest into the death of Brian Lloyd Sinclair.

The government of Manitoba has broadly committed itself to continue to address the challenges faced by Aboriginal people who reside in the province. For example it officially accepted all the recommendations of the Aboriginal Justice Implementation Commission in its final report of June 2001. This case, and the requests being made to the government of Manitoba to fund the Sinclair Estate and Family in an adequate, equitable and non-discriminatory manner, provide an opportunity for the government to do so.

## **SUMMARY OF RECOMMENDATIONS**

Based on my observations and conclusions as described below, I make the following recommendations that are intended to enable the full, meaningful and influential participation of the Sinclair Estate and Family in the inquest.

The recommendations made below are each part of a package. The package consists of recommendations concerning the questions that were put to me as descriptive of the matters in dispute between the government and the Sinclair Estate and Family. The recommendations, especially those concerning the hourly rates, the per-diem limit, the maximum number of lawyers, and compensation for preparation time are not severable. Each of these recommendations is necessarily contingent on the others also being adopted.

### **It is recommended that:**

1. *Legal counsel for the Estate and Family of Brian Sinclair be remunerated at not less than the following hourly rates:  
\$210 per hour for senior counsel (> 10 years call),  
\$175 for intermediate counsel (5-10 years call),  
\$120 for junior counsel (<5 years call), and  
\$65 for an articling student;*
2. *The Sinclair Estate and Family's legal counsel may be remunerated for up to ten hours per day per lawyer, and up to twenty hours per day in total when it is reasonable for more than one lawyer to provide services;*
- 3A. *Funding be provided for one senior lawyer and one lawyer of less than ten years call, provided that the work on behalf of the Sinclair Estate and Family will be undertaken and billed by only one lawyer per day whenever reasonably possible;*
- 3B. *Funding also be provided for one articling student or law clerk, up to ten hours per day;*
- 4A. *Legal counsel and any articling student or law clerk be remunerated for reasonable inquest-related preparation time and ancillary activities leading up to and during the inquest hearings, subject to the ten hour per lawyer or student or clerk per day limit, and without any other cap;*
- 4B. *The Government of Manitoba pay for the Sinclair Estate and Family's costs in relation to the funding issue in the amount of \$10,000 for work*

*undertaken up to 06 July 2009, and on an hourly basis at the rates and terms recommended herein for work undertaken after 06 July 2009;*

- 5A. Out-of-pocket disbursements and expenses actually and reasonably incurred be eligible for reimbursement;*
- 5B. Travel and accommodation disbursements be reimbursed at the rates that are set for travel on government business by the Government of Manitoba;*
- 5C. Travel and accommodation disbursements be limited to the notional case of counsel whose offices are located in Brandon, Manitoba, with no additional costs for out-of-province travel to be eligible;*
- 6A. The Government of Manitoba pay for the necessary travel expenses of a representative of the Sinclair family (who need not be the same person every day) to attend the inquest and meet with and instruct legal counsel. In the case of a Winnipeg resident expenses include the reasonable costs of local travel by reasonable means; and*
- 6B. Given the nature of the proceedings, the family representative be entitled to have a friend or family member attend the inquest for personal support, and that necessary travel expenses be paid or reimbursed on the same basis as for the family representative.*

## **PUBLIC FUNDING FOR THE SINCLAIR ESTATE AND FAMILY'S PARTICIPATION IN THE INQUEST**

### **I. The background, nature, scope and purpose of this report**

On 21 September 2008, Brian Sinclair, a 45 year old homeless, indigent Anishinaabe (Aboriginal) man confined to a wheelchair, died from a treatable condition after sitting in the waiting area of the emergency department of a public hospital for thirty-four hours without receiving care. Subsequently, the Chief Medical Examiner called an inquest into the death.<sup>1</sup>

At the inquest standing hearing on 15 June 2009, the Estate and Family of Brian Sinclair advised the Inquest Judge, the Honourable Chief Judge Raymond Wyant, that they were precluded from seeking standing to participate in the inquest because of their financial circumstances.<sup>2</sup> Chief Judge Wyant nevertheless granted standing to the Estate and Family. However, he noted that the Sinclair parties needed legal counsel "so that their full participation can be meaningful and influential."<sup>3</sup>

In view of the impasse between the government of Manitoba and the Sinclair parties on the issue of public funding for the Sinclair parties' legal representation in the inquest, Chief Judge Wyant said,

*"I strongly recommend that an independent conciliator or arbitrator be appointed suitable to both parties, to attempt to come to a satisfactory resolution of the issue."<sup>4</sup>*

In August 2009 I received communications from Orkin Barristers, Hamilton, Ontario, legal counsel for the Estate and Family of Brian Sinclair, asking if I would agree to act as a mediator or arbitrator in this matter.

As of the time that I was contacted by Orkin Barristers the government of Manitoba as represented by the office of the Attorney-General and Minister of Justice had not yet agreed to participate in mediation or arbitration.<sup>5</sup> In the event that no agreement could be reached to mediate or arbitrate this matter, I

---

<sup>1</sup> Letter from Dr. Thambirajah Balachandra, Chief Medical Examiner, to Honourable Chief Judge Raymond E. Wyant, 30 January 2009 (TAB 5); and various newspaper articles at TAB 4 and TAB 7 (Tab references are to the "Brief of Documents" that is more fully described below).

<sup>2</sup> Transcript of Standing Hearing, 15 June 2009, at pp. 19-30 (TAB 34).

<sup>3</sup> *Ibid.*, p. 57.

<sup>4</sup> *Ibid.*, p.58-59

<sup>5</sup> Letter from Orkin Barristers to Jeffrey Schnoor, 20 August 2009 (TAB 65)

was asked to provide an independent report based on the existing written record and to recommend terms of funding, as a neutral third party.

I was advised by the Sinclair parties that the issues in dispute are:

1. The hourly rate at which the Sinclair parties' legal counsel are to be funded in the inquest.
2. The maximum number of hours per day that may be billed.
3. The maximum number of lawyers and students on the Sinclair parties' legal team.
4. Whether the Sinclair parties' legal counsel will be remunerated for preparation time and ancillary activities before and during the inquest hearings.
5. Which categories of disbursements will be eligible for reimbursement.
6. Reimbursement for the Estate and Family's inquest-related legal expenses to date.

I wrote and sent a letter to the parties to the dispute on 20 August 2009 (letter appended). In this letter I indicated my willingness to serve as a mediator or arbitrator, and to write an independent report in the event that no agreement was reached to mediate or arbitrate.

The Sinclair parties' legal counsel agreed to participate in mediation or arbitration and sent me an extensive written record on 21 August. I make some observations about this record below.

On 21 August, I received a letter from Jeffrey Schnoor, Q.C., Deputy Minister of Justice and Deputy Attorney-General, in which he advised me that his department intends to await a hearing that has been requested before Judge Wyant, the inquest judge, on the matter of Manitoba's contribution to the legal expenses of the Estate and Family of Brian Sinclair (letter appended).

In light of this development I concluded that I should write the independent report as I had agreed to do.

In subsequent communications I was advised by legal counsel for the Sinclair parties that the hearing regarding the funding issue would be held at a later date than the originally anticipated 31 August date. Accordingly this report has been prepared at a date later than that which was originally planned.

In preparing for the writing of this report I also decided to revise my initial proposal contained in the 20 August 2009 letter that I wrote to the parties, and to submit this report to legal counsel for the Sinclair parties only and not to both

parties as I proposed in that letter. My reason for doing so is that the report is not the product of a mediation or arbitration process between the parties. My role as an independent rapporteur is undertaken at the request of legal counsel for the Sinclair parties and not at the request of the representatives of the government of the province of Manitoba.

This report sets out what I believe to be a principled approach to resolving the matters in dispute. It is hoped that this report may provide some measure of assistance in enabling what Chief Judge Wyant characterized as the “full... meaningful and influential” participation of the Sinclair Estate and Family in the inquest.

Manitoba judges have, on a number of occasions, recommended that a policy be designed and adopted by the government of Manitoba to address the very issues dealt with in this report. Accordingly in writing this report I also view my task as a possible contribution, however minor, to the public interest of Manitobans on a significant policy issue, and my work is done on a *pro bono* basis.

## **II. The written record**

The written record of contacts between the Sinclair Estate and Family and the government of Manitoba, provided by counsel for the Sinclair Estate and Family, provided a substantial basis for my report. The positions and approaches of the two parties are thoroughly explained in this record which is entitled ‘Brief of Documents’. The written record is 310 pages long and consists of 65 tabbed sections and a summary table of contents.

This report relies upon and makes extensive reference to the written record as contained in the “Brief of Documents.” I suggest that the “Brief of Documents” be appended to this report if it is submitted to the inquest judge or to any third party.

## **III. The context and subject of the inquest**

The inquest relates to the death on 21 September 2008 of Brian Sinclair, a 45 year old homeless, indigent Anishinaabe (Aboriginal) man confined to a wheelchair. Mr. Sinclair was found dead of a treatable condition after sitting in the waiting area of the emergency department of a public hospital in Winnipeg called the Winnipeg Health Sciences Centre, for thirty-four hours, without receiving the care he required. The hospital is administered by a statutory corporation called the Winnipeg Regional Health Authority (WRHA).

According to the province's Chief Medical Examiner who ordered the inquest, "delay in delivering care to patients waiting in emergency departments of hospitals is not an unfamiliar problem in Winnipeg. Unfortunately the death of Mr. Sinclair is not the first case reported to the OCME where a patient has died in a waiting room."<sup>6</sup>

The inquest was called pursuant to the provisions s.19(1) and s.19(2) of the *Fatality Inquiries Act* (FIA)<sup>7</sup> to determine the circumstances under which Mr. Sinclair died and what, if anything, can be done to prevent deaths in similar circumstances.

As noted in the Final Report of the Aboriginal Justice Implementation Commission (to which I was honoured to be appointed as a Commissioner by the Government of Manitoba):

*"The Aboriginal Justice Inquiry report concluded that Aboriginal people face 'greater socio-economic problems than does any other segment of Canadian society.' (AJI, Volume I, page 9) Compared to the Manitoba population as a whole, Aboriginal people lived shorter lives, received less education, made less money, lived in more crowded and inadequate housing conditions, and experienced more health problems."*<sup>8</sup>

Also, it is notorious that many sick and injured people must endure painfully long waits for surgery and other treatment in Canadian hospitals, including in Manitoba hospitals. This state of affairs applies even to urgent cases in the emergency wards of public hospitals. People have suffered and died waiting for surgical treatment of illnesses. People (such as Brian Sinclair) have died while waiting in emergency wards.

It is clearly a matter of great public interest to change and improve the hospital or health care system where it is apparent that some of these deaths could have been prevented if prompt attention and care were given. In Canada, hospitals and medical care are funded out of the public purse by the state. The state has undertaken to create a monopoly on the delivery of health care to Canadian residents and citizens. Where the state has undertaken to monopolize health care delivery, it has an obligation to do well. The sick and the injured have no option but to seek help from state-sponsored institutions. Where preventable

---

<sup>6</sup> Letter from Dr. Thambirajah Balachandra, Chief Medical Examiner, to Honourable Chief Judge Raymond E. Wyant, 30 January 2009 (TAB 5).

<sup>7</sup> *Fatality Inquiries Act, C.C.S.M. c. F52.*

<sup>8</sup> P. Chartrand and W. Whitecloud, "Final Report of the Aboriginal Justice Implementation Commission," 29 June 2001, citing A. C. Hamilton and C.M. Sinclair, "Report of the Aboriginal Justice Inquiry of Manitoba," November 1999.

deaths occur, it is a matter of the highest public interest that the operations of the monopolist system be reviewed and changed so that the sick and the injured may receive treatment that respects their human dignity and human rights to life and health.

It is not my role or intention to anticipate or pre-judge the outcome of the inquest into the death of Brian Sinclair. It will be up to the inquest judge to determine whether or how the fact that he was Aboriginal, poor, disabled, and homeless may have contributed in any way to his death, and to examine other relevant emergency health care issues as they relate to the death of Mr. Sinclair.

However, if the Sinclair Estate and Family were financially excluded from full, meaningful and influential participation in the inquest, it is less likely that such issues will receive the full and proper scrutiny that they require. The importance and value of the participation of victims' families has been repeatedly noted, including by Associate Chief Judge Murray Sinclair who has said that the role of families and their legal counsel is "essential to a fair and proper proceeding."<sup>9</sup>

It is a matter of public interest that the Sinclair Estate and Family's participation in the inquest be full, meaningful and influential. This can occur by means of public funding that is adequate and equitable, especially given the social and financial situation of Brian Sinclair and his family.

#### **IV. The role of families at inquests into deaths in hospitals and the burden of costs for legal representation**

1. An inquest is a non-adversarial inquiry into the facts relating to a death and not an adversarial fault-finding process.<sup>10</sup>
2. An inquest under the FIA has the mandate to make recommendations aimed at preventing deaths in similar circumstances.<sup>11</sup>
3. The Crown generally officially represents the public interest at an inquest that is held pursuant to the *Fatality Inquiries Act*.<sup>12</sup>
4. There is no statutory obligation on a province to make any contribution to legal fees for a party with standing at an inquest.<sup>13</sup>

---

<sup>9</sup> Associate Chief Judge Murray Sinclair, "The Report of the Manitoba Pediatric Cardiac Surgery Inquest: An Inquiry into Twelve Deaths at the Winnipeg Health Sciences Centre in 1994," December 2000 (TAB 8).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Fatality Inquiries Act*, s.33(1).

<sup>12</sup> Letter from Jeffrey Schnoor to Orkin Barristers, 06 July 2009 (TAB 56) cites *Hudson Bay Mining and Smelting Co. v. Cummings P.C.J.*, 2006 MBCA 98.

<sup>13</sup> Letter from Glenn McFetridge to David Frayer, 10 July 2009 (TAB 62) cites *Berg v. British Columbia* 2006 BCCA 146 for this proposition. The author has not conducted a search.

It is useful to examine these four propositions, not to contest their validity, but to elaborate their significance and some of the implications that flow from them in the present inquest and also to explain how they inform the recommendations in this report.

While the Crown officially represents the public interest of Manitobans, it will not be reasonably contested that the government of the day (or government institutions such as WRHA) will not have a legal, moral or political authoritative monopoly on precisely what constitutes good policy or practice on any particular issue, including on the most desirable means of preventing deaths in hospital waiting rooms. The details of important policy and practice may be expected to generate different opinions amongst the various interested parties, including experts, members of the public, victims' families, and the official political opposition in the legislative chambers.

In a democracy it is important to consider the views of the ostensible beneficiaries of a policy on the significance and effects of Crown policy on their particular interests. This proposition applies more pointedly in the case of Aboriginal people, who have historically been sidelined in political processes and governance in Canada and in the province. This is an important issue that is recognized and accepted by governments at all levels and of all political stripes. The general proposition is also widely supported in Canada in the case of minority groups, including, by way of example, minority ethnic or language groups, whose interests generate significant attention and concern apart from what may be conceived as good and sufficient "in the public interest."<sup>14</sup>

In the context of inquests into deaths in unusual circumstances in hospitals, it has been repeatedly recognized that the families of the deceased will have valuable views and insights to inform the making of appropriate recommendations. In his 2000 report of an inquest into the deaths of twelve children at the same hospital in which Mr. Sinclair died, Associate Chief Judge Murray Sinclair (as he then was) made certain recommendations respecting his finding that "the families involved in this Inquest were hampered throughout the hearings by the burden of the costs associated with having legal counsel present throughout."<sup>15</sup>

---

<sup>14</sup> This comment must not be confused with the distinct proposition that in theory each Aboriginal people, as a self-determining collectivity, has a right to determine its own vision of its 'public interest'. The comment in the text applies to Aboriginal persons in Canada *qua* citizens of Canada, and not *qua* members of self-determining peoples or nations.

<sup>15</sup> Associate Chief Judge Murray Sinclair, "The Report of the Manitoba Pediatric Cardiac Surgery Inquest: An Inquiry into Twelve Deaths at the Winnipeg Health Sciences Centre in 1994," December 2000, at 482, 483 (TAB 8).

Sinclair A.C.J. (no relation to Brian Sinclair) wrote that;

*“The role of all counsel for the families was of fundamental importance in these proceedings. While both counsel for the Inquest performed their role 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.”*

His Honour added that:

*“it seems unfair for families to have to take steps to persuade the government to provide them with financial assistance for legal costs on a case-by-case basis. Families that are best able to develop and marshal private or public support stand in a potentially more favourable position than do those whose political contacts or influence is lesser.”*

...

*“It is not unusual for Inquest proceedings to inquire into the conduct or decisions of a government department or official. In such a case, for the government to decide whether or not to pay the legal costs of counsel for the deceased’s family, without the family knowing on what basis such assistance will or will not be provided, can lead to the appearance of unfairness. Therefore some guidelines for such assistance should be provided.”*

The report then included the following recommendations:

***It is recommended that:*** *The Government of Manitoba establish a policy for the payment for counsel for families granted standing at inquests, taking into account the following factors:*

- 1. The length of the proceedings.*
- 2. The complexity of the issues.*
- 3. Whether or not the costs of family involvement in the proceedings would be prohibitive to the applicant.*
- 4. Whether or not the presiding judge so recommends on application by the family.*

***It is recommended that:*** *The Government of Manitoba pay the entire legal costs of the families involved in these proceedings... The rates paid to outside counsel retained by the Government should be used as a guideline.*

In proceedings before the Brian Sinclair Inquest judge in Winnipeg on 15<sup>th</sup> June, 2009, The Honourable Chief Judge Wyant stated that;

*“the estate and family of Brian Sinclair have the right to full participation in this inquest, and are therefore granted standing. It’s desirable that they be represented by legal counsel, so that their full participation can be meaningful and influential.”<sup>16</sup>*

Referring to the apparent failure of the government of Manitoba to adopt a policy as recommended in 2000, Wyant C.J. stated: “it’s, in my view, unfortunate if there is no such policy... And therefore, I certainly urge, and will urge the government to consider developing a policy on that for the future.”

At the moment it appears that the government of Manitoba has not designed or adopted a policy on this issue.

## **V. The inquest, the public interest and public policy**

One important purpose of this inquest is to make findings and recommendations on public policy in the public interest of persons who may attend Winnipeg hospitals and wait for treatment, and especially those who face the kinds of barriers and challenges that Brian Sinclair did. The policy must be aimed at preventable deaths in the case of persons waiting for treatment at government-funded hospitals, although it is expected that the inquest may generate more broadly-based policy recommendations on applicable procedures in hospital operations. This policy objective engages the most fundamental duty of the state, which is to protect the lives of the people who are governed by it.

Preventable deaths in hospital emergency wards shock the public conscience. This is illustrated by the national media attention that has been given to the death of Mr. Sinclair.<sup>17</sup> An inquest into such a death is thus distinguishable from an inquiry into accidental deaths or deaths of victims of crime, even though the particular facts of such deaths might themselves be shocking. The former case results from the actions or omissions of public bodies, while the latter two cases result from accidental actions or omissions of individuals or from criminal actions or omissions.

In this particular inquest the Winnipeg Regional Health Authority (WRHA) is a party that has a mandate to serve the public interest. It is expected that the participation of the representatives of the WRHA will serve the public interest and seek to improve the delivery of health care in the province. However, WRHA

---

<sup>16</sup> Transcript of Standing Hearing, 15 June 2009, p. 57 (TAB 34)

<sup>17</sup> Various newspaper articles (TABS 4, 7, and 35)

can also be expected to actively defend itself where its actions are under scrutiny, and this objective, though legitimate, could conceivably clash with the public interest as viewed by an outside observer.

As noted by Sinclair A.C.J. in the Pediatric Cardiac Surgery Inquest, a previous instance in which the actions of the Winnipeg Health Sciences Centre and its staff were under scrutiny:

*“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.”<sup>18</sup>*

Given that WRHA’s role in the Sinclair inquest can be anticipated to be similarly “active,” as is its right, the “full, meaningful and influential” participation of the representatives of the Sinclair Estate and Family will be essential. *Inter alia*, this will be essential to the integrity and legitimacy of this inquest and to its ability to establish the full facts concerning Brian Sinclair’s death and to determine in as comprehensive a way as possible how to avoid similar deaths in the future. This is particularly so in this case where the deceased is a vulnerable Aboriginal person because it is notorious that in Canada Aboriginal people are not only the poorest of the poor and the least influential on public decision-making, but also suffer disproportionately poor health compared to other Canadians.<sup>19</sup> It is important that those who have personally experienced these circumstances and those who have been most directly affected by Brian Sinclair’s death are able to fully participate in this inquest. This is “essential for a fair and proper proceeding.”

This inquest may properly be viewed as an important part of the process of developing public policy for Manitobans, especially in light of the findings of the Manitoba Aboriginal Justice Inquiry and Aboriginal Justice Implementation Commission about the social and economic conditions that continue to face Aboriginal people in Manitoba. The participation of the Sinclair Estate and Family is an indispensable feature of this process.

More particularly, the fundamental objective of the inquest is to pursue the objectives that were intended by the Legislature when it enacted the provisions of the *Fatality Inquiries Act*. If the objectives intended by the legislators when the FIA was enacted are to be met, no difficulties, including impecuniosity or

---

<sup>18</sup> Associate Chief Judge Murray Sinclair, “The Report of the Manitoba Pediatric Cardiac Surgery Inquest: An Inquiry into Twelve Deaths at the Winnipeg Health Sciences Centre in 1994,” December 2000, p. 428 (TAB 8).

<sup>19</sup> A. C. Hamilton and C.M. Sinclair, “Report of the Aboriginal Justice Inquiry of Manitoba,” November 1999.

social exclusion, must be allowed to stand in the way of the full, equitable and meaningful participation of the Estate and Family.

## **VI. Conclusions on issue of public funding for the Sinclair Estate and Family**

1. This dispute about funding for the Sinclair parties representation at the inquest is fundamentally about:
  - meaningful access to justice for a vulnerable aboriginal victim and his family;
  - the integrity of an important inquest into a death that has shocked the conscience of ordinary Manitobans;
  - whether or not there ought to be two different standards for participation by publicly-funded interested parties in this Inquest, one of them being an Aboriginal victim's estate and family and the other being a non-Aboriginal governmental institution.
2. The participation of the victims' families in inquests and inquiries is an important contribution to the betterment of public policy in the public interest. This inquest is a matter of great interest to the Estate and Family of Brian Sinclair. They are the most interested and directly affected party in this inquest. This inquest is also of major concern to all Aboriginal people who continue to suffer disproportionately from the life difficulties that faced Brian Sinclair, and to all citizens who have an interest and a stake in the proper role and functioning of public hospitals. The inquest is a matter of life and death for Manitobans who seek treatment in public hospitals and who wait there to be cared for.
3. It is regrettable that this dispute was not mediated or arbitrated, as strongly recommended by Judge Wyant. The large power imbalance between the parties to this dispute makes this the kind of case that is least amenable to agreement to mediate or arbitrate.
4. It is also regrettable that no policy has been implemented in the nine years since Associate Chief Judge Murray Sinclair urged the government of Manitoba to develop a policy on inquest funding. The recommendations of Sinclair A.C.J. and Wyant C.J. that the Government of Manitoba ought to design and adopt a principled and defensible policy on the provision of public funding for the costs of participation of families of deceased persons at provincial inquests are compelling.

5. A policy, as a guide on how 'to do the right thing,' will tend to legitimize government-sponsored inquests in the view of the public in Manitoba. Conversely, the absence of a policy results in decisions being made on an ad hoc basis, and such decisions are more likely to be arbitrary, unfair, and discriminatory.
6. A policy will assist to remedy the inequitable gap in access to funding between the parties to an inquest, for example where one party is the government or a government institution which has access to the public treasury and the other party is an Aboriginal person or family afflicted by poverty and marginalization.
7. One view is that adequate and fair payment of costs is implicitly required in the case of impecunious parties at inquests where their lack of participation would impair the ability of the inquest to fully meet the objectives of the FIA.
8. In any case the province arguably has a moral and social obligation to pay reasonable fees and costs, despite not having a statutory obligation.
9. The province of Manitoba ought to provide adequate, fair, and equitable funding to meet the costs of full, meaningful and influential participation of the Sinclair Estate and Family in the inquest into the death of Brian Lloyd Sinclair.
10. While an inquest judge may not have authority to *order* a government to pay legal costs of counsel retained by families which are granted standing at inquests, I understand that an inquest judge has inherent jurisdiction over the inquest process. The inquest judge may thus have jurisdiction to, for example, suspend an inquest where there exist procedural disabilities or inequities arising from a provincial government's refusal to adequately cover the legal costs of an impoverished victim's family.<sup>20</sup>

## **VII. Guiding principles to set the fees payable and costs to be reimbursed**

The object of this report is to make recommendations in a specific case in the absence of an applicable policy where a policy is needed.

It is not possible to apply a policy where there is none. Neither is it reasonable to recommend a policy and then to make recommendations that are based on a

---

<sup>20</sup> Letter from Orkin Barristers to Hon. David Chomiak, 29 May 2009, at 2 and footnote 1 at 3 (references to media coverage of the Villanueva inquest); *Hudson Bay Mining and Smelting Co. v. Cummings P.C.J.*, 2006 MBCA 98.

policy that has no legitimacy because it was not created in a legitimate process. The legitimacy, if not the soundness, of a policy depends on procedure as well as substance. Sound policy-making processes will usually engage the full, meaningful and influential participation of multiple parties or their representatives.

Accordingly this report identifies certain principles or bases that appear to me to be useful guides in the making of specific recommendations in this specific case. These principles are listed below and are numbered consecutively although they are not listed in any particular order of importance. Whether or not the principles that will be identified and applied are the right ones for a Manitoba policy is a matter for others to determine in a legitimate policy-making process. I do, however, consider them to be applicable in this particular case.

The analysis and recommendations that follow are based upon review of the record of documents that was described earlier, and upon the professional and personal knowledge and experience of the writer.

### **1. Participation of beneficiaries legitimizes policy**

Public policy ought to be designed with the participation of its ostensible beneficiaries, that is, those persons or groups whose interests are most directly affected by the intended policy. Inquests that are held pursuant to the FIA are among the various institutions whose recommendations inform the development of public policy on a particular subject matter. The participation of the Sinclair Estate and Family in the inquest would legitimize the inquest procedures and inform the ultimate recommendations that are made.

### **2. Economics and other realities of legal representation**

Where legal counsel who represent one party to an inquest are paid appreciably more than the other party, the economics of the practice or policy tend to provide an incentive for lawyers to represent the better-paying party. In such a circumstance it follows that one party's participation will tend to be fuller and more meaningful and influential than that of the other party – and that the latter may not be able to participate at all.

In addition, where institutional or government parties to an inquiry or inquest are represented by sizeable teams of lawyers from large law firms all working at high rates, whereas victims and their families are represented by one or two very underfunded lawyers, there are unacceptable consequences. These include an imbalance in the truth-finding process; an impression or reality of unfairness; and a perpetuation of an imbalance of power and influence. Where the victims

are Aboriginal or belong to another disadvantaged group, there may be a perception (or even a reality) of discriminatory treatment or structural injustice.

### **3. Equity, non-discrimination and equal pay for equal work**

Manitobans like all other Canadians are deeply committed to principles of equity, fairness and non-discrimination. These fundamental principles, and the principle of equal pay for equal work, are so strongly accepted and entrenched in Canada and internationally that elaboration on them should not be necessary in this context.

Legal counsel who are doing the same or equivalent work ought to be paid the same or equal fees and reimbursement of costs when paid out of the same public treasury. In particular, publicly funded parties in an inquiry or inquest should be reasonably equivalently funded so that there is not great disparity between their ability to participate, especially where one of those parties is a disadvantaged victim and the other is a government institution that may be responsible for the death.

### **4. Aboriginal people and Access to Justice**

In Canada it is notorious that the 'justice system' has not served Aboriginal people well, or has even oppressed them. Sound policies and practices ought to be designed to not only ensure but also enhance the equitable access and participation of Aboriginal people in all proceedings involving the judicial arm of the government.<sup>21</sup>

### **5. Aboriginal people and participation in the public life of Canada**

The concept of 'reconciliation' is leading a surge of interest in rectifying the legacies of past government policies and practices on indigenous peoples in Canada and in other countries around the world. An object of central significance in this process of introspection and cooperation between Aboriginal people and others is the promotion of the participation of Aboriginal people in the public life of the country. Although the immense contribution of Aboriginal war veterans is generally known and appreciated, Canada must also engage Aboriginal people in all aspects of Canadian public life. That Aboriginal people must be seen as significant contributors to the public good in contemporary Canada is a proposition that will not be contested. This applies to participation in the development of recommendations of an inquest that ought to inform public policy.

---

<sup>21</sup> This general point has been made most often and effectively in the case of criminal justice matters. See, e.g. the report of the Royal Commission on Aboriginal Peoples on the subject of criminal justice entitled *Bridging the Cultural Divide*.

## 6. Comparative analysis and evaluation of policies

Comparative examination and analysis can yield invaluable contributions to policy analysis and design. For example, the Australian experience in developing state-funded Aboriginal legal services would be a worthwhile contribution to the development of policy and practice in Canada.<sup>22</sup>

Worthwhile comparative studies will necessarily focus on the inherent fairness, equity or practicality of policy or practice. Arbitrary policies or practices that are morally and politically indefensible must be distinguished from defensible policies.

In arriving at the recommendations below, comparisons have been viewed with circumspection. In particular it has been concluded that the standards of Legal Aid in Canada are not equitable guides in the context of inquiries and inquests for setting the amount of legal fees to be paid for members of the public generally and for Aboriginal people in particular.<sup>23</sup>

In a similar vein the policies of provinces such as Ontario and Saskatchewan on funding of legal costs for families to participate in inquests, although they have some use, do not have readily discernible bases in equity and fairness.

In this case, the Government of Manitoba claims that the funding offer it has presented to the Sinclair Estate and Family is "as good as or better than any contribution to legal fees that the Government of Manitoba has ever made in an inquest and as good as or better than the reimbursement of legal fees contemplated by the policies established in Ontario and Saskatchewan"<sup>24</sup> Based on the record, neither of these claims appears to be completely accurate. In any event, as these policies and practices have no readily discernible basis in equity and fairness, comparisons to these policies and practices are of limited value.

## 7. Judicial opinions and recommendations

There is a strong and consistent view from inquest judges in Manitoba that adequate public funding must be provided for impecunious participants who are

---

<sup>22</sup> See, e.g. the mandate and structure of Victorian Aboriginal Legal Services at [www.vals.org.au](http://www.vals.org.au).

<sup>23</sup> This view is based on the writer's knowledge and professional experience, including views expressed by Aboriginal lawyers at meetings of Canada's Indigenous Bar Association. Evidence of concerns about Legal Aid rates have been recently publicized in issues of *Lawyers Weekly* and the press – see for example E. Greenspan, "Legal Aid in Crisis" *Winnipeg Sun*, 29 Sept. 2009.

<sup>24</sup> Letter from Jeffrey Schnoor to Orkin Barristers, 06 July 2009 (TAB 56)

granted standing at inquests, including families of deceased persons.<sup>25</sup> In particular, the remarks of Sinclair A.C.J. are cited, *supra*.

The following criteria have been identified as the basis for a sound policy on funding, viz;

1. The length of the proceedings.
2. The complexity of the issues.
3. Whether or not the costs of family involvement in the proceedings would be prohibitive to the applicant.
4. Whether or not the presiding judge so recommends on application by the family.

When these specific criteria are applied to the Sinclair inquest and the issue of participation by the Sinclair Estate and Family, it is evident that these parties reveal the strongest possible case for public funding:

1. The proceedings, which concern the wrongful death of a marginalized person while he was seeking care in a government institution, are expected to be lengthy.
2. Many witnesses are to participate and the number of witnesses by itself ensures that dealing with all the issues will be complex.
3. The costs of the Sinclair Estate and Family's involvement are prohibitive for them.
4. The inquest judge expressed concern about the Estate and Family's representation and recommended that funding be made available (indicating, for example, that there should be little difference between inquiries and inquests with respect to funding for victims' families' legal representation).<sup>26</sup>

### **VIII. Applying the principles to the issues**

Based on my observations and conclusions as described herein, I make the following recommendations that are intended to enable the full, meaningful and influential participation of the Sinclair Estate and Family in the inquest.

The recommendations made below are each part of a package. The package consists of recommendations concerning the questions that were given to me as

---

<sup>25</sup> In the present inquest, and also by Sinclair, A.C.J. in the Pediatric Cardiac Surgery Inquest (TAB 8,) and by Swail, J in the Donald Lorne Miles inquest.(TAB 9)

<sup>26</sup> Transcript of Standing Hearing, 15 June 2009, at 57 (TAB 34).

descriptive of the issues in dispute between the parties. The recommendations, especially those concerning the hourly rates, the per-diem limit, the maximum number of lawyers, and compensation for preparation time are not severable. Each of these recommendations is necessarily contingent on the others also being adopted.

### **1. The hourly rate at which the Sinclair parties' legal counsel are to be funded in the inquest.**

1.1 There is no provincial policy governing the hourly rate to be paid. Actual practice has varied. Most recently, in 2008, funding was provided to counsel for the family of Matthew Dumas in the Dumas inquest at a rate of \$190 per hour.<sup>27</sup>

1.2 Chief Judge Wyant has indicated that there should be little difference between inquiries and inquests with respect to funding for victims' families' legal representation.<sup>28</sup> I understand that in the 2008 Taman inquiry and the 2006 Driskell inquiry, legal counsel for the victims or their families were funded at a rate of \$200 per hour, with "junior" counsel funded at \$175 per hour.<sup>29</sup>

1.3 The government of Manitoba has proposed to provide funding to the Estate and Family at an hourly rate equal to the Legal Aid standards in the province, for one lawyer only, up a maximum of only 8 hours per day.<sup>30</sup> Legal Aid standards in Manitoba and elsewhere in Canada have been publicly criticized as being far from adequate and a barrier to acceptable access to justice.

1.4 The rate proposed by the government of Manitoba is notionally \$80 per hour, for one lawyer. However, given that the Sinclairs will sometimes inevitably need more than one lawyer to fully and adequately represent them in these lengthy, complex and important proceedings, and given that there will inevitably be some days, especially once hearings commence, when an 8-hour per day cap will necessarily be exceeded, the effective hourly rate per lawyer may be only \$40 per hour or less. It seems to me that such an hourly rate is probably at or below the overhead cost of providing the requisite legal services.

1.5 In addition, the government of Manitoba takes the position that there be *no funding at all* for the Sinclair Estate and Family to undertake preparation work in excess of \$10,000, an amount which the Sinclair Estate and Family states it had

---

<sup>27</sup> Letter from Jeffrey Schnoor to Orkin Barristers, 06 July 2009 (TAB 56); Report of the Inquest in the Matter of Matthew Dumas ([www.manitobacourts.mb.ca/pdf/dumas\\_inquest\\_report.pdf](http://www.manitobacourts.mb.ca/pdf/dumas_inquest_report.pdf)) It is indicated that funding for this inquest was capped at \$25,000; however, that inquest lasted only nine days.

<sup>28</sup> Transcript of Standing Hearing, 15 June 2009, at 58 (TAB 34).

<sup>29</sup> This information was provided by counsel for the Sinclair Estate and Family, and has not been independently verified.

<sup>30</sup> Letter from Jeffrey Schnoor to Andrew Orkin, 30 June 2009 (TAB 49).

already reached before 09 July.<sup>31</sup> This position would mean that any further preparation work by counsel representing the Sinclairs will be uncompensated. Conservatively assuming one day of preparation for each day of hearings going forward, the effective hourly rate for the Sinclair Estate and Family's counsel may thus actually be closer to \$20 per hour.

1.6 No information available to me supports the proposition that legal counsel for one party at an inquest (for example the WRHA) ought to be remunerated at a rate higher than that of other parties (for example the Sinclair Estate and Family), or the proposition that only one of the parties' legal counsel will be fully remunerated for necessary preparation work, where all are paid out of the public treasury.

1.7 A recommendation based on the principles of non-discrimination, equity and fairness would suggest that counsel for the Sinclair Estate and Family be paid at the same rate as legal counsel for WRHA. This approach seems to be better suited to the context of an official policy where the power and influence of the government promotes respect and timely adherence to the practical requirements of implementing the policy.

1.8 With specific application to this case, it would clearly be inequitable and unfair for lawyers for WRHA, which is responsible for the death of Brian Sinclair, to be paid \$210 per hour or more<sup>32</sup> for their work in this inquest without any caps, where legal counsel representing the family of the victim Brian Sinclair are paid only a fraction of that amount and are subject to some seemingly arbitrary limits on the necessary work they can be paid for doing.

1.9 In the present context, I recommend a fee that is consistent with what has been suggested as being reasonable as payment for outside counsel retained by government<sup>33</sup> (being mindful of the recommendations of Sinclair A.C.J.<sup>34</sup>), and that is consistent with fees paid to counsel for victims and their families in recent inquests and inquiries, even though it is far below the fees that are generally charged by private law firms. The present recommendation is intended as an interim measure in the absence of a government policy.

**It is recommended that:** Legal counsel for the Estate and Family of Brian Sinclair be remunerated at not less than the following hourly rates:  
\$210 per hour for senior counsel (> 10 years call),

---

<sup>31</sup> Letter from Andrew Orkin to Jeffrey Schnoor, 06 July 2009 (TAB 50)

<sup>32</sup> Letter from Catherine Tolton, WRHA, to Orkin Barristers, 15 June 2009 (TAB 26)

<sup>33</sup> Letter from Jeffrey Schnoor to Orkin Barristers, 06 July 2009 (TAB 56)

<sup>34</sup> Associate Chief Judge Murray Sinclair, "The Report of the Manitoba Pediatric Cardiac Surgery Inquest: An Inquiry into Twelve Deaths at the Winnipeg Health Sciences Centre in 1994," December 2000 (TAB 8)

\$175 for intermediate counsel (5-10 years call),  
\$120 for junior counsel (<5 years call), and  
\$65 for articling students

## 2. The maximum number of hours per day that may be billed

2.1 It cannot be assumed that legal counsel for the Estate and Family would be able to guarantee the “full, meaningful and influential” participation of their clients by working no more than eight or ten hours per day.

2.2. Lawyers are bound by professional codes of ethics and their professional work is subject to the supervision, control and discipline of provincial professional bodies. This applies to their billing practices. The judge presiding at the inquest will also supervise the intervention of all of the parties and will determine all parties’ participation as may be just.<sup>35</sup>

2.3 I have found no rationale or explanation for the limits on the number of hours per day that may be billed where they have been established in other provinces. The government of Manitoba has stated in this case that it is prepared to pay \$800 per day at the Legal Aid rate of \$80 per hour.<sup>36</sup> This implies that the provincial government is prepared to pay for 10 hours of work per day, though it has in other places proposed an 8 hour per day limit on funding for the Sinclair parties’ legal representation.

2.4 I understand that in the Taman and Driskell inquiries in Manitoba, billable hours were capped at 10 hours per day per lawyer. I can see no rationale why any cap on representation of the Sinclair parties should be any lower than this amount, especially given the importance and complexity of the issues at stake in this inquest, its duration, and the acknowledgement of the presiding judge that there should be little difference between this inquest and such inquiries.

2.5 This report is not part of a mediation process, but in light of the readiness of counsel for the Sinclair Estate and Family to accept a daily limit on this item<sup>37</sup>, it is appropriate to recommend a limit, which is set at 10 hours per lawyer, and 20 hours in total.

**It is recommended that:** *The Sinclair Estate and Family’s legal counsel may be remunerated for up to ten hours per day per lawyer, and up to twenty hours per day in total when it is reasonable for more than one lawyer to provide services.*

---

<sup>35</sup> See, e.g., *Fatality Inquiries Act*, s.28(2); *Hudson Bay Mining and Smelting Co. v. Cummings P.C.J.*, 2006 MBCA 98

<sup>36</sup> Letter from Jeffrey Schnoor to Andrew Orkin, 30 June 2009 at 2 (TAB 49)

<sup>37</sup> Letter from Andrew Orkin to Jeffrey Schnoor, 06 July 2009 (TAB 50).

### 3. The maximum number of lawyers and students on the Sinclair parties' legal team

3.1 The principles of equity and fairness would suggest that any limits ought to be the same as those imposed in respect of payments out of the public treasury for other parties doing the same or similar work on the same inquest. That approach seems to be better suited to the context of a provincially-adopted policy than interim measures that are recommended in this report.

3.2 If these proceedings are to be fair and the WRHA and other parties are engaged with numerous witnesses and issues, then the Sinclairs must be enabled to cross-examine the same witnesses, engage and test the same issues, and engage with the work of the WRHA and other parties in an adequate manner.

3.3 It is clear that the Sinclairs' representation in the inquest may not be full, meaningful and influential if it is to be handled by only one lawyer. The inquest is expected to last several months, and will involve many witnesses and complex issues. To structure the funding for the Sinclair Estate and Family so that they can only have one lawyer would tend to marginalize their participation and may effectively reduce them to being a spectator in these proceedings.

3.4 I expect that there will be more than one lawyer representing the WRHA and other parties, and if the participation of the Sinclair Estate and Family is to be genuinely "full, meaningful and influential" they must be able to fully keep pace with the examinations and cross-examinations and other inquest activity. For example, if one lawyer for the Sinclairs is fully engaged in the hearing room, another lawyer may be required to be available to undertake research, client communication or cross-examination preparation at the same time.

3.5 This report is not part of a mediation process, but in light of the indication of counsel for the Sinclair Family and Estate that the Sinclairs could accept a limit on this item,<sup>38</sup> it is recommended that a reasonable limit is as follows (provided that the above recommendations are also implemented).

**It is recommended that:** *Funding be provided for one senior lawyer and one lawyer of less than ten years call, provided that the work on behalf of the Sinclair Estate and Family will be undertaken and billed by only one lawyer per day whenever reasonably possible.*

---

<sup>38</sup> *Ibid.*

3.5 This should not be interpreted as preventing more than two lawyers from being engaged in representing the Sinclair Estate and Family in connection with the inquest. This recommendation contemplates that the available billable hours may be allocated between any appropriate number of lawyers where that is justifiable or most efficient.

3.6 In addition, where work can competently be provided by a junior lawyer or an articling student or law clerk, that should be encouraged in order to keep fees as low as possible.

**It is recommended that:** *Funding also be provided for one articling student or law clerk, up to ten hours per day.*

#### **4. Whether the Sinclair parties' legal counsel will be remunerated for preparation time and necessary ancillary activities before and during the inquest hearings**

4.1 Legal counsel are entitled to receive fair compensation for all and not only part of the work that has been or is undertaken on behalf their clients in respect of their participation in the Brian Sinclair inquest.

4.2 Once again, it cannot be expected that the Sinclairs' participation could be full, meaningful and influential if their legal counsel are not paid to be fully and properly prepared, which is a basic requirement for such representation in important proceedings. Any arbitrary cap on preparation time or any other portion of the work required is thus inherently problematic and unjustifiable. I believe it is safe to assume that WRHA and other parties' legal counsel will be fully remunerated for their extensive preparation and necessary ancillary activities. It would be inequitable and unfair if the Sinclairs' legal counsel were not.

4.3 There is no evident principled support for the establishment of a limitation or cap such as the \$40,000 limit originally proposed by the government of Manitoba<sup>39</sup> or even the \$90,000 limit that seems to be part of Ontario policy,<sup>40</sup> especially when that funding could run out in mid-proceedings for a lengthy and complex inquest such as this one. In principle it would seem that fairness and equity require that no advance overall limit be placed on the amounts that may be paid. The limits would naturally be determined by the hourly rates that are paid and the length and complexity of the proceedings, under the supervision of the inquest judge.

---

<sup>39</sup> Letter from Jeffrey Schnoor to Orkin Barristers, 05 June 2009 (TAB 18)

<sup>40</sup> "Ontario legal fee reimbursement program, coroner's inquests" , appended to Letter from Jeffrey Schnoor to Andrew Orkin, 2009 06 30 (TAB 49)

4.4 Chief Judge Wyant stated on 15 June 2009 that:

*"I agree... that the cap that was suggested, and perhaps even the rate, given the potential length of these proceedings and the complexity, would seem, at least at first blush, to be problematic."<sup>41</sup>*

Chief Judge Wyant was referring to the \$40,000 overall cap that was originally proposed by the government. That offer has since been replaced by one that proposes a \$10,000 cap on preparation work by counsel for the Sinclair Estate and Family. However, this revised cap appears to me to be similarly inherently problematic and arbitrary. It is inconsistent with "full, meaningful and influential" participation in the inquest by the Sinclair Estate and Family.

4.5 In light of the history of communications between the parties that forms part of the documentary record upon which this report is based, it is appropriate to recommend as follows.

**It is recommended that:** *Legal counsel and any articling student or law clerk be remunerated for reasonable inquest-related preparation time and ancillary activities leading up to and during the inquest hearings, subject to the ten hour per lawyer or student or clerk per day limit, and without any other cap.*

4.5 Preparation time and ancillary activities may include: meetings with the presiding Judge, inquest counsel and other parties, consultation with the Sinclair Estate and Family clients to obtain instructions and prepare the client to provide evidence; legal and factual consultations, research and preparation as reasonably required; disclosure and information review; cross-examination preparation, submission preparation and presentation, and other work as may fall within the scope and activity of the inquest as determined by the presiding judge.<sup>42</sup>

4.6 In addition, the Sinclair Estate and Family has already incurred significant costs in connection with the inquest, including preparing for and appearing at the inquest standing hearing, communicating with inquest counsel and other parties' counsel, and attempting to secure fair and equitable funding for their clients' representation in the inquest.<sup>43</sup> The efforts undertaken to secure funding are necessarily incidental to the inquest, because securing funding for their representation is a prerequisite to the Sinclair parties being able to participate properly in the inquest.

---

<sup>41</sup> Transcript of Standing Hearing, 15 June 2009, at 59 (TAB 34)

<sup>42</sup> *Ibid.*

<sup>43</sup> Letter from Andrew Orkin to Jeffrey Schnoor, 06 July 2009 (TAB 50) claims \$10,000 for costs in relation to these efforts up to 09 July 2009.

**It is recommended that:** *The Government of Manitoba pay for the Sinclair Estate and Family's costs in relation to the funding issue in the amount of \$10,000 for work undertaken up to 06 July 2009, and on an hourly basis at the rates and terms recommended herein for work undertaken after 06 July 2009.*

## **5. Which categories of disbursements will be eligible for reimbursement**

5.1 The full, meaningful and influential participation of the Sinclair Family and Estate requires the expenditure of moneys on items that are reasonably and necessarily incurred for the purpose of participating in the inquest.

5.2 The Sinclair Estate and Family has the right to appoint their legal counsel of choice. While it is often preferable for a client to retain local legal counsel, sometimes it is difficult to find a local lawyer with the requisite expertise, capacity, and willingness to assist the client. In this case, it appears from the record that the Sinclair Estate and Family retained out-of-province counsel only after they were unsuccessful in finding local counsel that would agree to represent them without demanding a large up-front retainer payment that the Sinclair Estate and Family does not have the ability to fund.<sup>44</sup>

5.3 I understand that the government of Manitoba has paid travel and accommodation costs for out-of-province counsel in other contexts, including in the Driskell inquiry.<sup>45</sup>

5.4 Chief Judge Wyant noted at the standing hearing that there is nothing wrong with the fact that the Sinclair Estate and Family's legal counsel is from outside the jurisdiction, although that alone cannot be determinative of the cost issue. Accordingly, a compromise solution on this item is appropriate.

5.5 It is noted that the travel costs from many communities within the jurisdiction (e.g., Thompson or any other communities outside southern Manitoba) would be similar to travel costs for Ontario counsel.

5.6 The Sinclair Estate and Family has indicated a readiness to accept that any extra costs that may be incurred as a result of the fact that the Sinclair parties' legal counsel are from out-of-province would not be covered, and they propose that funding be limited to the notional case of a lawyer whose offices are located in Brandon Manitoba. I recommend this as a reasonable compromise position.

---

<sup>44</sup> Transcript of Standing Hearing, 15 June 2009, p.27 and 55 (TAB 34); Patrick White, '*Homeless man's family feels marginalized at inquest*,' The Globe and Mail, 18 June 2009 (TAB 35).

<sup>45</sup> [www.driskellinquiry.ca](http://www.driskellinquiry.ca). Counsel for James Driskell included a lawyer from Ontario. The Commissioner was also from outside the jurisdiction.

**It is recommended that:**

*A. Out-of-pocket disbursements and expenses actually and reasonably incurred will be eligible for reimbursement.*

*B. Travel and accommodation disbursements will be reimbursed at the rates that are set for travel on government business by the Government of Manitoba.*

*C. Travel and accommodation disbursements will be limited to the notional case of counsel whose offices are located in Brandon, Manitoba, with no additional costs for out-of-province travel to be eligible.*

**6. Reimbursement for the Estate and Family's inquest-related legal expenses to date**

6.1 At the inquest into the death of Donald Miles<sup>46</sup> Swail, J. urged the Government of Manitoba that where members of the immediate family of a deceased person are granted standing by the judge conducting the deceased's inquest and are unable to pay such costs themselves, that the Government of Manitoba pay:

a) the necessary travel expenses of such family members who reside at a location in Manitoba distant from the location where the deceased's inquest is to be held, and

b) for legal representation of such family members at the deceased's inquest.

**It is recommended that:**

*A. the Government of Manitoba pay for the necessary travel expenses of one representative of the Sinclair family (who need not be the same person every day) to attend the inquest and meet with and instruct legal counsel. In the case of a Winnipeg resident expenses include the reasonable costs of local travel by reasonable means; and*

*B. given the nature of the proceedings, the family representative be entitled to have a friend or family member attend the inquest for personal support and that necessary travel expenses be paid or reimbursed on the same basis as for the family representative.*

---

<sup>46</sup> Provincial Judge Wesley Swail, "The Report of the Inquest in the Matter of Donald Lorne Miles," 27 January 2005 (TAB 9).

## **IX. Closing observations**

The government of Manitoba has broadly committed itself to continue to address the challenges of respecting and acting upon the human rights concerns that affect aboriginal and other marginalized people in Manitoba. An example of this is the government's official acceptance of the recommendations of the Aboriginal Justice Implementation Commission of 2001. This case, in the context of the requests made to the government of Manitoba to fund the Sinclair Estate and Family in an adequate, equitable and non-discriminatory manner, provides an important opportunity for the government to do so.

All of which is respectfully submitted

A handwritten signature in black ink, appearing to read "P. Chartrand". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Paul L.A.H. Chartrand

APPENDIX "A"

Paul L.A.H. Chartrand, IPC  
The University of Winnipeg  
515 Portage Avenue  
Winnipeg, MB R3B 2E9  
Email> [p.chartrand@uwinnipeg.ca](mailto:p.chartrand@uwinnipeg.ca)  
Mobile 204 230 4197

August 20, 2009

Jeffrey Schnoor, Q.C.                      Fax # 204-945-4133; [dmjus@leg.gov.mb.ca](mailto:dmjus@leg.gov.mb.ca)  
Deputy Attorney General  
Deputy Minister of Justice  
110 - 450 Broadway  
Winnipeg MB  
R3C 0V8

Andrew Orkin                                Fax # 905-522-0884; [andrew.orkin@orkinlaw.ca](mailto:andrew.orkin@orkinlaw.ca)  
Orkin Barristers  
103 Glenfern Ave.  
Hamilton ON  
L8P 2T9

Dear Mr. Schnoor and Mr. Orkin:

RE: Mediation/Arbitration regarding public funding for the family and estate of Brian Sinclair in the matter of the inquest into the death of Brian Sinclair

I have been asked by Orkin Barristers, for the family and estate of Brian Sinclair, to serve as a mediator-arbitrator, or alternately as an independent rapporteur, with respect to a dispute between the Sinclair parties and the Government of Manitoba. This concerns funding for the Sinclair parties' participation in the inquest into the death of Brian Sinclair.

I note that Chief Judge Raymond Wyant recommended on June 15, 2009 "that an independent conciliator or arbitrator be appointed suitable to both parties, to attempt to come to a satisfactory resolution of the issue." I have therefore agreed to make myself available at times in the month of August to mediate or arbitrate this dispute.

I am not privy to the reasons why this dispute has not yet been mediated or arbitrated. However, I take note of Chief Judge Wyant's comments at the standing hearing encouraging both sides to show good faith and conciliate, mediate, or arbitrate the matters at issue. Accordingly, I would ask for the cooperation of the parties in this process in accordance with those recommendations.

I am advised by the Sinclair parties, and accept that the issues in dispute are:

- The hourly rate at which the Sinclairs' legal counsel are to be funded in the inquest;
- The maximum number of hours per day that may be billed;
- The maximum number of lawyers and students on the Sinclairs' legal team;
- Whether the Sinclairs' legal counsel will be remunerated for preparation time and ancillary activities before and during the inquest hearings;
- Which categories of disbursements will be eligible for reimbursement;
- Reimbursement for the Estate and Family's inquest-related legal expenses to date.

If the Government of Manitoba agrees to participate in mediation or arbitration, or both, of these issues, I propose that the process will occur on Wednesday, August 26, 2009 or on Thursday, August 27, 2009, whichever of those dates is more suitable for the parties.

I request that the Government of Manitoba indicate by August 21, 2009, 5:00 p.m. Central Time, whether or not it will participate in mediation and arbitration, or either of them, of this matter.

If the government agrees to participate:

- I request that both parties indicate by 5:00 p.m. Central Time on August 21, 2009 which of the two available dates (August 26 or August 27) is preferable for them.
- Prior to the mediation/arbitration, it will be important for me to have a complete record of the existing materials relevant to this dispute. I request that the Sinclair parties prepare, serve and file a complete record of relevant materials, by e-mail and/or courier, by August 21, 2009.
- If the Government of Manitoba considers the written record to be incomplete, it may file additional existing records by 5:00 p.m. Central Time on August 24, 2009.
- I invite the parties to submit written mediation/arbitration briefs up to ten pages in length. If they choose to do so, these should be submitted no later than 5:00 p.m. Central Time on August 25, 2009.
- I will advise the parties early next week of the location at which the mediation/arbitration will take place, or I may direct that the mediation/arbitration proceed by way of conference call.
- If the parties are unable to reach a mediated settlement and proceed to arbitration of the matter, I will make every effort to render my decision by August 31, 2009.

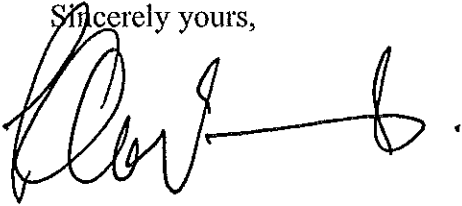
For your convenience I enclose a timetable setting out these steps.

If by the end of the business day on August 21, 2009 the Government of Manitoba either declines to participate in mediation and/or arbitration, or does not indicate that it agrees to participate in this mediation-arbitration process, I have been asked by the Sinclair parties to independently prepare a report concerning this dispute based on the existing written record, and I will attempt to issue that report to the parties no later than August 31, 2009.

If the Government of Manitoba agrees to participate, my invoice for my services will be submitted to the government. If not, I will undertake this work pro bono.

I look forward to hearing from both parties by the end of the business day on August 21, 2009.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Paul L.A.H. Chartrand', with a long horizontal flourish extending to the right.

Paul L.A.H. Chartrand, IPC

## SINCLAIR INQUEST MATTER

### TIMETABLE FOR MEDIATION-ARBITRATION / INDEPENDENT REPORT

AUGUST 2009

August 21, 2009 5:00 p.m. CDT

Government of Manitoba to advise whether it will or will not participate in mediation, mediation-arbitration or arbitration

August 21, 2009 5:00 p.m. CDT

Sinclair parties and Government of Manitoba to advise Paul Chartrand of preferred mediation-arbitration date (choice of Aug. 26 or Aug 27, or both if necessary)

August 21, 2009 5:00 p.m. CDT

Sinclair parties to provide record of relevant existing written material to Manitoba and to Paul Chartrand by email and/or courier

August 24, 2009 5:00 p.m. CDT

Government of Manitoba (if mediation/arbitration is agreed to by the Government) to file any additional written materials to complete the record, if in its view the record is incomplete

August 25, 2009 5:00 p.m. CDT (at the latest)

Sinclair parties and Government of Manitoba (if mediation/arbitration is agreed to by the Government) to file mediation-arbitration briefs not exceeding ten pages (at their option)

August 26 and/or 27, 2009

MEDIATION / ARBITRATION

At a location to be determined by Paul Chartrand or by teleconference (if mediation/arbitration is agreed to by the Government)

August 31, 2009

DECISION (if parties proceeded with arbitration)

OR

INDEPENDENT REPORT based on review of written record (if Manitoba declined to participate in mediation and/or arbitration)

Paul L.A.H. Chartrand, IPC



**Deputy Minister of Justice  
and Deputy Attorney General**

Room 110  
Legislative Building  
Winnipeg MB R3C 0V8

**AUG 21 2009**


Paul L.A.H. Chartrand, IPC  
Director & Professor  
Aboriginal Governance Program  
515 Portage Ave  
Winnipeg, MB  
Canada R3B 2E9

Dear Mr. Chartrand:

Thank you for your letter dated August 20, 2009.

Please be aware that Manitoba Justice has written to the counsel for the Inquest into the Death of Brian Sinclair to request that the issue of Manitoba's contribution to the legal expenses of the estate and family of Mr. Sinclair be brought back before Judge Wyant as soon as possible. It is our intention to await that hearing.

Yours truly,

  
Jeffrey Schnoor, Q.C.