

**IN THE MATTER OF THE INQUEST INTO THE  
DEATH OF BRIAN LLOYD SINCLAIR**

**RE: PUBLIC FUNDING TO ENABLE THE SINCLAIRS'  
"FULL, MEANINGFUL AND INFLUENTIAL"  
PARTICIPATION IN THE INQUEST**

**WRITTEN SUBMISSIONS OF THE SINCLAIR ESTATE AND FAMILY**

**I. OVERVIEW**

1. Since Chief Judge Wyant “strongly recommended” on June 15, 2009 that the Government of Manitoba and the Sinclair Estate and Family engage in independent mediation or arbitration to resolve the terms of funding for legal representation of the Sinclair Estate and Family so that their participation in the inquest could be “full... meaningful and influential,” there has regrettably been no mediation, no arbitration, and no forward progress in resolving this dispute. Any “progress” has actually been backward.
2. The Sinclair Estate and Family have attempted, without success, to engage the government of Manitoba in principled discussions. However, the government of Manitoba has showed no sign that it is willing to deal with the Sinclairs honourably or in good faith. It is apparent from the government’s course of conduct since June 15, 2009 that its position is uncompromisingly this:
  - The government will not participate in mediation of the dispute;
  - The government will not agree to conciliation;
  - The government will not agree to arbitration;
  - The government will not agree to adjudication;
  - The government will not negotiate;
  - The government will no longer engage in “discussions” with the Sinclairs (as it now sees “no point” in doing so);
  - The government will not respond substantively to multiple principled funding proposals made by the Sinclairs (which are all consistent with judicial recommendations);
  - The government will not accept or act upon any of the recommendations made by Manitoba judges concerning funding for victims’ families in inquests, either in this specific context or generally; and
  - The government will not offer any concrete suggestions for actually resolving the matter.

3. At the standing hearing on June 15, 2009, the Sinclair Estate and Family advised the court that they could not participate in an inquest in which they were being economically excluded, and that the inquest could not be full, fair, thorough, just or equitable if the Sinclairs were denied the full opportunity to participate in a non-inferior and non-discriminatory way.
4. Since then, the government of Manitoba has presented a funding proposal to the Sinclairs that is even more inadequate, inferior, and inequitable than the one it tabled prior to the standing hearing. Specifically, it has replaced its original unacceptable \$40,000 offer with one that would result in actual funding of only \$33,320 for a complex three-month inquest. Rather than seeking a principled middle ground, the government has widened the gap.
5. This funding proposal would result in the Sinclairs being funded at one-tenth of the estimated level of funding for WRHA's legal representation in the inquest, and a fraction of the funding amounts that have been provided to other victims of government institutional wrongdoing in Manitoba in inquests and inquiries during this decade.
6. Though the Sinclairs' extensive efforts to constructively engage the government in resolving the dispute did not achieve any resolution, they did accomplish the amassing of a large written record. In light of the government's refusal to voluntarily engage in any independent third party process, the Sinclair Estate and Family submitted that 310 page written record to an eminent Manitoba jurist, Professor Paul Chartrand (Co-commissioner of Manitoba's Aboriginal Justice Implementation Commission, Commissioner of the Royal Commission on Aboriginal Peoples, and distinguished scholar), and asked him to prepare an independent report concerning the matter.
7. Professor Chartrand concluded 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," and identified several principles to guide the making of specific funding recommendations in the absence of any official Manitoba policy.
8. The Sinclairs have presented the government of Manitoba with a further offer to settle upon the terms recommended in Professor Chartrand's report. As of the date of this brief, the government has not responded to that offer.
9. On June 15, 2009, Chief Judge Wyant stated that "the court has the responsibility to do what it can" to bridge the impasse between the parties, and that the court would "await further information and representations before deciding what the further course is with respect to this inquest." The Sinclair Estate and Family now come to the court to respectfully seek its further assistance, and ask the Court to do what it

can to ensure that they can fully, meaningfully and influentially participate in the inquest on a non-inferior and equitable basis.

10. The purpose of this brief is to:

- a. Review the Sinclair's record of engagement with the government from June 15 through the completion of and follow-up to the Chartrand Report in November 2009, and the manner in which the government has dealt with the Sinclairs in this matter;
- b. Set out some principles that ought to guide the resolution of this matter;
- c. Describe the government's funding offer and justifications, and how the offer measures up to funding provided in other relevant contexts; and
- d. Describe the jurisdiction that the court has to assist the parties in resolving this matter.

11. At the end of the day, the position of the Sinclair Estate and Family is that the pattern of marginalization, paternalism, and unfairness that is emblematic in the circumstances surrounding Brian Sinclair's death must not be repeated or compounded within the structure of this inquest itself.

## **II. WHY WE ARE WHERE WE ARE: Or rather, why we are not where we should be**

### ***Initial efforts***

12. In February 2009, the Chief Medical Examiner called an inquest into the death of Brian Lloyd Sinclair. Brian Sinclair was a homeless, disabled, vulnerable Aboriginal man who died in September 2008 after being ignored for thirty-four hours in the waiting room of a Winnipeg hospital emergency department. The Chief Medical Examiner has said his death was preventable.

**Letter from Dr. Thambirajah Balachandra, Chief Medical Examiner, to Honourable Chief Judge Raymond E. Wyant, 2009-01-30 [Document Brief Tab 5]**

13. Subsequently, the family of the victim attempted to secure adequate public funding from the government of Manitoba to enable the family to meaningfully participate in the inquest, but without success.

**See the numerous letters from Orkin Barristers to the Government of Manitoba at Tabs 12, 14, 15, 16, 19, and 24 of the Document Brief**

14. Just prior to that standing hearing on June 15, 2009 (some two-and-a-half months after the Sinclairs initially contacted the government), the government of Manitoba made an offer of funding that failed to address any of the considered positions of principle respectfully outlined in correspondence, and that would not enable their full and meaningful inquest participation. Specifically, the government offered funding capped at \$40,000 for the Sinclair's legal representation in the inquest, no matter what the level of effort and time would be required.

**Letter from Jeffrey Schnoor to Orkin Barristers, 2009-06-05 [Document Brief Tab 18]**

15. The Sinclair Estate and Family felt that they could not accept this proposal, which they saw as being discriminatorily inferior and inadequate, and which would marginalize their participation in an inquest in which they were the most interested parties, reducing them to spectators in the process. The Sinclair family never had the chance to help Brian Sinclair in the 34 hours prior to his death, but they do not want to be left just as powerless after his death. The family has committed to making sure that Brian Sinclair's death was not in vain, but it cannot fulfil that commitment from the sidelines, which is where acceptance of the government's funding offer would have left them

**Winnipeg Free Press, "I hope that Brian's death is not in vain," 2008 09 27 [Doc. Brief Tab 4]; Letter from Orkin Barristers to Hon. David Chomiak 2009-06-09 [Doc. Brief Tab 19]; 2009-06-11 Letter from Orkin Barristers to Jeffrey Schnoor, 2009 06 11 [Doc. Brief Tab 24.]**

## ***A judicial framework for resolution: the June 15 standing hearing***

16. At the inquest standing hearing on June 15, 2009, the Sinclair Estate and Family advised the inquest judge that that they could not request standing in the inquest under circumstances where the government refused to provide adequate and equitable funding for their legal representation, because:

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 Sinclair family does not believe that an inquest into Brian Sinclair's death can be full, fair, thorough, just or equitable, if it is denied the full opportunity to participate in a non-discriminatory way.

**Transcript of Standing Hearing, 2009 06 15, at pages 20, 28, 31 [Doc. Brief Tab 34]**

17. Even though they were unable to seek standing, Chief Judge Wyant granted full standing to the Sinclair Estate and Family.

[T]he 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.** [emphasis added]

**Transcript of Standing Hearing, 2009 06 15, at p. 57**

18. On the issue of the funding dispute that was preventing the Sinclairs from participating in the inquest, Chief Judge Wyant stated:

**I strongly recommend that an independent conciliator or arbitrator be appointed suitable to both parties** [the government of Manitoba and the Sinclair Estate and Family], to attempt to come to a satisfactory resolution of the issue.

...

It's not lost on me that there seems to be quite a bridge between the position of Mr. Zbogor and the position of the government. And quite frankly, I think that, as it often is, the solution may lie somewhere in between.

I agree with Mr., and sympathize with Mr. Zbogor, at least, 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.** By the same token, it's not lost on me that counsel who appears for the family today is from outside the jurisdiction. There is nothing wrong with that. But that alone can't be determinative of the cost issue, nor can the funding of not just one counsel, but a whole legal team.

So that's the reason that **I think there needs to be some conciliation and mediation...**

In essence, then, **I am asking, and expect, both sides to show good faith to discuss and perhaps mediate the issues.**

...

[T]hese are issues that need to be resolved amicably to the satisfaction of all, so that we can get on with what the real business of this inquest is.

**Transcript of Standing Hearing, 2009 06 15, at p. 57-61 [emphasis added]**

***Following the standing hearing: no mediation, no arbitration, no progress***

19. Following the standing hearing, there was hope and optimism that a fair and principled resolution would be reached on the funding issue. The press reported that “within an hour of Wyant’s urgings, Justice Minister Dave Chomiak pledged to negotiate a fairer deal for Sinclair’s family.” The Minister of Justice stated that: “We, of course, support the family getting standing and we support the family having legal representation” and that: “we agree with the decision of the judge that we’ll fund the family... reasonable legal costs.” He indicated that the government would sit down with the family and the AMC to resolve the issue.

**Winnipeg Free Press, 2009 06 15, “Province increases legal funding for Sinclair family”; Winnipeg Free Press, 2009 06 17, “Scales of justice faulty on legal representation” (TAB 35)**

20. Since then, however, there has regrettably been a total lack of progress. The Sinclairs promptly made every effort to resolve this dispute in a principled and respectful manner and to heed and fully implement the recommendations of Chief Judge Wyant. However, the government of Manitoba has refused to engage in any independent mediation or arbitration process, and has refused to even negotiate with the Sinclairs or deal with them in any honourable and respectful way. Instead, the government unilaterally tabled a new funding proposal that was actually even worse than its original unacceptable, inferior, inequitable, and inadequate proposal that the court had already opined was “problematic.”

21. In the absence of the government’s willingness to engage in a mediation or arbitration process, the Sinclairs agreed (with some trepidation) to some informal unmoderated meetings with the government. Regrettably, those meetings were an exercise in frustration and futility. The government came to the table with a predetermined funding offer; rejected discussions about establishing a fair and safe (for the Sinclairs) process for moving forward; refused to listen to any of the Sinclairs’ positions of principle; and would not honour the recommendations of either Chief Judge Wyant or Associate Chief Judge Murray Sinclair.

22. To summarize, the government of Manitoba has:

- a. Avoided engaging in mediation, conciliation or arbitration or any such process with a mutually acceptable independent third party despite the strong recommendations of Chief Judge Wyant;
- b. Refused to respond to the list of respected, immediately-available, independent, Manitoba mediator-arbitrators presented by the Sinclairs;

- c. Remained intransigent and uncompromising in insisting that the only process that is acceptable for moving forward is the process that the Government of Manitoba has unilaterally predetermined, and refused to work toward agreement on a process for moving forward that was *mutually agreeable* – despite the Estate and Family’s pleas that such agreement was essential for them to feel safe in a process in which the inequality between the parties and the unfortunate history of an absence of good faith engagement was great;
- d. Insisted on informal settlement discussions rather than arbitration or mediation, but refused to engage in such discussions on a without-prejudice basis (stating that the Government intended to repeat any offer it might table during without prejudice settlement discussions in with-prejudice correspondence that it could immediately disclose publicly);<sup>1</sup>
- e. Unilaterally transmitted a substantive offer to the Estate and Family less than two hours after the Estate and Family advised the government that: “Until issues of process are resolved, and while we are still discussing issues of process, we are not prepared to receive any offers of substance, and would consider any unilateral transmission of such offer(s) to be a serious breach of protocol and good faith.”<sup>2</sup>
- f. Tabled a take-it-or-leave-it funding offer that would provide an even lower amount of funding than would have been available under its original unacceptable offer, and that has no discernible basis in fairness, equity, or even adequacy;
- g. Made efforts to displace the Sinclair Estate and Family’s chosen legal counsel and have them replaced with counsel recruited by the government itself to represent the Sinclairs;<sup>3</sup>
- h. Delayed responding to repeated requests to disclose key information about the rates that the Government pays when it retains outside counsel;
- i. Refused to respond in any way to the two substantive offers that were tabled by the Sinclair Estate and Family, or to the principles upon which those offers were based;
- j. Instead of responding to the Sinclairs’ settlement offers, wrote to inquest counsel that the government sees “no point” in having discussions with the Sinclairs, and describing the status of the matter in an incomplete and prejudicial manner (e.g., completely ignoring the offers made by the Sinclairs

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<sup>1</sup> Email from Orkin Barristers to Jeffrey Schnoor, 30 June 2009, 6:13 p.m. (Document Brief Tab 48); letter from Orkin Barristers to Jeffrey Schnoor, 06 July 2009 (Document Brief Tab 50); Letter from Orkin Barristers to David Frayer, 14 July 2009 (Document Brief Tab 63)

<sup>2</sup> Email from Orkin Barristers to Jeffrey Schnoor, 30 June 2009 (Document Brief Tab 47)

<sup>3</sup> Letter from Jeffrey Schnoor to Orkin Barristers, 06 July 2009, at 3-4 (Document Brief Tab 56); Letter from Glenn McFetridge to David Frayer, 06 July 2009 (Document Brief Tab 58); Letter from Glenn McFetridge to David Frayer, 10 July 2009 (Document Brief Tab 62); Letter from Orkin Barristers to David Frayer, 14 July 2009 (Document Brief Tab 63)

and the fact that the Sinclairs' offers entailed no additional expense relating to the out-of-province location of the Sinclair's counsel);<sup>4</sup> and

**Document Brief, Tab 58 and 62**

- k. Repeatedly refused to provide any response to the question: "Is your government willing to give mediation and/or arbitration a *bona fide* attempt using one of the ten eminently qualified available mediator-arbitrators off our list before we return to Judge Wyant for directions? Surely you can now provide a clear, prompt Yes or No response."<sup>5</sup>

**Tab 59, Tab 61, Tab 63**

23. Legal counsel for the Government of Manitoba advised inquest counsel on July 10, 2009 that the Government has expended its "best efforts" to reach an agreement and that it has proceeded in "good faith." However, it has not been the Sinclairs' experience that either best efforts or good faith have been exercised by the Government of Manitoba in this context.
24. "Best efforts" and "good faith" require more than unilaterally tabling one offer but refusing to engage in any discussion of matters of principle raised by the other party. "Best efforts" and "good faith" in this context would require, at the very least, that the parties abide by the recommendations of the court, and the government of Manitoba has utterly failed to do so.
25. Thus, rather than moving forward since June 15, the gap between the parties is now wider than ever. There has been no mediation, arbitration or conciliation, nor even negotiation in the true sense of that word. The Sinclairs have presented compromise funding proposals to which the government has never responded. (The Sinclairs' funding proposals entailed no additional cost arising from the out-of-province location of their counsel, and limited the size of the legal team to what has been provided in other contexts, i.e., one lawyer except where circumstances may require up to two). The government has replaced its original inferior, inadequate, and inequitable funding offer with one that is even worse. The Sinclairs' recent efforts to revive the possibility of progress have gone nowhere.
26. There is a huge inequality of bargaining power between the parties: a deceased, homeless, legless, impoverished, disabled Aboriginal man and his family on the one hand, and the Government of a Province of a G8 state on the other. Rather than ameliorating this, it appears to the Sinclairs that the Government has exploited it and is relying on it to marginalize, paternalize and control the Sinclairs, who are seeking only to participate in an important inquest into their relative's death on a fair, equitable, and non-inferior basis.

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<sup>4</sup> Document Brief, Tab 58 and 62

<sup>5</sup> Document Brief, Tabs 59, 61 and 63

27. It now seems clear that the Government of Manitoba is unwilling to provide the necessary funding to allow the Sinclair Estate and Family to prepare for and participate in this inquest in any meaningful or influential manner.
28. The Sinclairs now find themselves less than two months away from the start of the inquest hearings, and they still do not know whether or not they will be able to participate in the inquest meaningfully or at all.

### ***The Chartrand Report***

29. The Sinclairs' most recent effort to give effect to Chief Judge Wyant's strong recommendation that independent mediation or arbitration take place was in August 2009. At that time, the Sinclairs contacted Professor Paul Chartrand, who agreed to make himself available to mediate or arbitrate the dispute.
30. Professor Chartrand, B.A., LL.B., LL.M., I.P.C. is an eminent Manitoba jurist who was appointed by the government of Manitoba as a co-commissioner of the Aboriginal Justice Implementation Commission, and by the federal government as a Commissioner to the historic Royal Commission on Aboriginal Peoples, and who has a long and distinguished record as a scholar.

#### **Curriculum Vitae of Paul Chartrand [Hearing Record, Tab 3]**

31. Professor Chartrand contacted the government of Manitoba directly with some specific mediation-arbitration dates and asked for the government's cooperation in giving effect to the recommendations of Chief Judge Wyant. Once again, the government declined to participate in any such independent third party process, indicating that:

"Manitoba Justice has [requested]... 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."

In other words, the government indicated it did not wish to comply with Chief Judge Wyant's recommendation that mediation or arbitration take place and instead would await another hearing before the judge.

#### **Appendix "B" to the Chartrand Report [Hearing Record, Tab 2]**

32. In the absence of any willingness by the government of Manitoba to engage in mediation or arbitration, the Sinclairs asked Professor Paul Chartrand to review the existing written record concerning the dispute and to independently prepare a report concerning the matter.
33. Professor Chartrand agreed to do so, and completed his report in late October 2009. The report made 11 recommendations concerning the terms on which funding

should be provided to the Sinclair Estate and family in this context. Those recommendations were guided by seven principles that Professor Chartrand identified as being applicable, in the absence of any official government policy on the subject.

**Chartrand Report [Hearing Record, Tab 2]**

34. The report echoed the comments of Chief Judge Wyant indicating that the Sinclair Estate and Family was an essential party to the inquest:

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.

**Chartrand Report, at p. 1-2 [Hearing Record, Tab 2]**

35. With respect to the offer that had been tabled by the government, Professor Chartrand observed that it "does not have a readily discernible basis in equity or fairness, and it may not enable the Sinclair parties' "full, meaningful and influential" participation in the inquest.

**Chartrand Report, at p. 3 [Hearing Record, Tab 2]**

36. In November, 2009, the Sinclairs presented a further funding proposal to the government that was based exactly on Professor Chartrand's recommendations. That proposal was consistent with the terms of the proposals previously tabled by the Sinclairs. As of the date of the writing of this brief, no response has yet been received from the government.

**Letter from Murray Trachtenberg to Minister of Justice, 2009 11 09 [Hearing Record, Tab 4]**

37. After the better part of eight months of attempting to gain minimally adequate, fair and non-discriminatory publicly funded access to the inquest into their relative's unjust death, the Sinclairs feel they have gotten nowhere.

### **III. A MATTER OF PRINCIPLE: How to determine what is fair and equitable**

38. At root of the substantive dispute in this case is the question of the appropriate principles to apply. As Professor Chartrand observed:

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.

**Chartrand Report, at p. 2 [Hearing Record, Tab 2]**

39. More fundamentally, Professor Chartrand noted that this dispute is only superficially about payment for lawyers, and that the dispute is really about:

- 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.

**Chartrand Report, at p. 15 [Hearing Record, Tab 2]**

40. While the government of Manitoba has attempted to emphasize the “money for lawyers” angle, that really is not the issue that most concerns the Sinclairs. The issues of equitable and fair treatment for a marginalized victim and his family; the integrity of the justice system; and non-discrimination should together be the guiding principles – particularly in a case “that has shocked the conscience of ordinary Manitobans”.

41. In addition to ignoring Chief Judge Wyant's recommendations concerning independent mediation or arbitration, the government has also ignored the recommendations of inquest judges who strongly urged the government to establish a policy concerning funding for victim's families in inquests, including Associate Chief Judge Murray Sinclair (Pediatric Cardiac Surgery Inquest, 2000) and Judge Wesley Swail (Donald Miles Inquest, 2005), and now Chief Judge Wyant as well.

42. In the absence of such a policy, Professor Chartrand's report identifies certain principles for guiding the making of specific recommendations in this context.

- 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.

**Chartrand Report, at pp. 3 and 17-19 [Hearing Record, Tab 2]**

#### **IV. THE GOVERNMENT FUNDING PROPOSAL: Clearly inferior treatment of the Sinclairs**

##### ***The Government's current funding proposal***

43. The government has offered to contribute to the Sinclairs' legal fees and expenses for representation in the inquest on the following terms:

We are prepared to contribute at the rate of \$80.00 per hour to a maximum of \$40,000.00. A maximum of \$10,000.00 (of the \$40,000.00) may be billed for preparation time and the balance may be billed for attendance at the inquest; not more than eight hours per day may be billed. If and when billings reach \$40,000.00, the Government of Manitoba is prepared to pay \$800.00 for each full or partial sitting day of the inquest. Out-of-pocket disbursements actually and reasonably incurred will also be eligible for reimbursement. No amount may be billed for travel or accommodation costs.

**Document Brief, Tab 49**

44. Based on 53 currently-scheduled hearing days, the government's offer will amount to funding for the Sinclairs in the gross amount of \$33,320 plus limited disbursements.<sup>6</sup> Notably, the \$40,000.00 threshold will not be reached unless the number of hearing days exceeds 68, which is 15 more days than are currently scheduled.

45. In other words, the \$10,000 cap for preparation time renders the government's latest (current) funding proposal even more inferior and regressive than the original \$40,000 proposal (which did not limit preparation time and which would have resulted in actual funding of \$40,000).<sup>7</sup> Both offers are of the same order of magnitude of inferiority and inadequacy, but in actual dollar terms, the government's latest offer is almost 20% worse than its original offer.

46. With respect to the government's original \$40,000 offer, Chief Judge Wyant indicated:

I agree with Mr. [Zbogar], and sympathize with Mr. Zbogar, at least, 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.

**Transcript of Standing Hearing, at p. 59 [Document Brief, Tab 34]**

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<sup>6</sup> There are up to 5.5 hours scheduled for inquiry attendance on each of the 53 days of hearings, for a maximum total of 291.5 scheduled hours of inquiry attendance. At \$80/hour, 291.5 hours of hearing attendance amounts to \$23,320. An additional \$10,000 is allowed for preparation time, for a total funding amount of \$33,320.

<sup>7</sup> The original offer was for funding "at the Legal Aid Manitoba tariff rate of \$80 per hour to a maximum of \$40,000 plus reasonable office disbursements necessarily incurred," excluding disbursements for "investigative, travel or accommodation expenses."

47. Rather than heeding these observations (or any of the recommendations concerning mediation or arbitration), the government tabled a take-it-or-leave-it offer that contains a cap that is even more problematic, arbitrary, inadequate and unreasonable.
48. To the Sinclairs, this feels like yet another slap in the face. First, they lost their relative, Brian Sinclair, to what seems to be institutional marginalization, neglect, and possibly discrimination. Now, in the context in which the Sinclairs are trying to get answers about what happened and why, and to contribute to making changes so that these kinds of practices or attitudes never take another life, they are encountering the same kind of disdain, paternalism, and marginalization from a government that refuses to listen to them, fails to respond to them, and will not deal with them in any principled or honourable manner.

### ***The Government's purported justifications for its funding offer***

49. The government has advanced four rationales or justifications for the offer it has made to the Sinclairs:
- a. It is the role of Crown counsel to serve the public interest, and the family's involvement in the inquest is really non-essential (and therefore the family need not even be present at the inquest, let alone be funded);
  - b. The government's offer is:
    - i. "as good as or better than the amount of reimbursement contemplated in the policies in place in Ontario and Saskatchewan" and
    - ii. "as good as or better than any contribution to fees that the Government of Manitoba has ever made in an inquest;" and
  - c. The offer is "acceptable to local respected counsel."  
**Letter from Jeffrey Schnoor to Orkin Barristers, July 6, 2009 [Document Brief, Tab 56]**
50. The Sinclair Estate and Family has been unable to accept the Government's funding offer or its justifications for the offer because:
- a. the claims that the offer is the best funding offer ever made in Manitoba and better than other jurisdictions' policies are false;
  - b. the offer is *prima facie* discriminatory and also unjust;
  - c. it treats the family of the victim as vastly inferior to the government authority responsible for Brian Sinclair's death, within this inquest context;
  - d. it is not in any way consistent with highly applicable judicial recommendations;

- e. it will not enable the full, meaningful and influential participation of the Sinclair Estate and Family in the inquest; and
- f. The fact that things have been done in a certain way in the past does not in itself mean it is the right way, especially not in a progressive society that values human rights, equality, and the principles set out in the Canadian Charter of Rights and Freedoms and applicable international human rights instruments that are binding on Canadian governments.

**See Document Brief, Tab 59**

51. Professor Chartrand articulated many of the same concerns about the equity and adequacy of the Government's funding offer. In summary:

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.

**Chartrand Report, at p. 2 [Hearing Record, Tab 2]**

### **Government justification #1: The Sinclair Estate and Family's involvement is non-essential**

52. The Government has stated that there is "no legal obligation on a province to make any contribution to legal fees for a party with standing at an inquest," thereby indicating that the role of a deceased's family in an inquest is really non-essential, and therefore that any contribution to their expenses for participating in any such process is entirely gratuitous.

**Document Brief, Tab 56 and 62**

53. This position:

- a. Is not at all consistent with Manitoba judicial recommendations including those of Associate Chief Judge Murray Sinclair, or with the observations of Professor Chartrand;
- b. Ignores the actual circumstances of the Sinclair Family, who are the victims of government institutional neglect in this instance;
- c. Disregards the government's moral and social responsibilities to victims of government institutional neglect; and
- d. Is actually moot, given that the court has granted the Sinclair Estate and Family "the right to full participation in this inquest" and declared them to be parties that are "essential to the inquest."

**Transcript of Standing Hearing, June 15, 2009, pp. 57, 58 [Document Brief, Tab 34]**

54. Brian Sinclair faced many challenges in his life, including poverty. His nearest surviving relatives face significant socio-economic and health challenges of their own. His two brothers in Winnipeg are living in circumstances similar to Brian Sinclair's, in poverty and under trusteeship. Mr. Sinclair's mother (who is elderly and very frail) and his three sisters live in British Columbia and are of modest means. Their financial, geographical, and health circumstances mean that they have neither the resources to retain legal counsel nor the ability to participate in the inquest in Manitoba personally. In order for Brian Sinclair's family to participate in the inquest at all, it is essential that they be provided with public funding for legal representation.

**Document Brief, Tab 12**

55. While there may not be a statutory obligation to provide funding, there is certainly a compelling moral and social obligation to do so particularly in the circumstances of this inquest.

**Chartrand Report, at p. 16 [Hearing Record, Tab 2]**

56. This social and moral obligation is reinforced by repeated and consistent judicial findings concerning the essential importance of the participation of the families of deceased persons at inquests. Notably, the government of Manitoba's offer did not take any of these judicial recommendations into account.

**Document Brief, Tab 60**

57. The applicable judicial recommendations and observations include the following:

**A. From the Report of the Pediatric Cardiac Surgery inquest (Associate Chief Judge Murray Sinclair), at pp. 481-482 [Doc. Brief, Tab 8]:**

The families of the 12 children who died in 1994 had compelling reasons to choose to follow and participate in the proceedings of this Inquest. However, the length of the proceedings and their complexity would have effectively barred all but the wealthiest of families from participating.

...

I believe that the families 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. 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.

In this case the families actively pursued the matter with the government of the day and were successful (in part at least) in persuading government to pay for their legal costs. However, 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 for 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.

#### **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. [Emphasis added.]

#### **B. From the Report of the Inquest in the Matter of Donald Lorne Miles (Provincial Judge Wesley Swail), at p.3 [Doc. Brief, Tab 9]:**

I would urge 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.

#### **C. From the Transcript of the Standing Hearing for the Inquest into the Death of Brian Sinclair (Chief Judge Raymond Wyant), at pp. 57-59 [Doc. Brief, Tab 34]:**

[I]t's, in my view, unfortunate if there is no such policy [as recommended by Sinclair A.C.J.P.C.], because it might have prevented what has now occurred this morning in court. And therefore, I certainly urge, and will urge the government to consider developing a policy on that for the future.

...

In this sense, though, there should be little difference between inquiries and inquests with respect to the reasonable provision of funding for legal counsel for those essential to the inquest, such as in this case, in any event, the family of Mr. Sinclair.

I glean from the paediatric inquest a number of factors, but it's important to note Judge Sinclair's comments at the end that the role of counsel to the families in that case, was fundamental, and I think it is fundamental in this case, that the role for the inquest, counsel for the inquest plays is a vital role in assisting the family in asking questions and explaining procedure, but cannot, and should not, also take the role of family representation.

Mr. Frayer is excellent, top notch counsel, a man with impeccable reputation for advocacy and integrity. He will do an admirable job as counsel of this inquest. But the family needs another advocate.

58. Professor Chartrand also considered this foundational issue in some detail in his report:

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."

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.

**Chartrand Report, p. 10 [Document Brief, Tab 2]**

59. As for the government's claim that the Crown will adequately represent the Sinclairs interests in the inquest, Professor Chartrand makes the following relevant observations:

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.

**Chartrand Report, p. 11 [Document Brief, Tab 2]**

60. Noting that the participation of WRHA would likely be active in this inquest, in the same manner in which the responsible hospital was active in the Pediatric Cardiac Surgery Inquest, Professor Chartrand continued:

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 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.

...

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.

**Chartrand Report, p. 14 [Document Brief, Tab 2]**

61. This issue is particularly poignant given Brian Sinclair's identity as a vulnerable Aboriginal person:

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

**Chartrand Report, p. 14-15 [Document Brief, Tab 2]**

## **Government justification #2: The government's offer is as good as or better than Ontario and Saskatchewan policies**

62. The Government has attempted to justify its funding proposal by stating:

In making the offer, the Government of Manitoba has given careful consideration to the policies which have been established in the provinces of Ontario and Saskatchewan for the reimbursement of legal fees... In our view, the offer we have made in this letter is as good as or exceeds the amount of reimbursement contemplated in those policies.

**Document Brief, Tab 49 and 56**

63. As is apparent from *Table 1*, the Government’s assertion that its offer is as good as or better than certain other funding arrangements in Manitoba and elsewhere is false in several fundamental respects.

*Table 1: Comparison of Government offer to Ontario and Saskatchewan policies*

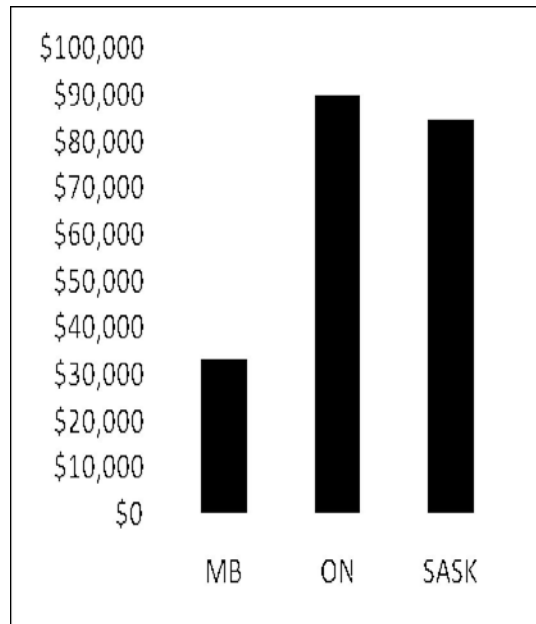
	<b>Manitoba offer to Sinclairs</b>	<b>Ontario/Saskatchewan policies/guidelines</b>
Hourly rate	\$80/hour up to \$640/day	ON: \$192/hr SK: \$800/day
Max billable time per day	8 hours/day	ON: 9 hours/day SK: no cap on time; only on per diem
Cap	\$10,000 cap on preparation time	ON: \$90,000 overall cap; no cap on preparation time SK: no overall cap
Disbursements	No travel or accommodation	ON: reasonable travel, meals and accommodation SK: included in per diem

- See Appendix A for detailed comparison

64. For a 53 day inquest, and assuming a modest 1:1 ratio of pre-hearing preparation days to hearing days, the maximum amount of funding that would be available under Manitoba’s offer and under the Ontario and Saskatchewan policies would be:

- \$33,320 Manitoba’s (2<sup>nd</sup>) offer
- \$90,000 Ontario policy
- \$84,800 Saskatchewan policy

*Figure 1: Comparison of Manitoba funding offer to Ontario and Saskatchewan policies*



65. Far more importantly than questions about dollars and cents, however, Professor Chartrand cautions that arbitrary policies or practices that are morally indefensible must be distinguished from defensible policies and practices, and that comparisons to policies and practices that “do not have readily discernible bases in equity and fairness” are of limited value.

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.

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.” 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. [Emphasis added.]

**Chartrand Report, p. 19 [Document Brief, Tab 2]**

### **Government Justification #3: The government’s offer is as good as or better than Manitoba’s previous contributions to victims’ families**

66. The Government’s claim that its offer is as good as or better than Manitoba’s previous contributions to families in inquests:

- a. Is false;
- b. Has no discernible basis in equity or fairness; and
- c. Ignores that there should be no appreciable funding difference between public inquiries and this inquest, as stated by Chief Judge Wyant.

67. At the inquest standing hearing on June 15, 2009, Chief Judge Wyant stated that there should be little difference between inquiries and inquests with respect to the reasonable provision of funding for legal counsel

I recognize that inquests, pursuant to The Fatality Inquiries Act, are different than inquiries, public inquiries ordered by the government. However, there are many similarities between the two. And I am aware that representation for key individuals at inquiries are often paid for by government, and that it may be somewhat commonplace, although I am not privy to the actual contractual arrangements that are made.

In this sense, though, there should be little difference between inquiries and inquests with respect to the reasonable provision of funding for legal counsel for those essential to the inquest, such as in this case, in any event, the family of Mr. Sinclair.

**Transcript of Standing Hearing, at p. 57-58 [Document Brief, tab 34]**

68. In this decade, Manitoba has held three public inquiries involving victims of governmental wrongdoing:

- The Inquiry Regarding Thomas Sophonow (2001)
- Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2006)
- Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk (2008)

69. The government of Manitoba provided funding to several of the parties in these public inquiries, including the victims, as follows:

- |                                     |           |
|-------------------------------------|-----------|
| • Thomas Sophonow                   | \$776,060 |
| • Stoppel Family (Sophonow inquiry) | \$269,025 |
| • James Driskell                    | \$468,900 |
| • Robert Taman                      | \$136,400 |
| • Derek Harvey-Zenk (Taman inquiry) | \$188,300 |

**Letter from Manitoba Justice re: FIPPA Application for Access, Nov. 4, 2009 [Hearing Record, Tab 5]**

70. These parties were allowed representation by two legal counsel, each capped at 10 hours per day, with senior counsel funded at a rate of \$210 per hour and junior counsel funded at a rate of \$175 per hour.

**Letter from Manitoba Justice re: FIPPA Application for Access, Nov. 4, 2009 [Hearing Record, Tab 5]; Emails from James Lockyer to Vilko Zbogar re: Driskell inquiry funding [Hearing Record, Tab 6]**

71. In addition, we are aware of two instances over the last decade in which the government provided funding to deceased's families in inquests, including:

- a. to the Matthew Dumas Family, at the rate of \$190 per hour to a maximum of \$25,000; and
- b. to the twelve families involved in the Pediatric Cardiac Surgery inquest, in the amount of \$85,000 per family.

**Document Brief, Tab 56**

72. In comparison to all of these inquests and inquiries, the amount of funding currently being offered to the Sinclair Estate and Family to pay for legal fees and expenses for their representation in this inquest is at the rate of \$80 per hour, with a cap of \$10,000 for preparation time, which will amount to only \$33,320 based on the current schedule of 53 days of hearings.

**Document Brief, Tab 49**

73. Legal counsel representing WRHA in this inquest will be paid from the same public purse that would be used to pay for the Sinclairs’ legal representation. WRHA has repeatedly refused to disclose to the Sinclairs any information about how much it will be paying for legal representation in this inquest (except to state that “the average rate that WRHA pays for external counsel is \$210 per hour”). Still, based on this limited information and a conservative estimate of the levels of effort that WRHA will deploy in this context, WRHA’s expenses for legal representation in this inquest can be expected to be \$364,530,<sup>8</sup> or about ten times more than the Sinclairs are being offered.

**Document Brief, Tab 26; Hearing Record, Tab 7**

74. Compared to other contexts in which the government has provided funding to a party to participate in an inquest or public inquiry, the government’s offer to the Sinclairs is vastly inferior, on a per-hearing-day basis and on a per-witness basis.

*Table 2. Public funding comparison – Manitoba inquests and inquiries*

Inquest / Inquiry	Party	Gross Funding	No of hearing days	No. of witnesses	funding per hearing day	funding per witness
Sophonow 2001	Thomas Sophonow	\$776,060	est. 100	65	\$7,760.60	\$11,939.38
Sophonow 2001	Stoppel Family	\$269,025	est. 100	65	\$2,690.25	\$4,138.85
Driskell 2006	James Driskell	\$468,900	33	28	\$14,209.09	\$16,746.43
Taman 2008	Robert Taman	\$136,400	30	50	\$4,546.67	\$2,728.00
Taman 2008	Derek Harvey-Zenk	\$188,300	30	50	\$6,276.67	\$3,766.00
Dumas 2008	Matthew Dumas	\$25,000	9	24	\$2,777.78	\$1,041.67
Sinclair 2009-10	WRHA (Estimated <sup>9</sup> )	\$364,530	53	50	\$6,877.92	\$7,290.6
Sinclair 2009-10	Sinclair Estate & Family	\$33,320	53	50	\$628.68	\$666.40

- See also Appendix A, which compares the specific terms of the various funding proposals with funding contributions in other contexts

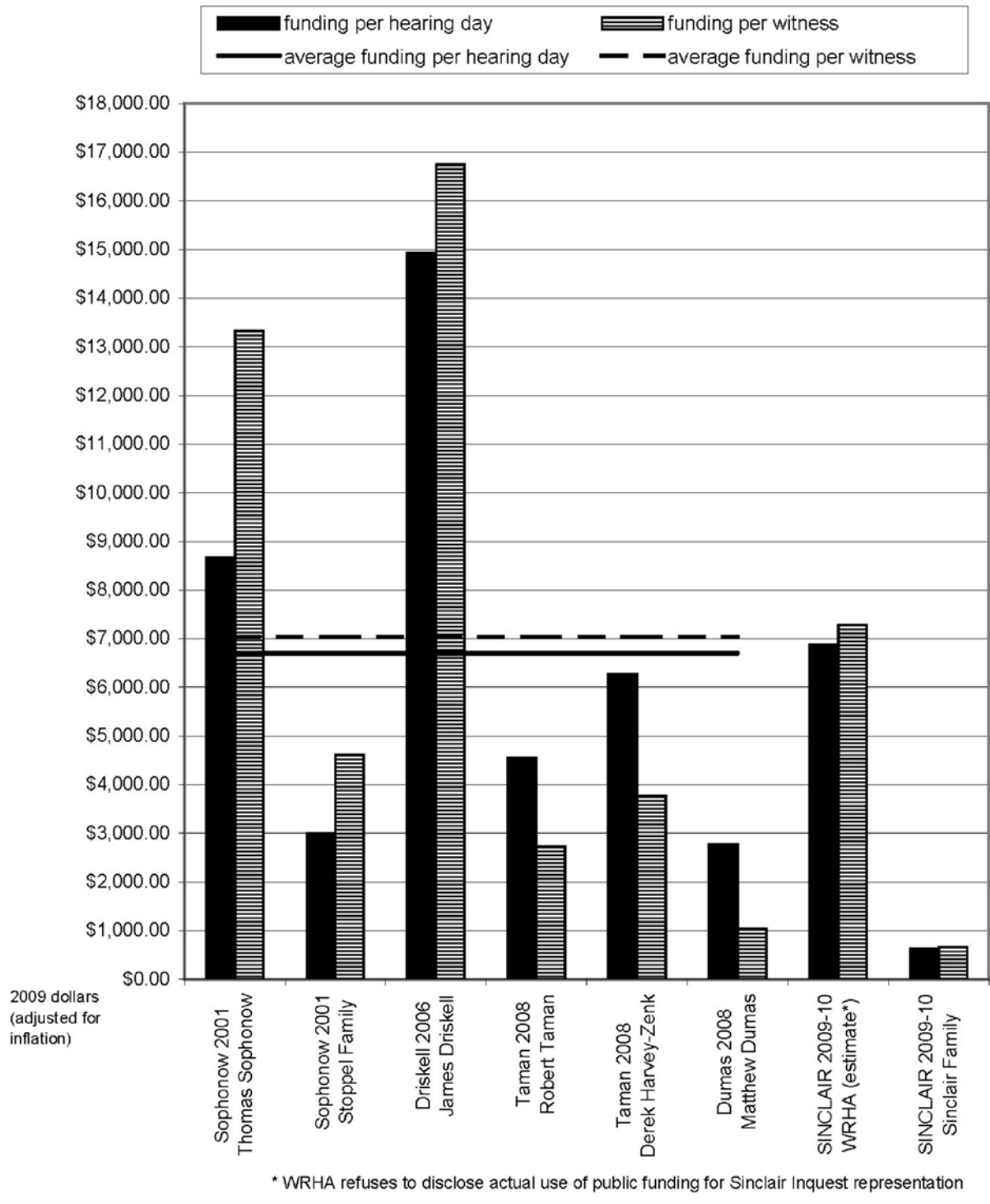
75. The following chart displays these data and compares them (using 2009 adjusted dollars) to each other on the basis of two key indicators: (a) funding per hearing day and (b) funding per witness:

<sup>8</sup> This estimate is based on the following assumptions:

- Average hourly rates: \$240 for senior lawyer(s); \$180 for intermediate lawyer(s); \$90 for law clerk or student
- Average number of lawyers per day during hearings: 1 senior lawyer; 1.5 junior/intermediate lawyers
- Pre-hearing preparation time: 182 hours for senior counsel (26 days at 7 hours/day); 371 hours for junior/intermediate counsel (53 days at 7 hours/day)
- Average hours per day during hearings: 9
- Law clerk/student: 120 hours (30 days at 4 hours/day)

<sup>9</sup> See para 33 and footnote 3, *supra*.

**Fig. 2: PUBLIC FUNDING COMPARISON - MB INQUESTS / INQUIRIES**



76. This chart (Figure 2) illustrates the inferiority, inadequacy and inequitable nature of the funding being offered to the Sinclairs, when compared to estimated WRHA funding in this context or funding provided to victims in other recent Manitoba inquests and inquiries:
77. No matter how the numbers are calculated or how long the inquest actually lasts, it is clear that the government's proposal is vastly inferior and inadequate. For example:
- a. If the inquest hearing goes 15 days longer than expected, the total funding that will be paid to the Sinclairs is \$39,920, or \$587.06 per hearing day.
  - b. If the hearing schedule is truncated by 20 days (to 33 total hearing days), the total funding that will be paid to the Sinclairs would be \$24,520, which would be even less than the government contributed to the Dumas family for a nine-day inquest.
78. In particular, it is notable that the funding being offered to the Sinclairs is a small fraction of what the government has ever paid for representation of any party in an inquest or inquiry, and especially any non-aboriginal party.
79. Clearly, the Government's claim that its offer to the Sinclairs is the "best ever" is simply incorrect. It is not even close.
80. The Government's proposal to fund the Sinclairs at a fraction of what has been deemed as minimally appropriate in other contexts, and which would appear to be one-tenth of the public funding WRHA is estimated to be using for its representation, appears to be intended to keep (or at least will have the effect of keeping) the Sinclairs on the sidelines in this inquest. It will prevent, or at least impair, their ability to fully for hearings, and their ability to participate fully, meaningfully and influentially in the inquest.
81. Professor Chartrand has also observed that the government's claim that its offer to the Sinclairs was the best ever did not appear to be accurate. Further, the Chartrand Report states that: "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."

**Chartrand Report, p. 19 [Hearing Record, Tab 2]**

82. Even if the offer were in line with government "policy" (of which none exists in Manitoba on the subject) or government practice, history teaches us that government policy is often discriminatory and unjust, and in those circumstances must be conscientiously opposed by those who are being unjustly affected by it. The fact that things have been done in a certain way in the past does not in itself mean it is the right way, especially not in a progressive society that values human rights, equality, and the principles set out in the Canadian Charter of Rights and Freedoms

and applicable international human rights instruments that are binding on Canadian governments.

**Document Brief, Tab 59**

**Government Justification #4:  
The government's offer is acceptable to one senior respected local counsel**

83. Prior to presenting the government's offer to the Sinclairs, the Deputy Minister of Justice and Deputy Attorney General contacted a Winnipeg lawyer, who he then claimed was willing to represent the Sinclairs upon the terms offered by the government. He stated:

I have spoken with a senior and respected Winnipeg lawyer and she has stated that she would be prepared to represent the estate and family of Mr. Sinclair on the basis set out above.

**Document Brief, Tab 56**

84. Counsel for the government of Manitoba then repeated this claim to inquest counsel on July 10, 2009:

Our offer is acceptable to well respected senior counsel (Sherri Walsh of Hill Dewar Vincent) who is prepared to act for the family and estate.

**Document Brief, Tab 62**

85. The Sinclairs took these remarks as another improper effort to separate them from their chosen legal counsel, and to prejudice them before this inquest.

86. The Government that is responsible for Brian Sinclair's death is in no position to be selecting or proposing lawyers to represent his estate and family. This is particularly inappropriate where the Government may have an interest in the Sinclair Estate and Family retaining someone other than the law firm that has conscientiously executed its instructions by asserting rights, principles and positions that the Government has not favoured in this context.

87. As of the date that the government made these representations, the lawyer that the Government has proposed to represent the Estate and Family had never spoken with the Sinclairs. In response to Mr. McFetridge's July 10 letter to Mr. Frayer, Mr. Zbogor advised Mr. Frayer:

If she had indeed advised the Government that she would be willing to represent the Estate and Family under current conditions, such indication would have been speculative or hypothetical at best. Had she actually spoken with the Estate and Family it would have been clear that any such speculation or hypothesis was contrary to the actual moderate and principled instructions and intentions of the Estate and Family.

**Document Brief, Tab 63**

88. This statement was proven to be true when the Winnipeg lawyer concerned subsequently advised that she and her firm were actually unable to represent the Estate and Family after she was contacted by the Sinclairs.

**Document Brief, Tab 64**

89. More recently, the Sinclair Estate and Family retained a respected senior Winnipeg lawyer to represent them as co-counsel, and who has agreed to act in full accordance with their instructions – including with respect to their reasonable and principled views regarding this funding matter and their unwillingness to participate in the inquest on a structurally inferior, marginalized and even discriminatory basis.

90. The fundamental issue of principle here is about whether the Estate and Family will be able to fully, meaningfully and equitably participate in the inquest on a minimally non-discriminatory and non-inferior basis vis-à-vis other parties in the Inquest, notably the WRHA, or not. The Sinclair Estate and Family insist that they be heard about these matters of fundamental principle, and not ignored and marginalized the way that Brian Sinclair was.

91. The Sinclairs are marginalized, poor, bereaved, and Aboriginal. They are nevertheless fully capable of making a principled decision for themselves as to whether they wish to participate in a process in which the institution that is responsible for their relative's death, the WRHA, receives first class treatment with apparently full and unrestricted funding from the public purse – while the victim's family is told it has to make do with inferior and grossly inadequate funding that will be incapable of ensuring that their full inquest participation can be meaningful and influential.

92. Whether Orkin Barristers, Posner & Trachtenberg, Hill Dewar Vincent, or any other lawyer or law firm considers the government's offer to be reasonable or not is wholly irrelevant. The current role of counsel for the Sinclairs is to advocate for their clients in accordance with their instructions, and to attempt to give effect to their wish that the marginalization, paternalism and discrimination that they have experienced and that they believe led to their relative's death is meaningfully abated here and now, and to enable their full participation in the inquest.

93. On the question of “who is going to represent the estate,” if the Sinclairs' participation in the inquest is properly enabled, they have counsel who will agree to act for them in accordance with their instructions. If it is not, then this question is moot, as their seat at the inquest will be empty.

## ***What is the real justification for the government's offer?***

94. Clearly, the government's funding is not principled, reasonable, or defensible on any of the bases it has articulated. While it is impossible to speculate why the government is really insisting on inferior and inequitable treatment of the aboriginal victim in this inquest, the past remarks of Associate Chief Judge Sinclair may have some relevance:

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 for 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.

### **Document Brief, Tab 8**

95. In other words, it is entirely possible that when there is a risk that full public scrutiny of a government's actions may lead to political embarrassment, there may be a tendency to try to exclude or sideline those who would shed the light.

96. In addition, as noted by the Aboriginal Justice Inquiry and other commissions, Aboriginal people have historically and to the present day been sidelined in political processes and governance in Manitoba and elsewhere in Canada, and there is a concern that some of these same patterns may now be repeating themselves within this inquest context – perhaps unwittingly but nevertheless with the same deleterious effect.

97. Whatever the real justification or motivation for the government's offer and its conduct toward the Sinclairs may be, the effect on their participation is clear: the victim's family will not be able to participate in the inquest in a full, meaningful and influential way, but will instead be economically and socially excluded from participation in this process. As observed by Professor Chartrand:

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. [Emphasis added.]

### **Chartrand Report, p. 26 [Document Brief, Tab 2]**

## VI. THE JURISDICTION OF AN INQUEST JUDGE

98. An inquest judge in Manitoba is a judge of the provincial court and has all of the powers of a provincial court judge, including, generally, “wide incidental powers”:

All judges, including judges of a statutorily created provincial court, generally have wide incidental powers... When conducting the inquest, the inquest judge acts qua judge, and thus has all the powers of a provincial court judge.

***Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 11, and 20 [Hearing Record, Tab 8]**

99. In addition, an inquest judge has those powers specifically conferred by the *Fatality Inquiries Act*, though “the legislation is remarkable in its silence where inquest proceedings are concerned.”

**Sinclair A.C.J.P.C., sitting as an inquest judge, in *The Manitoba Pediatric Cardiac Surgery Inquest* (13 January 1998) (Man. Prov. Ct.) (at pp. 18-19, 25), cited at *Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 8**

100. The powers of an Inquest Judge in Manitoba were reviewed by the Manitoba Court of Appeal in some detail in *Hudson Bay Mining and Smelting Co. v. Cummings*. The court found that:

The judges of [the Provincial Court] have powers intrinsic to all judges when they carry out their functions, and specifically, all powers which are necessarily incidental to the carrying out of their functions. These are powers ancillary to the jurisdiction set out in a statute; they are powers found by necessary implication in the legislation.

***Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 23 [Hearing Record Tab 8]**

**M.S. Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings,” (1997) 113 L.Q.R. 120 at p. 125-126 [Hearing Record, Tab 9]**

101. Even for those courts with no inherent jurisdiction, in the sense of original jurisdiction, there is a recognized power to control their own procedure.

A recent and persuasive articulation of this principle can be seen in *McNally v. Bass et al.*, (2003), 223 Nfld. & P.E.I.R. 322, 2003 NLCA 15 (at para. 28):

Even for those courts with no inherent jurisdiction, in the sense of original jurisdiction, there was a recognized power to control their own procedure. The Court of Appeal for New South Wales concluded in ***Bogeta Pty. Ltd. v. Wales***, [1977] 1 N.S.W.L.R. 139 (C.A.), at p. 149:

The general principle, where a court is properly seized with a matter, and there is no procedure laid down which enables it to deal with the particular problem facing it, that it should devise its own procedure is, in my opinion, applicable to all courts of Petty

Sessions in this day and age. Historically, inferior courts have been allowed to devise their own procedures.

***Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 24 [Hearing Record Tab 8]**

102. This is because, *inter alia*, “were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.”

The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

***Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 24, citing *Crocker v. Tempest* (1841), 7 M. & W. 501; 151 E.R. 864 (Exch.)**

103. The Supreme Court of Canada has made a similar point:

[t]he Court of Appeal ... has, like all courts, an implied, if not inherent, jurisdiction to control its own process, including through the application of the common law doctrine of abuse of process. [Emphasis added]

***United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21 at para. 33, cited in *Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 24**

104. Thus, though the term “inherent jurisdiction” is usually used in connection with superior courts (in the sense of referring to a court of original jurisdiction), it is clear that all statutory courts and tribunals also possess some inherent power or jurisdiction.

All courts, it has been said, have inherent power to regulate their own procedure, to make practice directions, to control abuse of process, to exclude the public if it becomes necessary for the administration of justice and to refuse to hear advocates who misconduct themselves...

An alternative explanation of the nature of inherent jurisdiction can be found in *Connelly v. D.P.P.* in the judgment of Lord Morris of Borth-y-Gest who said that:

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such a jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process...”

On this view, inherent powers exist because they are necessary if the court in question is to manage the work which has been assigned to it in an appropriate fashion.

**M.S. Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings,” (1997) 113 L.Q.R. 120, at p. 125-126 [Hearing Record, Tab 9]**

105. In *Hudson Bay Mining and Smelting Co. v. Cummings*, the Court of Appeal relied on the decision of the Supreme Court decision in *R. v. 974649 Ontario Inc.*, [2001] 3

S.C.R. 575, 2001 SCC 81 as providing some applicable principles for determining the powers that are impliedly endowed on a judicial officer. The Chief Justice of the Supreme Court of Canada, for a unanimous court, stated (at paras. 70-71):

It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: *Halsbury's Laws of England* (4th ed. 1995), vol. 44(1), at para. 1335. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose: *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose: *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Bell Canada, supra*; Macaulay and Sprague, [*Practice and Procedure Before Administrative Tribunals*, vols. 3 and 4. Toronto: Carswell, 1988 (loose-leaf updated 2001, release 1)] vol. 4, at p. 29-2. This emphasis on the function of a court or tribunal, in discerning the powers with which the legislature impliedly endowed it, accords with the functional and structural approach to the *Mills* [ [1986] 1 S.C.R. 863] test set out above. [Emphasis added]

***R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 at paras. 70-71, cited in *Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 28**

106. The function of an inquest judge under the *Fatality Inquiries Act (FIA)*, and indeed the purpose of an inquest, is to:

make and send a written report of the inquest to the minister setting forth when, where and by what means the deceased person died, the cause of the death, the name of the deceased person, if known, and the material circumstances of the death;...

and [the judge] may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the presiding provincial judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

***Fatality Inquiries Act*, section 33(1)**

107. To facilitate and indeed ensure the achievement of those objectives, which in some ways are more far-reaching than the usual judicial decisions made by a provincial judge, the inquest judge is expressly given certain powers under the *FIA*, such as granting standing for interested persons to “attend the inquest in person or by counsel” or limiting examinations or cross-examinations.

***Fatality Inquiries Act*, sections 28(1), 28(2)**

108. However, not all of an inquest judge’s facilitative powers are expressed in the FIA, and powers that are necessarily incidental to the jurisdiction of the judge may be implied.

Those express grants of power [in the FIA] facilitate an inquest judge’s carrying out of his or her duties under the *FIA*, and the exercise of the jurisdiction which he or she has by virtue of being a judge. They aid in the accomplishment of the purposes required of him or her. But not all facilitative powers are expressed; they may be implied, if they are necessarily incidental to the jurisdiction of the judge.

***Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 31 [Hearing Record, Tab 8]**

109. Therefore, if the court finds that it is a matter of practical necessity for the court to have the presence of the victim’s family at the inquest (and indeed, the court has already determined that the Sinclair Estate and Family “has the right to full participation” and that it is a party that is “essential to the inquest”), it would appear to have the power and responsibility to do what it can to ensure that the Estate and Family’s attendance is properly and adequately facilitated so that the inquest can be fair and proper.

110. As noted by Associate Chief Judge Murray Sinclair in the Pediatric Cardiac Surgery Inquest report,” having counsel whose sole responsibility was that of advocating for the families was essential for a fair and proper proceeding.” Likewise, Chief Judge Wyant has found that “the role of counsel to the families... is fundamental in this case.”

**Document Brief, Tab 8**

**Transcript of Standing Hearing, at p. 58 [Document Brief, Tab 34]**

111. An inquest judge has a broad mandate to investigate the cause of death and to make a report which may recommend changes in programs, policies and practices. He or she may recommend changes in the law. It is fundamentally in the interests of justice. that the party who is most interested in the death, namely the estate of the late victim and his family, be able to participate fully and influentially in the process, and to have a meaningful role in making recommendations aimed at preventing deaths in similar circumstances, and to not be treated unfairly and inequitably in the process

112. In this regard, we submit that the court may, for example,
- a. Make further observations and recommendations that may assist in preventing one party from being unfairly excluded from the process;
  - b. Contribute to bringing about circumstances that will enable the inquest to be fair and proper so that the purpose of the inquest can be fully realized (for

example, communicate directly with Manitoba Justice concerning this issue); and

- c. As a final measure, exercise its inherent powers to not commence or to delay or suspend the inquest until it is satisfied that the process can be fair and proper, or in other words, decline to begin its work until an externally-imposed circumstance that minimizes or militates against the full and fair participation of an essential party is abated.

113. The latter authority was recently exercised by a Québec inquest judge who 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. In that case:

The coroner's chief counsel, François Daviault, admitted there was an "unprecedented situation of unequal forces" in the inquest. "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?"

**Globe and Mail, "Victim's family refuses role in shooting inquest" (May 28, 2009, online edition): <http://www.theglobeandmail.com/news/national/victims-family-refuses-role-in-shootinginquest/article1152950/> (accessed May 29, 2009), [cited in Document Brief, Tab 15]**

114. Either the power to make recommendations or the power to suspend or to decline to commence the inquest is necessarily incidental to the inquest judge's jurisdiction where it may be required as a matter of practical necessity. Ensuring that all essential parties have an opportunity to fully and fairly participate in the inquest is a matter of practical necessity to enable the inquest judge to accomplish the very wide purposes set out in s. 33(1) of the *FIA*. The exercise of such powers would substantially increase the likelihood that an inquest could make truly meaningful recommendations under the *FIA*.

Since the ultimate goal of the inquest judge includes the making of recommendations in a number of areas, providing the judge with all the tools that might be reasonably necessary to do the job accords well with a functional and structural approach to assessing jurisdiction. See also Sharpe J.A., in chambers, in *G. (N.) v. Upper Canada College*, (2004), 70 O.R. (3d) 312 (C.A.): "statutory courts have by necessary implication the power to control their own process and the procedural tools to ensure the effective and efficient disposition of matters falling within their competence" (at para. 10).

***Hudson Bay Mining and Smelting Co. v. Cummings* (2004), 190 Man.R. (2d) 231, at par. 34 [Hearing Record, Tab 8]**

115. One might imagine some hypothetical scenarios in which an essential party to an inquest is unwilling or unable to attend or fully participate in an inquest because of, for example:

- a. Severe adverse weather conditions;
  - b. Intimidation by someone else, possibly extending into the court room; or
  - c. Structural or overt discrimination, such as courthouse staff or government officials refusing entry to court proceedings by people of a certain race, class, or gender, or a government sign erected over courthouse entrances saying that certain categories of people may not enter.
116. We believe that in any of these hypothetical scenarios, the court would be justified and indeed required (even if it did not have the jurisdiction to *order* requisite changes in the external circumstances preventing the essential party's participation) to take whatever steps it effectively and possibly can to ensure that its own proceeding are fair, proper, and just, and not unacceptably tainted.
117. Such steps need not be permanent, but should be sufficiently clear and potentially effective to disallow an external party (particularly one who may be responsible for circumstances preventing the essential party's participation) from exercising a veto on fair and proper inquest proceedings – particularly where the external party (in this case the government of Manitoba) has the manifest ability to act differently and indeed has done so in other cases.
118. In circumstances where the Sinclair Estate and Family is being economically excluded from participation in the inquest into their relative's death by a government that has refused to deal with them honourably, respectfully, fairly or equitably, and where the government that is ultimately responsible for the death of their relative is wielding a veto over the Sinclairs' ability to participate meaningfully and influentially in the inquest, we believe that it is incumbent on the court to exercise its jurisdiction to prevent the perpetuation of an injustice that will impair the inquest process,

## **VII. Closing observations and conclusions**

119. The Sinclair Estate and family want to make a constructive, meaningful and influential contribution to the inquest and its mandate. They are most directly affected by the death of their relative. In particular, Brian Sinclair's two brothers are living on the streets of Winnipeg, as poor, vulnerable, marginalized, and invisible just as Brian Sinclair was. If and when they are in need of emergency medical care, they hope to receive the prompt, adequate, responsive and sympathetic treatment that every Canadian citizen deserves, and not be ignored and left to die.
120. The Sinclair family did not ask to be in this situation. This situation was imposed on them when their relative died, ignored to death by a government institution that was supposed to care for him and help him get well.

121. Brian Sinclair did not cause his own death. He did what he was supposed to. He sought treatment at a hospital, and he waited patiently when asked to do so. As stated in a letter from the Sinclairs' legal counsel to the Minister of Justice in June 2009:

A health care institution, for which your government is responsible, let him down grievously. Your government accordingly has an obligation to ensure **that things are made right** to the extent possible, and that the patterns of marginalization and inequity that underlay the treatment that Brian Sinclair endured are not repeated, at least in the important context of this Inquest. [Emphasis in original]

**Letter from Orkin Barristers to Hon. David Chomiak, 2009 06 09 [Document Brief, Tab 19]**

122. The Sinclairs also advised the Minister::

The upcoming 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 current, pertinent Québec situation) substantive issues are overshadowed by inequities relating to the proper publicly funded participation of the parties most interested in what happened, namely the Brian Sinclair's Estate and Family.

**Letter from Orkin Barristers to Hon. David Chomiak, 2009 05 29 [Document Brief, Tab 15]**

123. In these circumstances, it is submitted that there is an obligation on the government of Manitoba to do what it can to ensure that the deadly pattern of marginalization and discrimination that characterized Brian Sinclair's life and death is not carried into the court process that has been established to inquire into the circumstances leading to his death and try to ensure the same kind of tragedy never happens again.
124. And, we further respectfully submit, the inquest itself has both a responsibility and the necessary inherent power to take all possible steps that its full, fair and proper functioning is not hijacked by a government which refuses to honour its clear moral and social obligations to the victims.
125. The Introduction to Chapter 1 of the Report of the Aboriginal Justice Inquiry stated:

For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.

This denial of social justice has deep historical roots, and to fully understand the current problems we must look to their sources. We attempt to provide some of that context in the first part of this report. The mandate of this Inquiry is to examine the relationship between Aboriginal people and the justice system, and to suggest ways it might be improved. In this report we make many recommendations about how existing institutions of justice—the police, the courts, the jails—can be improved. But far more important than these reforms is our conclusion that the relationship between Aboriginal people and the rest of society must be transformed fundamentally. This transformation must be based on justice in its broadest sense. It

must recognize that social and economic inequity is unacceptable and that only through a full recognition of Aboriginal rights—including the right to self-government—can the symptomatic problems of over-incarceration and disaffection be redressed.

The problems are daunting and our proposals are far-reaching. But we believe that in the interests of justice, the process of transformation must begin immediately.  
[Emphasis added.]

<http://www.ajic.mb.ca/volume1/chapter1.html#2>

126. Professor Chartrand, an eminent and highly respected Manitoba academic and himself Co-Commissioner of the Aboriginal Justice Implementation Commission that was charged with implementing many of the recommendations of the Aboriginal Justice Inquiry, reviewed the written record concerning this matter in detail and placed this dispute in the broader context. His Report on this inquest matter concludes:

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.

**Chartrand Report, at p. 29 [Hearing Record, Tab 2]**

127. The government's failure to take advantage of this opportunity is regrettable. Indeed the government failure to deal with a vulnerable Aboriginal party honourably, fairly, or in good faith since day one, reveals that the government is not yet learning from Mr. Sinclair's death or has forgotten the important lessons of the Aboriginal Justice Inquiry.
128. The government's conduct shows not only disdain and disrespect for the victims of the government's own institutional neglect, but unfortunate disrespect for the inquest process itself.
129. The Sinclairs believe that this conduct – the effects of which are starkly manifest in the chart in Figure 2 on page 24 in this submission – warrants the court's condemnation in the strongest terms.
130. On February 11, 2009, the Minister of Health stated: "I am very concerned that it really is my job to ensure that every individual is going to get a fair hearing" in the inquest, and: "In the name of a fair and balanced place for these facts to come out, I believe that the judge that is going to be appointed will do that, and I just ask for people to respect my wish for others to have fair and due process." Ironically, the government she was speaking on behalf of is the government that is now standing in

the way of a “fair and balanced” process and that has showed no willingness to support the Sinclair’s efforts to ensure that there is a truly “fair and due process.”

<http://video.edmontonsun.com/search/oswald/tracking-down-minister-oswald/11889677001>

131. The written record establishes that the Sinclairs have expended every possible effort to engage with the government of Manitoba diligently, respectfully, and in a principled manner. Those efforts have been frustrating and futile, and have now been exhausted. Their final recourse is to lay out the government’s regrettable course of dealings before the court, and to ask the court to do whatever it can to enable the Sinclair’s full meaningful and influential participation in the inquest, so that the inquest can be fair and proper – and thus have the best possible chance of making a real difference to the lives of Manitoba’s aboriginal, disabled and other most vulnerable people, and all those who have the misfortune of finding themselves or their families in need of emergency medical or social services.

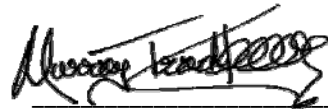
ALL OF WHICH IS RESPECTFULLY SUMMITTED THIS 13<sup>th</sup> DAY OF NOVEMBER, 2009



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