



HAMILTON • TORONTO

103 GLENFERN AVE. 51 CROSSOVERS ST.
HAMILTON ONTARIO TORONTO ONTARIO
CANADA L8P 2T9 CANADA M4E 3X2

VILKO ZBOGAR
TORONTO OFFICE:
DIRECT TEL: (416) 855-6710
DIRECT FAX: (416) 855-6709
vilko.zbogar@orkinlaw.ca

June 11, 2009

BY FAX AND EMAIL

Jeffrey Schnoor, QC
Deputy Minister of Justice
110 – 450 Broadway
Winnipeg Manitoba R3C 0V8

Dear Mr. Schnoor:

Re: Inquest into the Death of Brian Sinclair – Funding Issues

This is to acknowledge receipt of your two dishearteningly unsatisfactory communications of earlier today. They do not respond at all, let alone engage in a principled and respectful manner, with our letter of June 9, 2009, or with our previous correspondences of March 30, April 28, May 29, and June 1.

The Brian Sinclair Estate and Family notes that the Government of Manitoba:

- delayed a substantive response to their prompt and early requests about funding for almost three (3) months;
- responded in the days before the beginning of the inquest proceedings without engaging, as requested, in proper consultation with the Brian Sinclair Estate and Family;
- made a unilateral proposal for discriminatorily inferior and inadequate funding that the Brian Sinclair Estate and Family feel marginalizes and re-victimizes them;
- represented that this proposal for discriminatorily inferior and inadequate funding is doing the Brian Sinclair Estate and Family some kind of favour or charity;
- ignored the substance of detailed communications to it in recent days, simply repeating its unilateral and discriminatory determinations regarding the Estate and Family's concerns without even addressing the detailed and considered positions of principle; and
- ignored, and thus rejected, a reasonable proposal for mediation of this question.

This is unfortunate, particularly in light of earlier Manitoba judicial recommendations that victims' families in such circumstances have all of their legal fees paid on the same terms upon which the government engages outside counsel for itself, and judicial statements that it is "essential for a fair and proper proceeding" for victims' families to be represented by legal counsel.

In short, your government's approach is suprisingly unilateral, discriminatory and paternal under all of the circumstances. It appears to be possibly intended to exclude the Sinclair Estate and Family from full and equitable participation in the inquest.

We attach for your information a press release that was just issued in Canada and internationally by the Estate and Family of the late Brian Sinclair.

Yours truly,
ORKIN BARRISTERS

A handwritten signature in black ink, appearing to read 'Vilko Zbogar', with a stylized flourish at the end.

Vilko Zbogar

Encl.

cc. David Chomiak, Minister of Justice, Attorney General
Theresa Oswald, Minister of Health
David Frayer, Crown Attorney, Inquest Counsel
Esther Grant, Administrator of the Estate of Brian Sinclair
Robert Sinclair, Sinclair family representative

Manitoba



Deputy Minister of Justice
and Deputy Attorney General

Room 110
Legislative Building
Winnipeg MB R3C 0V8

JUN 11 2009

Andrew Orkin
Orkin Barristers
103 Glenfern Avenue
Hamilton ON L8P 2T9

Dear Mr. Orkin:

I am writing in response to your June 9, 2009 correspondence to the Honourable Dave Chomiak expressing your concern as to the sufficiency of the funding for legal costs being offered to the estate and family of the late Brian Sinclair.

As noted in my recent letter to you, in Manitoba, an inquest does not determine who is at fault or who caused the death. In the case of Mr. Sinclair's death, the inquest judge has been asked by Manitoba's Chief Medical Examiner to examine the reasons for delays in treating patients presenting in emergency departments of Winnipeg Regional Health Authority hospitals, and to consider measures necessary to reduce delays in treating those patients. Crown counsel assembles and presents the evidence and represents the public interest. In this context, in addition to providing information to the family and dealing with any questions or concerns, Crown counsel will generally ask the family if there any areas that they would like covered at the inquest, provided it is reasonable and within the scope of the inquest to do so.

As I have indicated, given the unique circumstances of this inquest, Manitoba is prepared to depart from its usual practice by providing a contribution to the legal costs incurred by the estate and family of Mr. Sinclair for the standing hearing and inquest, if standing is granted.

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The retainer letter referenced in my June 5, 2009 letter to you will follow shortly.

Sincerely,



Jeffrey Schnoor, Q.C.
Deputy Minister of Justice
Deputy Attorney General

- c Honourable Dave Chomiak
Honourable Theresa Oswald
David Frayer, Q.C.



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HAMILTON ONTARIO TORONTO ONTARIO
CANADA L8P 2T9 CANADA M4E 3X2

ANDREW ORKIN
TEL: (905) 522-7929
FAX: (905) 522-0884
andrew.orkin@orkinlaw.ca

June 9, 2009

BY E-MAIL AND FAX

Hon. David Chomiak
Minister of Justice and Attorney General
104 – 450 Broadway
Winnipeg Manitoba
R3C 0V8

Dear Minister Chomiak:

Re: Minimum prerequisites for equitable participation of the Sinclair Estate / Family in the Inquest into the Death of Brian Sinclair

On June 5, Deputy Minister Jeffrey Schnoor wrote to us advising of Manitoba's position regarding providing funding to enable the Brian Sinclair Estate and Family to be represented at the Inquest into the Death of Brian Sinclair.

The letter of June 5, 2009 contains an offer of partial and limited funding. It does not, however, enable the Brian Sinclair Estate and Family to participate fully and equitably in the approaching Inquest into Brian Sinclair's preventable wrongful death in the waiting room of a hospital facility owned by the Province of Manitoba.

Rather, the offer of funding that has been proposed has the effect (if indeed not the purpose) of limiting or marginalizing the Estate and Family's participation in the Inquest by capping and limiting their role in an inequitable and re-victimizing manner. Such an approach may well result in the Estate and Family not being able to participate in the Inquest at all, even though their participation is essential for the process to be thorough, credible and fair.

Further, your government's insistence to date on dealing with this matter unilaterally and without consultation is offensive and unacceptable to the Estate and Family.

At the core of this Inquest must be the issue of Brian Sinclair's marginalization as an Aboriginal, homeless, mentally and physically disabled man who was unable to advocate for himself as he sat in a hospital waiting room, ignored, for 34 hours. It would appear that this marginalization made Brian Sinclair invisible in his last hours. A funding decision that repeats and perpetuates the marginalization and inequity suffered by Brian Sinclair and his Family during their lives in the context of this Inquest cannot, therefore, be accepted.

Two fundamental points are self-evident and beyond dispute:

- a) Brian Sinclair's Estate and Family are entitled to meaningfully participate in the inquest into the death of Brian Sinclair; and
- b) Brian Sinclair's Estate and Family are entitled to be treated equitably in this Inquest vis-à-vis the other parties.

These two points, which are the principled foundation for the **minimum essential criteria** described in our letter of June 1, 2009, have been entirely disregarded in Mr. Schnoor's most recent letter.

Rather than engaging on any principled basis, your government has unilaterally and arbitrarily chosen the lowest presentable standard – but one that discriminatorily limits and caps the Sinclairs' ability to fully and effectively participate in this process while other official parties such as the WRHA surely will not be subject to the same caps or limitations.

Judges in two prominent Manitoba inquests have already condemned the usual no-funding approach for victims' families, and recommended that it be changed. In particular, in the Report of the Manitoba Pediatric Cardiac Surgery Inquest, Chief Judge Murray Sinclair stated that:

the families [of the dead victims] are entitled to have *all their legal costs* associated with this Inquest paid. *The role of all counsel for the families was of fundamental importance in these proceedings... It is recommended that the Government of Manitoba pay the entire legal costs of the families involved in these proceedings.* [emphasis added].

What Mr. Schnoor's letter suggests is that the Estate and Family's participation in the Inquest is really optional because the Family's interests will be looked after by inquest counsel, and that some funding will be offered as some kind of favour. This ignores and misstates the fundamental role of the Estate and Family in this Inquest. While we trust that Mr. Frayer will perform his tasks admirably in this Inquest, it is not his role to represent or advocate for the Estate and Family. As stated by Chief Judge Sinclair:

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* [emphasis added].

A fair and proper proceeding is essential in this case. The Sinclair parties cannot readily accept to participate in a process that is destined to be less than fair or proper.

Your government has expressed its condolences. It has said that it accepts responsibility for the tragedy. It has said that it is committed to ensuring "that every individual is going to get a fair hearing,"¹ and of course the victims are just as entitled to a fair hearing as anyone else. It has accepted that the systems failed Brian Sinclair terribly. Minister Chomiak, the Estate and Family are asking your government to give **concrete meaning** to your government's words, to show that they are backed up by principle and are not just empty statements intended to placate the victims or the public.

It is only because of the actions and inactions of a government institution that Brian Sinclair and his family have been placed in this situation in the first place. 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. 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.

There may be overall circumstances in which legal aid rates and caps are justifiable, even if they are inferior. This is not such a legal aid case. Mr. Sinclair was not accused of any crime. He was not, in some perverse way, undeserving. He was only sick, and he received grossly marginal and inferior care that cost him his life.

This is a special matter, one of broad, major public interest concern. It is not acceptable to the Estate and Family, and it should not be acceptable to your government, that it is being proposed to fund the Sinclairs' participation on a discriminatory and inferior basis. This would be at best insensitive and at worst would perpetuate existing systemic marginalization and injustice.

If your government is really committed to ensuring a fair hearing, we suggest it is incumbent on you to ensure that victim and his family are able to participate **fully, fairly and equitably** in the process.

More than three months have gone by since we first tried to engage regarding these issues. We cannot in conscience now recommend to our Aboriginal clients that they get onto a bus where they are implicitly being told they will have to sit at the back, participate less than anyone else on the bus, simply let government and non-aboriginal parties unilaterally determine the route, and possibly be forced to get off the bus half way through the journey because that is as far as their fare will take them.

¹ Statement of Minister of Health Theresa Oswald to the press, February 11, 2009.

We respectfully suggest that there are two possible options for moving forward, namely for your Government to immediately:

- a) Guarantee funding at a **non-discriminatory rate** (i.e., either at the rate ordinarily paid by WRHA to outside counsel in the normal course, or at the rate ordinarily paid by the government of Manitoba to retain its own outside legal counsel in these or analogous contexts²), **and** remove any cap on total fees that may limit the Estate and Family's ability to reasonably, fully and equitably participate³; or
- b) Agree to engage the services of a mutually acceptable mediator to promptly determine what funding is fair, just, and equitable in these particular circumstances.

Kindly advise us as early as possible this week, as to how you would be prepared to proceed with this matter.

We look forward to hearing from you. The delays in properly addressing funding for our clients are now adversely affecting and even harming them.

Yours truly,
ORKIN BARRISTERS



Andrew Orkin

- cc. Jeffrey Schnoor, Deputy Minister of Justice
Theresa Oswald, Minister of Health
David Frayer, Crown Attorney, Inquest Counsel
Esther Grant, administrator of the Estate of Brian Sinclair
Robert Sinclair, Sinclair Family representative

² This is the standard adopted by Chief Judge Murray Sinclair in the Pediatric Cardiac Surgery Inquest: "The rates paid to outside counsel retained by the Government should be used as a guideline."

³ This by no means suggests a "blank cheque". A senior, respected Chief Judge has been appointed to carry out the inquest process. Through his procedural and other pronouncements during the course of the proceedings, the Chief Judge will determine the limits of the participation of the Estate and Family, and of every other party. In addition, we have proposed that the size of the Sinclairs' legal representation team can be reasonably defined.



Justice

Deputy Minister of Justice and Deputy Attorney General
Room 110 Legislative Building, Winnipeg, Manitoba, Canada R3C 0V8

JUN 5 2009

Andrew Orkin
Orkin Barristers
103 Glenfern Ave
Hamilton ON L8P2T9

Dear Mr. Orkin:

I am writing in response to your correspondence to the Honourable Dave Chomiak and to myself asking for financial assistance for counsel to represent the family and estate of the late Brian Sinclair at the inquest that has been called into his death.

I begin by asking that you please convey my condolences to the Sinclair family for their loss. I know that this has been a very difficult time for them.

Although I can understand that the Sinclair family may feel they need counsel, the purpose of an inquest and the role of the Crown counsel at the inquest reduce the need for that counsel to be provided at public expense.

As you are aware, the purpose of an inquest is to determine when, where and by what means someone died, as well as the circumstances surrounding the death. In addition, an inquest tries to find ways to reduce the likelihood of further deaths in similar circumstances. It is important to note that an inquest does not determine who is at fault or who caused the death. The proceedings are not an adversarial process.

The public interest at an inquest is represented by a Crown counsel, who assembles and presents evidence. In this case, the Crown has retained David Frayer, Q.C., a very experienced and well respected senior member of the Bar to fulfil this role. Mr. Frayer is a former Senior General Counsel for Justice Canada.

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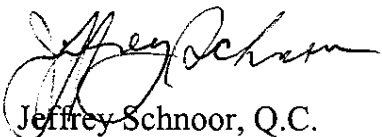
At past inquests, the Crown counsel has met with the deceased's family to explain matters to them, deal with any questions or concerns that they have, and canvass any areas that the family would like covered at the inquest, provided it is reasonable to do so. This process has worked very well in making sure that all of the relevant facts and information are brought to light. Our expectation is that Mr. Frayer would perform this role at the inquest. While members of a family and other participants may seek and be granted permission to examine and cross-examine witnesses, they do so at their own expense.

It is within this framework that the request for funding on behalf of the estate and family of the late Mr. Sinclair has been considered. Given the unique circumstances of this upcoming inquest and the concerns that have been raised, Manitoba is prepared to depart from its practice described above and provide a contribution to the legal costs incurred by the estate and family for the standing hearing and the inquest, if standing is granted.

The contribution that has been authorized is at the Legal Aid Manitoba tariff rate of \$80 per hour to a maximum of \$40,000 plus reasonable office disbursements necessarily incurred (such as fax, copying, imaging and the like). Manitoba will not contribute to any investigative, travel or accommodation expenses. The contribution would be paid based on invoices submitted to and approved by Manitoba.

I have instructed staff to prepare a retainer letter; the retainer will be effective upon your returning a signed copy accepting the terms of the contribution.

Sincerely,



Jeffrey Schnoor, Q.C.
Deputy Minister of Justice
Deputy Attorney General

- c. Honourable Dave Chomiak
Honourable Theresa Oswald
David Frayer, Q.C.



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CANADA L8P 2T9 CANADA M4E 3X2

ANDREW ORKIN
TEL: (905) 522-7929
FAX: (905) 522-0884
andrew.orkin@orkinlaw.ca

June 1, 2009

BY E-MAIL AND FAX

Hon. David Chomiak
Minister of Justice and Attorney General
104 – 450 Broadway
Winnipeg Manitoba
R3C 0V8

Dear Minister Chomiak:

Re: Minimum prerequisites for equitable participation of the Sinclair Estate / Family in the Inquest into the Death of Brian Sinclair

This letter confirms Deputy Minister Schnoor's telephone call to me of Friday afternoon, May 29 2009.

Prior to that call, we had repeatedly requested an opportunity to engage with the Government of Manitoba proactively and in person in regard to assuring equitable participation of the Brian Sinclair Estate / Family in the upcoming inquest. Unfortunately that opportunity was not afforded to us and now we are just days away from the standing hearing.

Mr. Schnoor apologized for the long delay in responding. This is acknowledged but is not sufficient. Mr. Schnoor also indicated to me during our telephone conversation that it would "not be possible" for the Brian Sinclair Estate and Family to proactively present its views regarding a minimum basis for equitable funding in advance of a decision.

The only alternative to such advance consultation is for the Government of Manitoba to make this decision unilaterally and on the basis of criteria it alone determines.

Mr. Brian Sinclair endured marginalization for much of his life, and this likely contributed to his death. It appears that these structural patterns are now being repeated in the context of this upcoming inquest, which is statutorily mandated to examine and prevent such occurrences in the future.

We nevertheless write to you in a spirit of helpful diplomacy to outline some of the minimum essential considerations that: (a) will enable the Sinclair Estate and Family to participate fully, fairly, and equitably in the approaching inquest into Brian Sinclair's death; and (b) prevent any untoward pitfalls that will, inter alia, continue to compound the injustice and stress being endured by this family.

We respectfully suggest that the following four minimum essential principles should be comprehensively accommodated in any decision that may be made regarding funding for the Sinclair Estate and Family:

1. The Estate and Family's legal fees, from its initial pre-inquest consultations with legal counsel until the completion of inquest proceedings (including a response to the Final Report) are to be covered and guaranteed, with that commitment made by June 5 in order to allow for proper preparation by involved family members and their counsel sufficiently for the Standing Hearing scheduled for June 15;
2. Funding is to be provided for the as-required involvement of *up to* three lawyer-equivalents (consisting of at most one senior, one intermediate and one junior lawyer as circumstances may require) and one articling student or clerk;
3. Counsel fee rates are to be equal to those rates ordinarily paid, in the normal course, by WRHA and other official parties for external counsel, to ensure that the Sinclair Estate / Family can participate fully, without undue impairment, and on a level field vis-a-vis the other parties; and
4. Reasonable disbursements, including investigation expenses and reasonable ordinary travel and accommodation expenses for both legal counsel and for involved family representatives, are to be covered.

We further request that all decisions regarding funding and other central aspects of the participation of the Sinclair Estate / Family henceforth be made in an equitable, consent-based manner in prior and timely consultation with authorized representatives of the Sinclair Estate / Family.

We commend the above points to you as being in the mutual interests of all involved. As stated at the top of this letter, we believe they are, together, minimum principles for the proper and equitable participation of the Sinclair Estate / Family in the upcoming inquest,

ORKIN BARRISTERS

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particularly in light of the extremely inequitable and marginalized circumstances of Mr. Sinclair's death (and life).

Please do not hesitate to contact me for any necessary clarification.

I look forward to hearing from you by the end of this week.

Yours truly,
ORKIN BARRISTERS

A handwritten signature in black ink, appearing to read 'A Orkin', written in a cursive style.

Andrew Orkin

cc. Jeffrey Schnoor, Deputy Minister of Justice
David Frayer, Crown Attorney, Inquest Counsel
Esther Grant, administrator of the Estate of Brian Sinclair
Robert Sinclair, Sinclair Family representative



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CANADA L8P 2T9 CANADA M4E 3X2

ANDREW ORKIN
TEL: (905) 522-7929
FAX: (905) 522-0884
andrew.orkin@orkinlaw.ca

May 29, 2009

BY FAX TO 204-945-2517 AND EXPRESS POST

Hon. David Chomiak
Minister of Justice and Attorney General
104 – 450 Broadway
Winnipeg Manitoba
R3C 0V8

Dear Minister Chomiak:

**Re: Inquest into the Death of Brian Sinclair –
the Brian Sinclair Estate’s and Family’s continuing wait**

We have been retained to assist and represent the Estate and family members of the late Brian Sinclair in their efforts to obtain status and funding to participate fully in the upcoming inquest arising out of Mr. Sinclair’s death while waiting for medical care at the Winnipeg Health Sciences Centre on Sept. 21, 2008.

We are now advised that a Standing Hearing for the inquest is scheduled for June 15, 2009. Brian Sinclair’s Estate and his Family wish to seek standing at the inquest. They have many important questions that they wish to have answered, and they also hope to contribute to the hearing so that changes will be made that may prevent similar deaths from occurring again – and so that Mr. Sinclair’s unnecessary and painful death will not have been in vain.

However, in order for the Brian Sinclair Estate and Family to participate in the inquest at all, it will be essential that they be provided with funding for legal representation. Some of the Sinclair siblings are living in the same poverty and marginalization that Brian Sinclair suffered in his life and during his death. Mr Sinclair’s other surviving relatives are in poor health and/or living several provinces away. None have the ability to participate in the inquest in Manitoba personally let alone the resources to retain legal counsel to represent them.

We first wrote in this regard to Chief Judge Raymond Wyant on March 6, 2009. His Honour referred us to the Manitoba Ministry of Justice.

We wrote to Deputy Minister Jeffrey Shnoor regarding this matter two months ago, on March 30, 2009. At that time, we advised him that: "We hope to be able to reassure the Sinclair family as a matter of some urgency, in order to alleviate the stress of this uncertainty as a major public legal process concerning their brother's death draws nearer, that it will indeed be possible for them to have legal counsel participate fully in this important inquiry on their and their late brother's behalf."

We further indicated to Mr Schnoor that: "Judges conducting previous [Manitoba] inquests (including the Paediatric Cardiac Surgery Inquest and the Donald Miles inquest) have noted the fundamental importance of families having legal representation in inquest proceedings. In their reports, these judges have strongly recommended that public funding be provided to pay for legal representation of the deceased's family and for travel costs, where the costs to the family of being involved in the proceedings would be prohibitive. There can hardly be a more compelling case for public funding for legal representation of a deceased's family than the present circumstances, where the Sinclair family faces insurmountable barriers to accessing the proceedings and will be entirely unable to participate in the inquest unless it has paid legal representation." Accordingly, we offered to meet Mr Schoor in Winnipeg anytime in the first two weeks of April to discuss these issues.

Mr. Schnoor advised on April 14, 2009 that: "the department will give the matter appropriate consideration and I will respond to you as soon as possible."

We replied on April 28, 2009 stating: "In light of the extraordinary questions raised by the circumstances of Mr. Sinclair's death, his status as a marginalized, poor, disabled aboriginal man, and the severely difficult situation of his family members, the Family looks forward to being consulted and included in any discussions regarding this matter."

Since then, there has regrettably been no consultation as requested, and in fact the Family has received no information about this matter whatsoever, even though the issue of funding will determine whether or not the Family is able to participate in the inquest at all.

This waiting and waiting since then in regard to the Brian Sinclair Estate's and Family's participation in the upcoming inquest has been excruciating for the involved members of the Sinclair family. Minister Chomiak, Brian Sinclair died waiting.

Recently, a Judge in Québec 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. Likewise, the Sinclair Family does not believe an inquiry into Brian Sinclair's death can be full, fair, thorough, just, or equitable if it is denied the full opportunity to participate.

The Province of Manitoba has appropriately accepted responsibility for Brian Sinclair's death. In order to ensure that justice is done and that the family is not further victimized, we believe Manitoba must also take responsibility for making sure that the Family can and will be properly represented at the inquest. The Family asks nothing more than to have same kind of access to publicly funded legal counsel that the Winnipeg Regional Health Authority and other official parties to the inquest will enjoy.

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 situation¹) 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.

We have waited two months for a response and now the Standing Hearing is soon upon us. Kindly advise by June 5, 2009 whether or not the Province of Manitoba will cover the Sinclair Family's legal expenses for participating in the upcoming inquest. (Such funding will need to be adequate, equitable and assured, considering all of the extraordinary circumstances of this case.)

Yours sincerely,
ORKIN BARRISTERS



Andrew Orkin

cc. Esther Grant, Administrator of the Estate of Brian Sinclair
Robert Sinclair, Sinclair Family representative
The Honourable Gord Mackintosh (by email)
The Honourable Eric Robinson (by email)
Honourable Theresa Oswald (by email)
Deputy Minister Jeffrey Shnoor (by email)

¹ See for example Globe and Mail, "Victim's family refuses role in shooting inquest" (May 28, 2009, online edition):

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?" Mr. Daviault asked the coroner, Quebec Court Judge Robert Sansfaçon.

<http://www.theglobeandmail.com/news/national/victims-family-refuses-role-in-shooting-inquest/article1152950/> (accessed May 29, 2009)