Federal Court  Cour fédérale

**Date: 20190527**

**Docket: T-502-19**

**Citation: 2019 FC 741**

**Ottawa, Ontario, May 27, 2019**

**PRESENT: Mr. Justice Mosley**

**BETWEEN:**

**THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA on behalf of THE RCMP, DEPUTY COMMISSIONER CURTIS ZABLOCKI, and CHIEF SUPERINTENDENT JAMES ZETTLER**

**Respondents**

# JUDGMENT AND REASONS (REDACTED)

## I. Introduction

[1] The public interest in the work of the National Inquiry into Missing and Murdered Indigenous Women and Girls (the National Inquiry or Commission) cannot be overstated in light of the appalling and tragic record of violence and other abuse they have suffered for many years. The importance of that work is underscored by the fact that, for the first time ever, each of Canada's fourteen federal, provincial and territorial governments joined in issuing Orders in Council under their respective public inquiries legislation to empower the National Inquiry.

[2] The matters to be determined on this application do not call into question the National Inquiry's importance. Rather, they address the issue of whether, in the particular context in which they have arisen, the public interest in the National Inquiry's work outweighs the public interest in protecting two ongoing criminal investigations from the risk of disclosures that could compromise the investigations and any prosecutions that may ultimately result.

[3] The two investigations in question – one involving a murdered Indigenous woman and the other a missing Indigenous woman – were the subject of certificates issued by Divisional Commanders of the Royal Canadian Mounted Police (RCMP) under section 37 of the *Canada Evidence Act*, RSC 1985, c C-5, objecting to the disclosure of information to the National Inquiry on the ground of a specified public interest. The two Divisional Commanders certified that the disclosure of the files in each case would be injurious to ongoing criminal investigations into the death and the disappearance of the two Indigenous women.

[4] It is important to note at the outset that in supporting the work of the National Inquiry, the RCMP disclosed 119 investigative files, including 23 active files. Nothing in the record before the Court indicates that the issuance of the certificates in respect of the two cases in question was intended to impede the work of the National Inquiry, or that they were issued in bad faith to shield the RCMP from embarrassment. The Court is satisfied that both certificates were issued to prevent encroachment on a legitimate public interest.

[5] Having considered the evidence submitted and the oral and written representations of counsel for the parties, and for the reasons that follow, the Court is satisfied that the certificates must be upheld.

[6] This application has been subject to a confidentiality order from the outset, and a further confidentiality order was issued to govern the hearing in open court at Vancouver on May 13 and 14, 2019. These reasons have been written to be made public. The Court has chosen not to identify the murdered and missing Indigenous women or the locations in which their cases are under investigation. While it would not be difficult to determine their names from information in the public domain, the Court considers it appropriate to continue to shield their identities in the interests of their privacy and that of their families, and in order to protect the investigations. For the same reasons, certain documents filed in this proceeding will be kept under seal and certain information in these reasons has been redacted.

## II. **Background**

[7] The National Inquiry was established on September 1, 2016, by Order in Council PC 2016-737, (2016) C Gaz II, 3425 (published August 24, 2016). As noted, all the provinces and territories chose to also participate. The terms of the provincial and territorial Orders mirror those of the Federal instrument, with variations to apply to each jurisdiction. The same five Commissioners were appointed in each order, one of whom subsequently resigned.

[8] Pursuant to the federal Terms of Reference, a copy of which is attached as Annex A, the National Inquiry's Final Report was due on November 1, 2018, and its mandate was to expire on

December 31, 2018. In June 2018, the deadline for delivering the Final Report was extended to April 30, 2019. In April 2019, Canada extended the deadline to May 30, 2019. The National Inquiry has a month thereafter to complete matters such as transferring its records to the Privy Council Office for retention and storage in the National Archives.

[9] The Terms of Reference, among other things, directed the Commissioners to inquire into and report on the:

> i. systemic causes of all forms of violence – including sexual violence – against Indigenous women and girls in Canada, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada, and
>
> ii. institutional policies and practices implemented in response to violence experienced by Indigenous women and girls in Canada including the identification and examination of practices that have been effective in reducing violence and increasing safety.

[10] The Commissioners were also instructed to conduct the National Inquiry as they considered appropriate and to make recommendations on concrete and effective action that can be taken to remove systemic causes of violence and to increase the safety of Indigenous women and girls in Canada. The Commissioners were directed to perform their duties without expressing any conclusion or recommendation regarding any person or organization's civil or criminal liability and to perform their duties in such a way as to ensure that the National Inquiry's conduct does not jeopardize any ongoing criminal investigation or criminal proceeding.

[11] If the Commissioners have reasonable grounds to believe that any information obtained in the course of the National Inquiry may be used in the investigation or prosecution of an offence under the *Criminal Code*, RSC 1985, c C-46, they were authorized to remit that information to the appropriate authorities. Further, they were authorized to remit to the appropriate authorities any information that was obtained in the course of the National Inquiry that the Commissioners have reasonable grounds to believe relates to misconduct.

[12] In conducting the National Inquiry, the Commissioners were authorized to engage the services of the experts and other persons referred to in section 11 of the *Inquiries Act*, RSC 1985, c I-11, including technical experts and legal counsel. Under this authority, the National Inquiry established a Forensic Document Review Team (FDRT).

[13] According to a Transparency Statement issued by the National Inquiry, the FDRT's mandate is to conduct a forensic review of police and related institutional files to:

1. identify potential systemic barriers or problems in areas of weakness relating to the protection of Indigenous women, girls and 2SLGBTQ individuals; and,
2. make findings and recommendations about the systemic causes of the disappearances and deaths of Indigenous women, girls and 2SLGBTQ individuals and acts of violence against them.

[14] As described, the FDRT was to function under the supervision of the National Inquiry's Research Director and be advised by a National Family Advisory Circle and Grandmother Advisors. The National Inquiry would refer a selection of cases to the FDRT, drawn from those pertaining to the more than 1,700 persons or families that had engaged with or registered to engage with the National Inquiry through its Community Hearings and Statement Gathering

events. The object was to obtain and analyse related police, coroner and Crown Counsel files, as well as Court records and other information from relevant institutions.

[15] The information received was to be kept strictly confidential and used for the FDRT's analysis and recommendations in accordance with the National Inquiry's Terms of Reference and a document entitled *Legal Path: Rules of Respectful Practice.*

[16] The record in this proceeding does not disclose what files were requested or obtained from law enforcement agencies other than the RCMP or from coroners, Crown Counsel or the Courts.

[17] For the purposes of the intended review of the two files in question, the FDRT would be comprised of two lawyers, an investigator and one support staff, all of whom had received Secret-level security clearances from the Privy Council Office. The Court was informed that in view of the size of the files, the FDRT intended to employ the services of a document management team within the law firm of McCarthy Tétrault to examine the files, employing a checklist developed by the FDRT investigator.

[18] At the National Inquiry's outset, the RCMP assigned a team of officers and civilian employees at National Headquarters in Ottawa to manage the production of RCMP documents to the inquiry. Inspector Kurtis Kamotzki was the acting, and subsequently the appointed, Operations Officer overseeing this work. In his affidavit sworn on April 9, 2019, Inspector Kamotzki avers that the RCMP asked the National Inquiry to issue subpoenas for the files it

wished to have produced so that the RCMP would be permitted, under the *Privacy Act*, to disclose any relevant personal information contained in the files.

[19] The RCMP provided an initial group of ten investigative files in July 2017 as a pilot project to inform the Commission staff. The RCMP and counsel from the Public Prosecution Service of Canada also facilitated a homicide file review exercise for the Commission.

[20] For each RCMP investigative file requested by the National Inquiry or the FDRT, the Division responsible for the investigation was asked to confirm whether it was active or concluded. If the investigation was concluded, Inspector Kamotzki averred, the file was produced. If the file was an active investigation, the responsible Division was asked to assess whether the file's disclosure to the National Inquiry would jeopardize the investigation, the laying of charges or the prosecution of the case. This assessment was done on a case-by-case basis by a major crime investigator in the Division. The active files that could be disclosed without jeopardizing an ongoing investigation were then produced, according to Inspector Kamotzki.

[21] Inspector Kamotzki's affidavit sets out a chronology of events relating to the requests for and production of files to the National Inquiry, supported by exhibits including correspondence between Commission counsel and RCMP counsel.

[22] The National Inquiry requested production of the two files at issue in this application on December 22, 2017, along with twenty-five other files. The headquarters team did not review the

content of the two files at issue other than to identify their "digital footprint," or size. The missing Indigenous woman file was found to consist of some 29,000 pages and the murdered Indigenous woman's file of some 25,800 pages.

[23] RCMP counsel informed Commission counsel on January 4, 2018 that the two files were active investigations and the RCMP was considering what, if any, information could be shared with the Commission without jeopardizing the ongoing investigations. On January 9, 2018 RCMP counsel shared a case summary regarding the missing woman for Commission counsel's information.

[24] On January 30, 2018, RCMP counsel confirmed that the other file at issue – that relating to the murdered woman case – was an active investigation and would not be produced based on public interest privilege. On April 19, 2018 the National Inquiry requested production of [redacted] a RCMP detachment in relation to that investigation. The National Inquiry was directed to the [redacted] to request the [redacted] which was produced.

[25] The FDRT issued a subpoena on September 20, 2018 for the production, by October 12, 2018, of all documents in the RCMP's possession related to 70 individuals. On September 26, 2018, RCMP counsel wrote to Commission counsel identifying the two investigative files at issue in this application as files over which the National Inquiry had previously been advised the RCMP was claiming public interest privilege.

[26] On October 30, 2018, RCMP counsel made a motion to the National Inquiry Commissioners seeking an order to vacate or vary the terms of the FDRT's September 20, 2018 subpoena and a further FDRT subpoena dated September 27, 2018 that had been served on October 1, 2018. The latter subpoena was for production of all documents in the RCMP's possession related to 89 individuals, also by October 12, 2018.

[27] The motion was heard on November 7 and November 14, 2018 on an *in camera* and *ex parte* basis. Other parties with standing before the National Inquiry did not participate. As part of the relief ordered, the RCMP was required to deliver written rationales for the public interest privilege claims in twelve files, including the claims at issue in this application, to the FDRT by December 5, 2018. The rationales were provided on a confidential basis the same day to Commission counsel.

[28] On January 10 and 11, 2019, six RCMP major crimes investigators were interviewed by Commission counsel and questioned about the basis for the public interest privilege claims. This was further to a process suggested by Commission counsel in which the RCMP agreed to participate. The interviews were conducted *in camera* and *ex parte*. Following the interviews, commission counsel sought rulings for production of ten of the twelve files (the National Inquiry withdrew its objection to the public interest privilege claim over one file and the RCMP withdrew its public interest privilege claim over another). Orders for the production of nine of the investigation files were issued, including for the two files at issue in this application. The RCMP withdrew its privilege claim for one of the other files and produced the files for the remaining six cases, further to the Commission's orders.

[29] On February 13, 2019 counsel for the Respondents wrote to Commission counsel to advise that the RCMP would invoke *Canada Evidence Act* section 37 with respect to the two files at issue in this application. Upon being informed on March 14, 2019 that Commission counsel had instructions to challenge the section 37 claims, the RCMP delivered the certificates on the same date. The National Inquiry then filed this application on March 22, 2019.

[30] Inspector Kamotzki was cross-examined on his affidavit on April 15, 2019. The cross-examination focused on the nature and extent of RCMP cooperation with the National Inquiry, including the staffing levels employed. Inspector Kamotzki testified that it reached a high of 30 regular and civilian members and was down to 18 on the date he was examined. In addition, when a decision was made to disclose a file, a team of evidence management employees in the Department of Justice would assist in identifying and redacting any information subject to class privileges.

[31] The [redacted] pertaining to the investigation of the murdered woman's case was produced and used for the purpose of Inspector Kamotzki's cross-examination. The report was also included in this application record. Portions of the [redacted] by the murdered woman's family and were produced to Inspector Kamotzki as exhibits during his cross-examination. Also produced were news reports from June 2015 regarding the release of a portion of [redacted] and RCMP Internet pages identifying the victim and requesting the public's assistance in the investigation.

[32] Also put to Inspector Kamotzki was a media report from 2017 regarding the case of the missing Indigenous woman. That report included a statement from [redacted]

## III. **Procedural History**

[33] This application was dealt with on an expedited basis. The initial Notice of Application was removed from the public record due to confidentiality concerns and the parties agreed that the application would be specially managed. A case management conference was held on April 1, 2019. Further to directions from the Court, a Notice of Motion for a confidentiality order on consent was received on April 4, 2019.

[34] The order was granted on April 5, 2019, listing documents to be filed confidentially and authorizing the filing of an Amended Notice of Application without information that may identify the victims and their families. A considerable number of documents were thereafter filed under seal with leave of the Court.

[35] On April 12, 2019, further directions were issued with respect to the subsequent steps to be undertaken. An order was issued on the same date regarding the filing of the Respondents' public and confidential affidavit evidence and cross-examination thereon, to be completed by April 15, 2019. An *ex parte* hearing before the application judge was scheduled for April 26, 2019 in Ottawa, and the hearing of the application was set down for May 13 and 14, 2019 at Vancouver.

[36] In addition to the public and confidential affidavits of Inspector Kamotzki, the Respondents filed the confidential affidavits of two RCMP investigative team leaders. The Applicant filed three affidavits with extensive exhibits to introduce documents, including correspondence between the parties.

[37] As noted above, on April 26, 2019, the Court presided over an *in camera*, *ex parte* hearing in which the two RCMP investigative team leaders gave evidence about the status of the two files in question. The officers' file review notes were provided to the Court. After a brief examination of each officer by Respondents' counsel, the officers were closely questioned by the Court relying, in part, on material submitted by the Applicant, including a list of questions for each officer. This hearing lasted over six hours. Further to the Court's direction, a summary of the *in camera*, *ex parte* hearing was prepared by Respondents' counsel, approved by the Court and forwarded to Applicant's counsel.

[38] During the case management conference on April 12, 2019, the Court had advised counsel that it may be necessary to conduct at least part of the hearing on the application *in camer*a to preserve the confidentiality of certain information pending a decision on the section 37 certificates while respecting the open Court principle as much as possible in the circumstances of this proceeding.

[39] In written representations and a case management conference held on May 7, 2019, the Respondents took the position that the hearing of the application should be primarily if not entirely *in camera*, given the difficulty of addressing the issues without discussing information

subject to the confidentiality order. The Applicant argued that most of the hearing could be public. The Court issued a direction that the hearing would begin in public at which time those present, including any members of the audience, would be invited to make submissions on whether the matter should proceed in camera. On May 9, 2019, the Respondents advised the Court that they had changed their position regarding the possibility of a public hearing and were of the view that most of it could be heard in public. During a case management conference on May 10, 2019, the Court indicated that the hearing would begin on May 13, 2019 in an open courtroom and would continue, if necessary, as a closed proceeding.

[40] At the opening of the hearing on May 13, 2019, counsel for the Canadian Broadcasting Corporation (CBC) requested to be heard and was granted standing for the limited purpose of making submissions on whether any part of the hearing could be conducted *in camera*. CBC counsel provided written representations and authorities and made oral submissions. The Court also heard from Applicant's counsel, who supported CBC's position, and Respondents' counsel, who maintained their position.

[41] The Court directed counsel, including CBC counsel, to confer on the possible terms of a further confidentiality order that would permit the entire hearing to be conducted in open Court while protecting the information listed in the April 5, 2019 confidentiality order. That was done, and the order was issued before the hearing continued. The persons present in the Courtroom during the hearing were advised that certain information could not be published, and counsel were careful to remind them of that restriction when it was necessary to refer to that information

during their argument. Media representatives remained in the Courtroom throughout the hearing and subsequently reported on it without disclosing the sensitive information.

## IV. **Relevant Legislation**

| **Specified Public Interest** | **Renseignements d'intérêt public** |
|---|---|
| **Objection to disclosure of information** | **Opposition à divulgation** |
| **37 (1)** Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a Court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the Court, person or body that the information should not be disclosed on the grounds of a specified public interest. | **37 (1)** Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public déterminées, ces renseignements ne devraient pas être divulgués. |
| **Obligation of Court, person or body** | **Mesure intérimaire** |
| **(1.1)** If an objection is made under subsection (1), the Court, person or body shall ensure that the information is not disclosed other than in accordance with this Act. | **(1.1)** En cas d'opposition, le tribunal, l'organisme ou la personne veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi. |
| **Objection made to superior Court** | **Opposition devant une cour supérieure** |
| **(2)** If an objection to the disclosure of information is made before a superior Court, that Court may determine the | **(2)** Si l'opposition est portée devant une cour supérieure, celle-ci peut décider la question. |

objection.

**Objection not made to superior Court**

**(3)** If an objection to the disclosure of information is made before a Court, person or body other than a superior Court, the objection may be determined, on application, by

**(a)** the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a Court established under a law of a province; or

**(b)** the trial division or trial Court of the superior Court of the province within which the Court, person or body exercises its jurisdiction, in any other case.

**Opposition devant une autre instance**

**(3)** Si l'opposition est portée devant un tribunal, un organisme ou une personne qui ne constituent pas une cour supérieure, la question peut être décidée, sur demande, par:

**a)** la Cour fédérale, dans les cas où l'organisme ou la personne investis du pouvoir de contraindre à la production de renseignements sous le régime d'une loi fédérale ne constituent pas un tribunal régi par le droit d'une province;

**b)** la division ou le tribunal de première instance de la cour supérieure de la province dans le ressort de laquelle le tribunal, l'organisme ou la personne ont compétence, dans les autres cas.

**Limitation period**

**(4)** An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the Court having jurisdiction to hear the application considers appropriate in the circumstances.

**Délai**

**(4)** Le délai dans lequel la demande visée au paragraphe (3) peut être faite est de dix jours suivant l'opposition, mais le tribunal saisi peut modifier ce délai s'il l'estime indiqué dans les circonstances.

**Disclosure order**

**(4.1)** Unless the Court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the Court may authorize by order the disclosure of the information.

**Ordonnance de divulgation**

**(4.1)** Le tribunal saisi peut rendre une ordonnance autorisant la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1), sauf s'il conclut que leur divulgation est préjudiciable au regard des raisons d'intérêt public déterminées.

**Disclosure order**

**(5)** If the Court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the Court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the Court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

**Divulgation modifiée**

**(5)** Si le tribunal saisi conclut que la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1) est préjudiciable au regard des raisons d'intérêt public déterminées, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public déterminées, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice au regard des raisons d'intérêt public déterminées, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

**Prohibition order**

**Ordonnance d'interdiction**

**(6)** If the Court does not authorize disclosure under subsection (4.1) or (5), the Court shall, by order, prohibit disclosure of the information.

**(6)** Dans les cas où le tribunal n'autorise pas la divulgation au titre des paragraphes (4.1) ou (5), il rend une ordonnance interdisant la divulgation.

**Evidence**

**(6.1)** The Court may receive into evidence anything that, in the opinion of the Court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.

**Preuve**

**(6.1)** Le tribunal peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

**When determination takes effect**

**(7)** An order of the Court that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal Court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

**Prise d'effet de la décision**

**(7)** L'ordonnance de divulgation prend effet après l'expiration du délai prévu ou accordé pour en appeler ou, en cas d'appel, après sa confirmation et l'épuisement des recours en appel.

**Introduction into evidence**

**(8)** A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the Court, person or body with jurisdiction to compel the production of information, may request from the Court

**Admissibilité en prevue**

**(8)** La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (5), mais qui ne pourrait peut-être pas le faire à cause des règles d'admissibilité applicables devant le tribunal, l'organisme ou la personne ayant le pouvoir de contraindre à la production de renseignements, peut

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|---|---|
| having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that Court, as long as that form and those conditions comply with the order made under subsection (5). | demander au tribunal saisi au titre des paragraphes (2) ou (3) de rendre une ordonnance autorisant la production en preuve des renseignements, du résumé ou de l'aveu dans la forme ou aux conditions que celui-ci détermine, pourvu que telle forme ou telles conditions soient conformes à l'ordonnance rendue au titre du paragraphe (5). |
| **Relevant factors** | **Facteurs pertinents** |
| **(9)** For the purpose of subsection (8), the Court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the Court, person or body. | **(9)** Pour l'application du paragraphe (8), le tribunal saisi au titre des paragraphes (2) ou (3) prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve devant le tribunal, l'organisme ou la personne. |

## V. **Issues**

[42] The only issue for this Court to determine is whether to uphold the certificates and thereby prevent disclosure to the National Inquiry of the documents relating to the death of the murdered indigenous woman and to the disappearance of the missing indigenous woman, or to order the documents disclosed in whole, in part or in summary form, or to order disclosure of a written admission of facts relating to the information, all subject to any conditions the Court considers appropriate.

[43] This Court will uphold the certificates and prevent disclosure of the information if it concludes that disclosure would encroach upon a specified public interest, namely investigative privilege, and that the public interest in disclosure does not outweigh in importance this specified public interest.

## VI. **Analysis**

### A. *Process*

[44] Section 37's purpose is to allow the Crown "to object to disclosures on public interest grounds": *R v Brassington*, 2018 SCC 37 at para 31. The Crown's ability to object to disclosure on public interest grounds does not arise only where there is compulsory disclosure in open Court; out of Court and/or voluntary disclosures may be equally harmful: *Brassington*, above at para 31. Disclosure of sensitive information can have consequences for third parties and the administration of justice: *Brassington*, above at para 31.

[45] There is no specific process to follow for section 37 objections; the Federal Court "has full discretion to choose its own procedure based on the circumstances before it": *Canada (Attorney General) v Chad*, 2018 FC 319 at para 10 [*Chad #1*]. In choosing its procedure, the Federal Court "should consider the nature of the public interest at stake, the factual and statutory context within which the [party] objects to disclose information, as well as the sensitivity of the redacted material": *R v Pilotte* (2002), 156 OAC 1 at paras 52, 60, 163 CCC (3d) 225 (Ont CA). The Court should consider the opposing party's submissions on the claimed privilege: *Chad #1*, above at para 27. The presiding judge can hold case management conferences before and after

closed proceedings to seek further submissions and identify the questions the opposing party would like posed to the person claiming public interest: *Chad #1*, above at paras 28–29.

[46] The Court may receive into evidence, and base its decision on, anything that it deems reliable and appropriate, even if it would not otherwise be admissible under Canadian law: *Canada Evidence Act*, s 37(6.1). Still, the Crown must ground their application on "specific and concrete assertions" and "must present sufficient evidence to convince the Court": *Chad #1*, above at para 15.

[47] The Crown may need to file evidence beyond their certification: *Chad #1*, above at para 16. Where the Crown allows the opposing party to review disputed information in order to show that it is irrelevant, and advises that issues of privilege or immunity are still to be determined despite the review, the Crown will not have waived their claimed public interest: *Canada (Attorney General) v Tepper*, 2016 FC 307 at paras 11–12.

[48] Courts have recognized investigative privilege as a specified public interest under section 37: *PJ et al v The Attorney General of Canada*, 2000 BCSC 1780; *R v Amer*, 2017 ABQB 651. However, investigative privilege is not a class privilege; it is a narrow basis for secrecy and is determined on a case-by-case basis: *R v Toronto Star Newspaper Ltd*, [2005] OTC 1112 at para 14, 204 CCC (3d) 397 (Ont Sup Ct).

[49] This is a *de novo* proceeding. It is not a judicial review of the reasonableness or correctness of the decisions made by the National Inquiry Commissioners. While the Court may

consider the rulings of the Commissioners, and may find them persuasive, the Court owes no deference to those rulings and must make its own determinations based on the facts and the law.

[50] In this proceeding, the Court considered that it would be necessary to conduct an *ex parte* and *in camera* hearing to receive the oral testimony of the two investigative team leaders in order to determine whether the privilege claims were valid and at risk of encroachment. In doing so, the Court requested and received, in advance, written representations from the National Inquiry, including statements of what the National Inquiry knew about the two cases and questions that they proposed should be put to the two officers.

[51] The Court recognizes that this process is not equivalent to providing a full opportunity to cross-examine the two officers, but the representations and proposed questions were helpful. One of the officers and the superior of the other had been interviewed by Commission counsel relating to the two cases and the answers were in the record. At the conclusion of the *in camera* hearing, the Court directed that a summary of the evidence be prepared and provided to National Inquiry counsel for the purposes of the hearing on May 13–14, 2019.

B. *Section 37 analysis*

[52] In its analysis, if the Court determines that disclosing the objected information would not encroach upon a specified public interest, the Court may order its disclosure: *Canada Evidence Act*, s 37(4.1); *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493 at para 34. In a case where disclosure is objected to in order to protect an ongoing investigation, the

person objecting to disclosure bears the onus of establishing that disclosure would have "a concrete deleterious effect on the ongoing investigation": *Wang*, above at para 35.

[53] If the Court determines that disclosing the objected information would encroach upon a specified interest, but that the public interest in disclosure outweighs the specified public interest, the Court may, after considering the form of disclosure and conditions to disclosure that are most likely to limit encroachment from disclosure, order disclosure, subject to appropriate conditions, if any, of all of the objected information, part of the objected information, a summary of the objected information, or a written admission of facts relating to the objected disclosure: *Canada Evidence Act*, s 37(5); *Wang*, above at para 35.

[54] In determining whether the information should be disclosed, the Court must first determine whether it is relevant to the issues that are before the party seeking disclosure: *Wang*, above at para 47. The Court must make its own determination of relevance, even where the party seeking disclosure is of the view that the information is relevant: *Wang*, above at para 50. This requires a "clear understanding" of the exact issues at play: *Wang*, above at para 51.

[55] If the Court does not authorize disclosure under either subsection (4.1) or (5), it shall order that disclosure of the objected information is prohibited: *Canada Evidence Act*, s 37(6).

C. *Findings on the specified public interest*

[56] Having considered the evidence and the submissions of the parties, I am satisfied that the protection of ongoing police investigations, as specified in the certificates, is a legitimate public

interest and that disclosing the information in the two files to the National Inquiry would encroach on that interest. The Supreme Court of Canada has concluded that there is a strong public interest in protecting documents related to law enforcement, including the confidentiality of police investigations: *Michaud v Quebec (Attorney General)*, [1996] 3 SCR 3 at para 48, 138 DLR (4th) 423. As stated in *Michaud* at para 51, the state's interest in protecting the confidentiality of its investigative methods remains compelling.

[57] I agree with the Respondents that the specified public interest lies here in preserving the confidentiality of the information collected by the RCMP in the two investigations and the integrity of any prosecution that may result. To establish encroachment on the specified interest, it is not necessary that the Respondents demonstrate that disclosure will necessarily endanger the investigations, only that it might: *Amer*, above at para 60; *R c Mirarchi*, 2015 QCCS 6629 at para 16; *R c Minisini*, 2008 QCCA 2188 at paras 54–55.

[58] The Applicant in these proceedings has argued that the Respondents have failed to demonstrate that there would be any concrete, deleterious effects from disclosure of the information to the National Inquiry. I disagree.

[59] I am satisfied, based on the *ex parte* hearing and submissions, that "the evidence supports a genuine, reasonably-based concern about the adverse effects" of disclosure on the two investigations: *Amer*, above at paras 55–56. That evidence directed my attention to, among other things, the form and extent of the investigations conducted thus far, the nature of the communities concerned, the history of violence in the vicinities, the risk of witness intimidation,

the nature of the investigative strategies remaining open to the police and the possibility that the two cases could be linked to those of other missing or murdered Indigenous women.

D. *Balancing of the competing public interests*

[60] The interests at stake in these proceedings are both important. In reaching conclusions on the evidence put before me and the submissions received from counsel, I do not want to in any way diminish the importance of the National Inquiry's work. As stated in the preambles to the Orders in Council that established the National Inquiry, the high number of deaths and disappearances of Indigenous women and girls in Canada is an ongoing national tragedy that must be ended.

[61] The National Inquiry is tasked with finding facts and providing recommendations to governments to address a serious national problem. That is an extraordinarily important role and must weigh heavily in favour of ordering the disclosure of information that the Commissioners consider necessary to complete their work. The Respondents acknowledge that the importance of this work is undeniable but argue that it must yield to the competing public interest in the particular circumstances before the Court. The National Inquiry has had the benefit of access to many other files from which to draw conclusions about the effectiveness of police investigations. It is not necessary, they contend, that the Inquiry receive these two files.

[62] The National Inquiry has a broad mandate to examine systemic causes of all forms of violence against Indigenous women and girls and the institutional policies and practices implemented in response, including those that have been effective in reducing violence and

increasing safety. The Commissioners were directed to make recommendations on: (1) concrete and effective action to remove systemic causes of violence and to increase the safety of Indigenous women and girls; and (2) ways to honour and commemorate the missing and murdered women and girls.

[63] The Commissioners were not empowered to make findings of misconduct or civil or criminal liability, but they may refer information that may be used in the investigation or prosecution of an offence under the *Criminal Code* or that relates to misconduct to the appropriate authorities.

[64] In conducting the balancing exercise, the Court must consider the context in which these two files are sought and other factors that may weigh in favour of one conclusion or the other. The factors set out in *Khan*, *Wang* and *Canada (Attorney General) v Chad*, 2018 FC 556 [*Chad #2*], varied to suit the present context, serve as a useful framework for considering the competing interests.

(1) Subject matter of the litigation

[65] The litigation stems from disagreement between the parties over whether production of the two files was necessary for the National Inquiry to complete its mandate. The Inquiry is entitled to challenge the two certificates. Nonetheless, it is regrettable that it ended up in Court.

[66] The record before the Court indicates that from the outset of the National Inquiry, there had been a high degree of cooperation and collaboration between the RCMP and the National

Inquiry through their respective counsel, the RCMP headquarters team and the FDRT. The RCMP facilitated an early homicide file review exercise with Commission staff, provided ten investigative files for a pilot project and ultimately disclosed 119 investigative files relating to homicides, serious assaults and missing persons, 23 of which were active, ongoing files. The correspondence on the record indicates that the parties were working together to provide information that the National Inquiry required. But there were also sizable gaps in time when it appears that it was not clear what the National Inquiry wanted and when it wanted it done.

[67] The preparation of an active investigative file for disclosure is time consuming and resource intensive. Care has to be taken not to divulge information subject to privilege (such as informant privilege and solicitor-client privilege), to redact private personal information and to protect key pieces of evidence commonly referred to as “holdbacks” that could be subsequently used to confirm the identity of a perpetrator or to corroborate a confession.

[68] The National Inquiry appears to have assumed that this work would have been done by the RCMP when its staff expressed an interest in a particular file at an early stage. The RCMP considered that it could wait to do so until any question of public interest privilege was resolved. Whichever view was correct, the deadlines fixed for production of the subpoenaed files in the fall of 2018 by the FDRT were unreasonable. It is clear that the two cases were known to the National Inquiry long before then, as the names of the murdered and missing women were included in a list provided to the Inquiry by the RCMP. Moreover, RCMP counsel made repeated requests from May 2017 for the files that would be required by the National Inquiry. No explanation was provided for the delay in issuing the subpoenas.

[69] The Applicant argues that delays in requesting the information is not a relevant consideration. I disagree. The evidence demonstrates that there was due diligence by the RCMP to cooperate with the National Inquiry's information requests from May 2017. There was no response from the Inquiry for much of the subsequent time. In the circumstances, it was reasonable for the RCMP to assume that the National Inquiry was not interested in the two files in question. Had they been informed that the two cases were regarded as important to the National Inquiry, the objections to disclosure could have been raised and dealt with much earlier – not in the last days of the Inquiry.

[70] On balance, this factor does not support disclosure.

(2) The Probative Value, Relevance and Necessity of the Evidence

[71] When encroachment on a specified public interest has been established, the test for relevancy requires that the information sought be of "critical importance" to the party seeking disclosure: *Chad #2*, above, at para 68. It is insufficient for the Applicant to assert that the information may be relevant. It must be assessed in terms of "its relative importance in proving or disproving the claim or defending it": *Pereira E Hijos S.A. v Canada (Attorney General)*, 2002 FCA 470 at para 17. Thus the Court must consider how the contents of the two investigative files in question would advance the National Inquiry's work.

[72] As the Respondents argue, the National Inquiry has received a great deal of information pertaining to investigations from the RCMP alone. The RCMP files include investigations into homicides, missing persons, sudden deaths and sexual assaults from various times and divisions

across the country. In addition, the RCMP produced over 200 policy documents relating to such investigations. While the results of requests to other investigative agencies are not in evidence on this proceeding, the Court assumes that the National Inquiry received similar material from them.

[73] It is not clear how the two files in question would advance the National Inquiry's task in addressing its mandate. Nor is it clear how the FDRT, even with the support of the document management team at McCarthy Tétrault, could review the files prior to the Commission's mandate expiring, within days of the writing of this decision. At the hearing, the Court was informed that there was the possibility of an addendum to the Final Report being issued later. While that may be possible, it would be under the control of the governments concerned and not that of the National Inquiry.

[74] In the circumstances, the Court agrees with the Respondents that the relevance and necessity of the two files to the completion of the National Inquiry's mandate is minimal at best. In particular, it was not demonstrated to the Court's satisfaction that these two files would significantly assist the Inquiry in its work. As noted above, in reaching this conclusion, the Court had the benefit of several hours of testimony from each of the two investigative team leaders and the opportunity to review the notes they made when they assessed the files.

(a) *The missing woman's file*

[75] This case concerns a young woman reported missing on [redacted] by her aunt, whom she had been visiting in a northern community. The young woman had gone out to meet some friends late on the evening of [redacted] and was seen getting into a vehicle. Inquiries were

undertaken but erroneous information was received that she was at an uncle's residence. She spent several days in another community and was reported to have left on [redacted] to hitchhike back to catch a flight to her home community on [redacted]. She failed to make the flight. The last credible sighting of her was on [redacted]. Searches in the area, including along the route she would have taken to return to her aunt's community, produced no results.

[76] The police have proceeded from the outset on the assumption that the missing woman was murdered, although no crime scene was identified and no remains have been located. They have also considered the possibility that she may have left the area and conducted inquiries further afield. Sophisticated modern techniques have been employed to determine her DNA profile and to eliminate a bone fragment as being connected to her. Similarly, remains found in a U.S. location were eliminated.

[77] While there were some initial suspects, including people known to have had contact with the missing woman in the days before her disappearance, they were cleared through various means, including polygraph examinations. In subsequent years, several suspects were arrested and interviewed at length. All of the many witnesses – hundreds, in the officer's estimation – that the investigators were aware of have been interviewed, and all the searches of locations where the police believed there could have been evidence, based on information received, have been conducted. Between [redacted], requests for information were posted in various forms of media, including community posters, television and Internet. A series of file reviews were undertaken in the ensuing years to ensure that all investigative steps had been undertaken. As of 1999, references to 115 investigators and 232 witnesses were found in the file. The

investigative team leader's evidence was that conventional investigative techniques had been entirely exhausted, [redacted].

[78] There were significant periods of time in which little was being done on the file because of a lack of resources, according to the team leader. Among other challenges, the officer explained, the file, now comprised of some 10,000 documents, was originally all on paper, which had to be converted to the electronic disclosure format which is now the RCMP standard. His Division did not have the resources to do that without external assistance.

[79] The funding for such investigations is provided through inter-governmental policing agreements. The major crimes unit in the RCMP division in question is small and has a very large territory to cover. Only recently was funding provided to investigate historical cases in the Division, including that of the missing woman. This case would be one of five that would be prioritized.

[80] Despite the passage of time and these challenges, the team leader was confident that the case was still solvable if the RCMP could [redacted]. And without a "disclosure ready" file to meet the Crown's obligations under the standard laid down by the Supreme Court of Canada in *R v*

*Stinchcombe*, [1991] 3 SCR 326, 130 NR 277, they could not proceed with [redacted]. That challenge has now been resolved.

[81] I am not satisfied that releasing the investigative file to the National Inquiry would assist the Inquiry in achieving its mandate. And it is unlikely to generate recommendations or a referral that would advance the investigation. Disclosure to the Inquiry could put the investigation at risk if information was inadvertently divulged.

(b) *The murdered woman's case*

[82] The victim in this case was reported missing by her mother on [redacted] when she did not respond to text messages. She had travelled to another city with her infant child and a friend on [redacted] and had left them in a motel room while she went out to purchase groceries and diapers on the evening of [redacted]. She accepted a ride from an unknown person and while in the vehicle, had a telephone conversation with a friend [redacted]. Her remains were found [redacted].

[83] The victim's name was placed on the Canadian Police Information Centre database after the report of her disappearance but removed when information was received that she had been sighted in another city and there was reported activity by her on social networks. The investigation was not restarted until the victim's mother called again in [redacted] to express concern.

[84] The [redacted] was delivered in [redacted] to the RCMP Commissioner and the Minister of Public Safety. It made 24 findings and 17 recommendations. In summary, the report found that the investigation at the outset was deficient in that various members were either not properly trained or did not adhere to their training and did not comply with existing policies, procedures and guidelines. The report also identified shortcomings with the existing training, policies, procedures and guidelines.

[85] It is clear that the case was mishandled by the RCMP at the outset of the investigation, [redacted]. If that was the extent of the information before the Court, I would have no hesitation in ordering the release of the file. However, carriage of the case was transferred to an investigative unit [redacted] that immediately implemented major case management principles. It was subsequently assigned to a specialized major crimes team organized on a Division-wide basis. Since then, many steps have been taken, including [redacted]. The [redacted] specifically did not relate to the conduct of the investigation [redacted].

[86] Based on the team leader's confidential affidavit, his file review notes and his evidence heard *ex parte* and *in camera*, the Court is satisfied that, except for that period of a few months in [redacted], the investigation has been, and remains, active. Many interviews have been conducted of contacts of the deceased and persons reported to have information about what happened to her. Fourteen court orders have been obtained to authorize evidence collection and seizure under

the *Criminal Code*. Those orders and the information submitted to obtain them remain under court sealing orders.

[87] The investigative team continues to receive and follow up on tips from the public. The team leader estimated that they had received over 1300 such tips, including some 400 received through the "Crime Stoppers" program. Tips continue to be received and interviews of potential witnesses have taken place in recent months. Over 100 witnesses have been interviewed and over 440 "persons of interest" have been identified and investigated. In addition to [redacted], which has not been released to the public, there is a piece of physical evidence found at the scene where the remains were located which has been designated as holdback evidence. The case is "solvable" in the team leader's view. The Court has no reason to question that assessment.

[88] I am satisfied that releasing the complete file beyond the control of the RCMP at this stage could put the ongoing investigation in jeopardy. And there are other, possibly related homicides under investigation that could lead to this case's resolution.

(3) Nature of the Public Interest to be protected

[89] The public interest in non-disclosure has been described as "protecting effective investigations, as well as those persons who are involved in or assist such investigations": *Chad #2*, above, at para 74.

[90] The Court is satisfied that the public interest in protecting the investigation in the murdered woman case is compelling based on the evidence heard *ex parte* and *in camera*. I have no reason to doubt that the case is currently active and that the RCMP is actively pursuing leads that may be compromised by inadvertent disclosure of sensitive information.

[91] The public interest in protecting the missing woman's case is less evident given the lengthy passage of time and the past gaps in the active pursuit of the investigation. Nonetheless, I am persuaded that with the recent allocation of additional resources, there is some prospect of a successful resolution and a risk that it could be jeopardized by disclosing the file.

(4) Effect of non-disclosure on the Public Perception of the Administration of Justice

[92] Given the National Inquiry's importance, the Court understands that there may be members of the public who do not accept that the RCMP is entitled to object to the disclosure of information relating to a case of a murdered or missing Indigenous woman on the ground that it may encroach on the investigation.

[93] I agree with the Respondents that the integrity of police investigations must be maintained when there is uncontradicted evidence that disclosing the file could result in the investigation being compromised. The public expects the police to do everything possible to solve crimes. In each of the two cases at issue, the evidence before the Court is that the RCMP officers now responsible for leading the investigations believe that both cases are solvable. And their commanding officers have endorsed those assessments by issuing the certificates.

[94] It is in the public interest to ensure that everything possible can be done to solve serious crimes. That interest is heightened when the victims are Indigenous women and girls because of the historical record which has demonstrated a shocking lack of attention and success in dealing with their cases. Those responsible for the murder or disappearance of Indigenous women and girls must be held accountable. It is also in the public interest to allow the families of the victims to achieve some degree of closure by learning what happened to their loved ones. I conclude that this factor does not support disclosure to the National Inquiry.

(5) Allegations of Government Wrongdoing

[95] As discussed above, in relation to the murdered Indigenous woman, the [redacted] clearly identified failings on the part of the local RCMP detachment that initially responded to the report of the victim's disappearance. That response was deficient and effectively delayed any attempt to find the victim.

[96] As indicated above, I am satisfied that the National Inquiry has enough information about the failings of the initial investigation from the [redacted] and that there is no additional value to be gained from ordering disclosure of the entire file at this stage. This is a case which is still being actively investigated. Indeed, the RCMP continues to receive tips. In the circumstances, the public interest in protecting that investigation outweighs the public interest in providing the file to the National Inquiry.

[97] In relation to the missing Indigenous woman, there were periods of time over the [redacted] since her disappearance during which little was being done by the police on the case. I accept the

evidence of the team leader that this was not due to any wrongdoing on the part of the police but because of the lack of resources for the investigation of major crimes in that jurisdiction. The resources have now been provided and the case will be among those given priority.

[98] The lack of adequate resourcing constitutes a systemic failure to properly address such crimes. The Court considered that this was the strongest factor in favour of ordering disclosure on the file in this case. It is offset, in my view, by the other factors. I am also satisfied that the National Inquiry has sufficient information about this case to point to it as an example of such a systemic failure.

(6) Sensitivity of the information

[99] The Court accepts that in both cases, the information held within the RCMP file is highly sensitive and that there is a risk of disclosure of that information beyond the police. The evidence submitted by the Respondents is more than generalized assertions of disadvantage – rather, the assertions are concrete and particularized. The Court has been provided with a specific understanding of the information at risk of disclosure.

[100] In this regard, the lack of information about the applicable privacy protocols, measures or protections put in place by the National Inquiry and the FDRT is concerning. The Court agrees with the Respondents that simply pointing to the FDRT Transparency Statement and to Rule 49.1 of the *Legal Path* document, which provides that information will be kept confidential, offers little comfort. This is not a "red herring," as the Applicant's counsel argued, but a legitimate concern. While four members of the FDRT have secret clearances, that doesn't

resolve the RCMP's concern that other support and technology personnel will necessarily also be involved. The greater the number of people having access to the files, the higher the risk of inadvertent disclosure will be.

[101] The Applicant makes a valid point that the RCMP were obliged to produce the murdered woman's investigative file, [redacted]. That body is created and bound by the provisions of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10. While, at first impression, it is arguably analogous to a Commission of Inquiry established under the *Inquiries Act*, the Court has no reason to believe that the risk of inadvertent disclosure by [redacted] is comparable to that raised by the Respondents as a concern in this proceeding.

(7) Prior Publication

[102] The Court accepts the Respondents' argument that there has been no prior publication of the evidence in the two investigative files. While there have been media articles regarding both investigations and the release of [redacted] in the murdered woman's case, the information disclosed was limited. In the murdered woman's case, the bulk of [redacted] and other holdback evidence were not released. In the missing woman's case, there have been appeals to the public for information about her disappearance but no disclosure of the investigative file. Other investigative efforts have not been divulged.

[103] The decision to disclose excerpts of the [redacted] to the media by the murdered woman's family revealed the inadequacies of the initial investigative response by a RCMP detachment. It did not extend to the subsequent efforts by the major crimes unit.

(8) General discovery or Fishing Expedition

[104] The Respondents have not argued that the Applicant is engaged in a fishing expedition in seeking these two files but contend that the files are not required for the National Inquiry to complete its important mandate. The RCMP has produced 119 investigative files identified and selected by the National Inquiry. Moreover, there are likely other files requested and produced by non-RCMP investigative agencies. The files already produced provide sufficient support for the National Inquiry to identify and examine the systemic causes of violence against Indigenous women and girls in Canada and to make recommendations for effective action.

[105] It was suggested in argument that the RCMP are resisting disclosure of these two files out of a concern that they would prove to be embarrassing to the Force. That possibility occurred to the Court at the outset of the proceedings. As a result, the two investigative team leaders were questioned closely to determine whether there was any basis for that concern. They were candid about the strengths and weaknesses of their cases. The Court is satisfied that while the officers were determined that non-disclosure was necessary to protect their investigations, it was not because of a fear of embarrassment or disclosure of misconduct by RCMP members.

## VII. **Conclusion**

[106] The Respondents have certified a specified public interest in protecting the integrity of ongoing police investigations and have demonstrated that disclosure of the two files in question would encroach upon this important public interest. They have provided concrete evidence as to how the disclosure of the files to the FDRT on behalf of the National Inquiry could have

deleterious effects on the ongoing investigations. While the National Inquiry is authorized to seek disclosure of the files under its terms of reference and has an important mandate to fulfill, that interest does not outweigh the public interest in protecting the investigations. Consideration of the factors discussed above weigh heavily in favour of upholding the public interest in maintaining the confidentiality of the investigations. For these reasons, this application will be dismissed.

[107] The Court understands that the parties are both funded by the Government of Canada. For that reason, there will be no award of costs.

[108] This Judgment and Reasons will be distributed first to counsel for the parties with a direction that they provide the Court with written representations regarding any information that should be kept confidential prior to public release. Counsel may share the Judgment and Reasons with their clients to obtain instructions.

**JUDGMENT IN T-502-19**

**THIS COURT'S JUDGMENT is that:**

(1) The application pursuant to section 37(3)(a) of the *Canada Evidence Act* for an order to set aside the objections filed by the Government of Canada and to require delivery of the RCMP investigative files relating to the Missing Indigenous Woman and the Murdered Indigenous Woman to the National Inquiry is dismissed;

(2) The confidentiality orders of April 5, 2019, May 13, 2019 and June 19, 2019 shall remain in effect until a further order is issued;

(3) This Judgment and Reasons (Redacted) shall be released to the public in accordance with the Court's June 19, 2019 confidentiality order; and

(4) There is no award of costs.

"Richard G. Mosley"
Judge

# ANNEX A

## Terms of reference

Whereas the high number of deaths and disappearances of Indigenous women and girls in Canada is an ongoing national tragedy that must be brought to an end;

Whereas the Government of Canada has committed to launching an inquiry to identify and examine the systemic causes of violence against Indigenous women and girls in Canada and to make recommendations for effective action;

And whereas the Government of Canada is committed to taking effective action to prevent and eliminate violence against Indigenous women and girls in Canada;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Prime Minister, directs that a commission ("the Commission") do issue, for the period beginning on September 1, 2016 and ending on December 31, 2018, under Part I of the *Inquiries Act* and under the Great Seal of Canada appointing five persons as commissioners (the Commissioners), namely, the Honourable Marion R. Buller as Chief Commissioner, Michèle Taïna Audette, E. Qajaq Robinson, Marilyn Poitras and Brian Eyolfson, to conduct an inquiry into missing and murdered Indigenous women and girls in Canada, which Commission must

a. direct the Commissioners to inquire into and to report on the following:

    i. systemic causes of all forms of violence — including sexual violence — against Indigenous women and girls in Canada, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada, and

    ii. institutional policies and practices implemented in response to violence experienced by Indigenous women and girls in Canada, including the identification and examination of practices that have been effective in reducing violence and increasing safety

b. direct the Commissioners to make recommendations on the following:

    i. concrete and effective action that can be taken to remove systemic causes of violence and to increase the safety of Indigenous women and girls in Canada, and

    ii. ways to honour and commemorate the missing and murdered Indigenous women and girls in Canada;

c. direct the Commissioners to conduct the inquiry under the name of the National Inquiry into Missing and Murdered Indigenous Women and Girls ("the Inquiry");

d. authorize the Commissioners to adopt any procedures that they consider expedient for the proper conduct of the Inquiry, to sit at the times and in the places, especially in Indigenous communities in Canada, that the Commissioners consider appropriate and to

conduct the Inquiry, to the greatest extent possible, by means of informal processes such as the gathering of statements by qualified trauma-informed persons to record the experiences of families of missing and murdered Indigenous women and girls and survivors of violence against Indigenous women and girls participating in the Inquiry;

e. direct the Commissioners to take into account, in conducting the Inquiry, that the Inquiry process is intended, to the extent possible,

    i. to be trauma-informed and respect the persons, families and communities concerned,

    ii. to provide an opportunity for persons, families and community members to express and share their experiences and views, particularly on ways to increase safety and prevent and eliminate violence against Indigenous women and girls in Canada,

    iii. to be culturally appropriate and to acknowledge, respect and honour the diverse cultural, linguistic and spiritual traditions of Indigenous peoples, and

    iv. to promote and advance reconciliation and to contribute to public awareness about the causes of and solutions for ending violence experienced by Indigenous women and girls in Canada;

f. authorize the Commissioners to provide any person having a substantial and direct interest in the subject matter of the Inquiry with an opportunity to participate in the Inquiry;

g. authorize the Commissioners to establish

    i. regional advisory bodies – composed of families of missing and murdered Indigenous women and girls and survivors of violence against Indigenous women and girls – to advise on regional matters that fall within the scope of the Inquiry, and

    ii. issue-specific advisory bodies – composed of elders, youth, families of missing and murdered Indigenous women and girls and survivors of violence against Indigenous women and girls, experts and academics, including academics specializing in Indigenous legal traditions, as well as representatives of national, Indigenous, local and feminist organizations – to advise on regional matters that fall within the scope of the Inquiry;

h. direct the Commissioners to conduct the Inquiry as they consider appropriate with respect to accepting as conclusive or giving due weight to the findings of fact set out in relevant reports, studies, research and examinations, whether national or international, including

    i. the Final Report of the Truth and Reconciliation Commission of Canada (2015),

    ii. The Report of the Royal Commission on Aboriginal Peoples (1996),

iii. Invisible Women: A Call to Action – A Report on Missing and Murdered Indigenous Women in Canada, Report of the Special Committee on Violence Against Indigenous Women (2014),

iv. Missing and Murdered Aboriginal Women: A National Operational Overview, Royal Canadian Mounted Police (2014),

v. What Their Stories Tell Us: Research findings from the Sisters In Spirit initiative, Native Women's Association of Canada (2010),

vi. Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (30 March 2015),

vii. Missing and Murdered Indigenous Women in British Columbia, Canada, Inter-American Commission on Human Rights (21 December 2014), and

viii. reports of the Missing Women Commission of Inquiry (Oppal Commission, British Columbia);

i. direct the Commissioners to review the results of the Government of Canada's pre-Inquiry engagement process;

j. authorize the Commissioners to rent, in accordance with the applicable Treasury Board policies, any space and facilities that are required for the purposes of the Inquiry;

k. authorize the Commissioners to recommend to the Clerk of the Privy Council that funding be provided, in accordance with approved guidelines respecting the rates of remuneration and reimbursement and the assessment of accounts, to any person described in paragraph (f), where in the Commissioners' view the person would not otherwise be able to participate in the Inquiry;

l. authorize the Commissioners to make available to members of the families of missing and murdered Indigenous women and girls and to survivors of violence against Indigenous women and girls, for the duration of their appearance before the Commission, the trauma-informed and culturally appropriate counselling services that the Commissioners consider appropriate;

m. authorize the Commissioners to refer the families of missing and murdered Indigenous women and girls and survivors of violence against Indigenous women and girls who contact the Commission for information and assistance with respect to matters such as ongoing or past investigations, prosecutions or inquests to the appropriate provincial or territorial authority that is responsible for the provision of victim services;

n. direct the Commissioners to use the electronic data systems and procedures specified by the Privy Council Office and to consult with records management officials within the

Privy Council Office on the use of standards and systems that are specifically designed for the purpose of managing records;

o. authorize the Commissioners to engage the services of the experts and other persons who are referred to in section 11 of the *Inquiries Act*, at the rates of remuneration and reimbursement that the Treasury Board approves;

p. direct the Commissioners to perform their duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization;

q. direct the Commissioners to perform their duties in such a way as to ensure that the conduct of the Inquiry does not jeopardize any ongoing criminal investigation or criminal proceeding;

r. if the Commissioners have reasonable grounds to believe that any information obtained in the course of the Inquiry may be used in the investigation or prosecution of an offence under the Criminal Code, authorize the Commissioners to remit that information to the appropriate authorities;

s. authorize the Commissioners to remit to the appropriate authorities any information that was obtained in the course of the Inquiry that the Commissioners have reasonable grounds to believe relates to misconduct;

t. direct the Commissioners to follow established security procedures, including the requirements of the Government of Canada's security policies, directives, standards and guidelines, with respect to persons engaged under section 11 of the *Inquiries Act* and the handling of information at all stages of the Inquiry;

u. direct the Commissioners to not disclose publicly or in any report any personal information, as defined in section 3 of the *Privacy Act*, that has been received in evidence during any portion of the Inquiry conducted in camera, unless, in the opinion of the Commissioners, the public interest in the disclosure outweighs any invasion of privacy that could result from the disclosure;

v. direct the Commissioners to make any disclosure referred to in paragraph (u) in such a way as to minimize, to the greatest extent possible, any invasion of privacy that could result from the disclosure;

w. direct the Commissioners, in respect of any portion of the Inquiry conducted in public, to ensure that members of the public can, simultaneously in both official languages, communicate with and obtain services from the Commission, including any transcripts of proceedings that have been made available to the public;

x. direct the Commissioners to submit, simultaneously in both official languages, the following reports to the Governor in Council:

    i. an interim report, to be submitted before November 1, 2017, setting out the Commissioners' preliminary findings and recommendations, and their views on

and assessment of any previous examination, investigation and report that they consider relevant to the Inquiry, and

ii. a final report, to be submitted before November 1, 2018, setting out the Commissioners' findings and recommendations; and

y. direct the Commissioners to file the records and papers of the Inquiry with the Clerk of the Privy Council as soon as feasible after the conclusion of the Inquiry.

**Cadre de référence**

Attendu que le nombre élevé de décès et de disparitions de femmes et de filles autochtones au Canada constitue une tragédie nationale perdurant qui doit cesser;

Attendu que le gouvernement du Canada s'est engagé à lancer une enquête pour cerner et examiner les causes systémiques de la violence à l'égard des femmes et des filles autochtones au Canada et pour recommander des mesures efficaces pour y remédier;

Attendu que le gouvernement du Canada s'est engagé à prendre des mesures efficaces pour prévenir et éradiquer la violence à l'égard des femmes et des filles autochtones au Canada,

À ces causes, sur recommandation du premier ministre, Son Excellence le Gouverneur général en conseil ordonne que soit prise, pour la période commençant le 1er septembre 2016 et se terminant le 31 décembre 2018, en vertu de la partie I de la *Loi sur les enquêtes*, une commission (ci-après « commission ») revêtue du grand sceau du Canada et portant nomination de cinq commissaires (ci-après « commissaires »), dont l'honorable Marion R. Buller à titre de commissaire en chef et Michèle Taïna Audette, E. Qajaq Robinson, Marilyn Poitras et Brian Eyolfson à titre de commissaires, chargés de faire enquête sur les femmes et les filles autochtones disparues et assassinées au Canada, laquelle commission :

a. ordonne aux commissaires d'enquêter et de faire rapport sur ce qui suit :

i. les causes systémiques de toutes formes de violence — y compris la violence sexuelle — à l'égard des femmes et des filles autochtones au Canada, notamment les causes sociales, économiques, culturelles, institutionnelles et historiques sous-jacentes qui contribuent à perpétuer la violence et les vulnérabilités particulières de ces femmes et de ces filles,

ii. les politiques et les pratiques institutionnelles mises en place en réponse à la violence à l'égard des femmes et des filles autochtones au Canada, y compris le recensement et l'examen des pratiques éprouvées de réduction de la violence et de renforcement de la sécurité;

b. ordonne aux commissaires de faire des recommandations sur ce qui suit :

i. les mesures pratiques et concrètes pouvant être prises pour éradiquer les causes systémiques de la violence et renforcer la sécurité des femmes et des filles autochtones au Canada,

ii. les façons d'honorer et de commémorer les femmes et les filles autochtones disparues et assassinées au Canada;

c. ordonne aux commissaires de mener l'enquête sous le nom d'Enquête nationale sur les femmes et les filles autochtones disparues et assassinées (ci-après « l'Enquête »);

d. autorise les commissaires à adopter les procédures qu'ils jugent opportunes pour le bon déroulement de l'Enquête, à siéger aux moments et aux endroits qu'ils jugent indiqués, en particulier dans les collectivités autochtones au Canada et, dans toute la mesure du possible, à mener l'Enquête au moyen de processus informels, notamment en faisant consigner les expériences des familles des femmes et des filles autochtones disparues et assassinées et des survivants de la violence à l'égard des femmes et des filles autochtones qui participent à l'Enquête, par des personnes qualifiées en traumatisme;

e. ordonne aux commissaires de tenir compte, dans le cadre de l'Enquête, du fait que celle-ci a pour but, autant que possible :

i. de prendre en compte les traumatismes subis et de respecter les personnes, les familles et les collectivités touchées,

ii. de donner aux personnes, aux familles et aux membres des collectivités l'occasion de faire part de leurs expériences et de leurs opinions, notamment sur les façons de renforcer la sécurité, de prévenir et d'éliminer la violence à l'égard des femmes et des filles autochtones au Canada,

iii. de tenir compte des réalités culturelles, de reconnaître, de respecter et d'honorer la diversité des traditions culturelles, linguistiques et spirituelles des peuples autochtones,

iv. de promouvoir et de favoriser la réconciliation et de contribuer à sensibiliser le public aux causes de la violence à l'égard des femmes et des filles autochtones au Canada ainsi qu'aux solutions pour y mettre fin;

f. autorise les commissaires à donner à toute personne ayant un intérêt direct et réel dans l'objet de l'Enquête la possibilité d'y participer;

g. autorise les commissaires à constituer les comités suivants :

i. des comités consultatifs régionaux composés de familles des femmes et des filles autochtones disparues et assassinées et des survivants de la violence à l'égard des femmes et des filles autochtones pour fournir des conseils sur des questions régionales qui relèvent du mandat de l'Enquête,

ii. des comités consultatifs chargés de l'étude de questions particulières et composés d'aînés, de jeunes, de membres des familles des femmes et des filles autochtones disparues et assassinées et des survivants de la violence à l'égard des femmes et des filles autochtones, d'experts, d'universitaires, notamment des spécialistes des traditions juridiques autochtones, ainsi que de représentants d'organismes

nationaux, autochtones, locaux et féministes pour fournir des conseils sur des questions régionales qui relèvent du mandat de l'Enquête;

h. ordonne aux commissaires de mener l'Enquête comme il leur semble opportun, en tenant pour définitives les conclusions de fait établies dans les rapports, études, recherches et examens pertinents menés à l'échelle nationale ou internationale ou en leur accordant l'importance qu'elles méritent, notamment :

   i. le Rapport final de la Commission de vérité et réconciliation du Canada (2015),

   ii. le Rapport de la Commission royale sur les peuples autochtones (1996),

   iii. Femmes invisibles : Un appel à l'action – Un rapport sur les femmes autochtones portées disparues ou assassinées au Canada, Rapport du Comité spécial sur la violence faite aux femmes autochtones (2014),

   iv. Les femmes autochtones disparues et assassinées : Un aperçu opérationnel national, Gendarmerie royale du Canada (2014),

   v. Ce que leurs histoires nous disent : Résultats de recherche de l'initiative Sœurs par l'esprit, Association des femmes autochtones du Canada (2010),

   vi. le rapport intitulé Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (30 mars 2015),

   vii. le document intitulé Missing and Murdered Indigenous Women in British Columbia, Canada, Commission interaméricaine des droits de l'homme (21 décembre 2014),

   viii. les rapports de la Commission d'enquête sur les femmes disparues (Commission Oppal, Colombie-Britannique);

i. ordonne aux commissaires d'examiner les résultats du processus de mobilisation préalable à l'Enquête entrepris par le gouvernement du Canada;

j. autorise les commissaires à louer les locaux et installations nécessaires à la tenue de l'Enquête, conformément aux politiques applicables du Conseil du Trésor;

k. autorise les commissaires à recommander au greffier du Conseil privé de financer la participation selon les lignes directrices approuvées concernant la rémunération et les indemnités ainsi que l'évaluation des comptes de toute personne visée à l'alinéa f), si les commissaires sont d'avis que celle-ci ne pourrait pas participer à l'Enquête sans ce financement;

l. autorise les commissaires à mettre à la disposition des membres des familles de femmes et de filles autochtones disparues et assassinées ainsi que des survivantes de la violence à

l'égard des femmes et des filles autochtones, durant leur comparution devant la commission, les services de counseling qu'ils jugent indiqués, et ce, compte tenu de leur culture et des traumatismes subis;

m. autorise les commissaires à orienter vers l'autorité provinciale ou territoriale compétente responsable de la prestation de services aux victimes les familles de femmes et de filles autochtones disparues et assassinées ainsi que les survivantes de la violence à l'égard des femmes et des filles autochtones qui communiquent avec la commission pour obtenir de l'aide ou des renseignements sur des questions relatives à des enquêtes, à des poursuites ou à des enquêtes du coroner passées ou en cours;

n. ordonne aux commissaires d'utiliser les systèmes de données électroniques et les procédures précisées par le Bureau du Conseil privé et de consulter les représentants de la gestion des documents du Bureau du Conseil privé concernant l'application des normes et l'utilisation des systèmes conçus précisément pour la gestion des documents;

o. autorise les commissaires à retenir les services de spécialistes et d'autres personnes mentionnées à l'article 11 de la *Loi sur les enquêtes* et à leur verser la rémunération et les indemnités approuvées par le Conseil du Trésor;

p. ordonne aux commissaires de remplir leurs fonctions sans formuler de conclusion ou de recommandation sur la responsabilité civile ou criminelle de quelque personne ou organisme que ce soit;

q. ordonne aux commissaires de remplir leurs fonctions de manière à ne nuire à aucune enquête criminelle ou instance pénale en cours;

r. autorise les commissaires à transmettre aux autorités compétentes tous les renseignements obtenus dans le cadre de l'Enquête si ces derniers ont des motifs raisonnables de croire que ces renseignements peuvent servir à une enquête ou à une poursuite relative à une infraction au *Code criminel*;

s. autorise les commissaires à transmettre aux autorités compétentes tous les renseignements obtenus dans le cadre de l'Enquête si ces derniers ont des motifs raisonnables de croire que ces renseignements ont trait à une inconduite;

t. ordonne aux commissaires de suivre les procédures établies en matière de sécurité, notamment les exigences prévues par les politiques, directives, normes et lignes directrices du gouvernement du Canada en matière de sécurité à l'égard des personnes dont les services sont retenus en vertu de l'article 11 de la *Loi sur les enquêtes* et à l'égard du traitement de l'information à toutes les étapes de l'Enquête;

u. ordonne aux commissaires de ne pas communiquer, publiquement ou dans quelque rapport que ce soit, des renseignements personnels au sens de l'article 3 de la *Loi sur la protection des renseignements personnels* qui ont été déposés en preuve au cours de l'Enquête lorsque celle-ci est menée à huis clos, à moins qu'ils soient d'avis que des raisons d'intérêt public justifient nettement une éventuelle violation de la vie privée;

v. ordonne aux commissaires de ne faire toute communication visée à l'alinéa u) que de façon à minimiser, dans toute la mesure du possible, une éventuelle violation de la vie privée;

w. ordonne aux commissaires de veiller à ce que le public, dans le cadre de toute partie de l'Enquête tenue en public, puisse communiquer avec la commission et obtenir ses services simultanément dans les deux langues officielles, y compris les transcriptions d'audiences si celles-ci sont mises à la disposition du public;

x. ordonne aux commissaires de soumettre au gouverneur en conseil les rapports ci-après, simultanément dans les deux langues officielles :

    i. un rapport provisoire, déposé avant le 1er novembre 2017, sur leurs observations et recommandations préliminaires sur les examens, enquêtes et rapports antérieurs qu'ils ont jugé pertinents et sur leur appréciation de ceux-ci,

    ii. un rapport final, déposé avant le 1er novembre 2018, sur leurs observations avec leurs recommandations;

y. ordonne aux commissaires de déposer auprès du greffier du Conseil privé, dès que possible à l'issue de l'Enquête, les documents et les rapports y afférents.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-502-19 |
| **STYLE OF CAUSE:** | THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS v THE ATTORNEY GENERAL OF CANADA on behalf of THE RCMP, DEPUTY COMMISSIONER CURTIS ZABLOCKI, and CHIEF SUPERINTENDENT JAMES ZETTLER |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | MAY 13-14, 2019 |
| **JUDGMENT AND REASONS (REDACTED):** | MOSLEY, J. |
| **DATED:** | MAY 27, 2019 |

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| Anne M. Turley<br>Helen Gray<br>Anne McConville | FOR THE RESPONDENTS |
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