Government of Ontario Submissions

Notice of Intention to Issue an Order Pursuant to the Terms of Reference

1. In keeping with the "families first" approach it has taken throughout this process, the Government of Ontario ("Ontario") is respectful of the wishes of those who provided their truths to the National Inquiry into Missing and Murdered Indigenous Women and Girls (the "Inquiry" or the "Commission"). However, Ontario opposes the issuance of the Draft Order (the "Order") appended to the Notice of Intention to Issue an Order (the "Notice"). Ontario does so for the following reasons:

The lack of procedural fairness

2. In a letter dated June 19, 2019 and delivered to Commission counsel and all parties, Ontario argued that the process afforded by the Commission regarding the pending Order amounts to a denial of natural justice. Ontario reiterates this position.

3. In particular, the deadline and page limit for submissions have deprived Ontario of the opportunity to fully present its position on the complex factual and legal issues arising from the Order. Ontario maintains its position that the Commissioners are proceeding in this matter in the absence of an adequate factual record, including information concerning the consent process engaged by the Commission with families and loved ones who participated in the Inquiry.[1] Ontario further submits that the Commission has predetermined, or has created the appearance that it has

[1] Ontario does not agree with the factual assertions contained at ¶13 of Schedule B to the Notice. Ontario is unable to particularize the nature of its disagreement without disclosing "without prejudice" communications with Commission counsel.

predetermined, the issues concerning its jurisdiction to issue the Order, as well as the terms of the Order.

The absence of jurisdiction to issue the Order

4. Ontario submits that the Inquiry is entirely without jurisdiction to issue the Order. Commissions of inquiry under federal, provincial and territorial public inquiries legislation are agencies of the executive. They enjoy independence as to the manner in which they exercise their statutory powers, conduct their hearings, and prepare their reports. However they must operate within their statutory authority and the mandate established by their Order(s)-in-Council:

> It has often been suggested... that commissions of inquiry were meant to operate and act as fully independent adjudicative bodies, akin to the Judiciary and completely separate and apart from the Executive by whom they were created. This is a completely misleading suggestion, in my view… No one disputes the necessity of preserving the independence of commissions of inquiry as to the manner in which they may exercise their powers, conduct their investigations, organize their deliberations and prepare their reports… All this, however, does not alter, in any way, the basic truth that commissions of inquiry owe their existence to the Executive. As agencies of the Executive, I do not see how they can operate otherwise than within the parameters established by the Governor in Council.[2]

5. Neither Ontario's *Public Inquiries Act, 2009* nor Ontario's Order-in-Council 1264/2016 ("Ontario's OIC"), as amended, authorize the Inquiry to issue an Order fettering the statutory discretion and authority of the Archivist of Ontario, or suspending the application of governing federal, provincial or territorial privacy, access and archiving legislation.

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[2] *Dixon v Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission),* [1997] FCJ No 985 (FCA), leave to appeal to SCC refused, [1997] SCCA No 505 at para 13.

6. As a commission appointed under the *Public Inquiries Act*, 2009, the Inquiry falls within the definition of a "public body" pursuant to s.2 of the *Archives and Recordkeeping Act* (the "*ARA*"). As such, the Inquiry is required to comply with the *ARA*, including the requirement that it submit a particularized records schedule to the Archivist of Ontario (the "AO") for approval.[3] Further, the Inquiry is prohibited from transferring, destroying or otherwise disposing of its records, except in accordance with an approved records schedule or with the written consent of the AO.[4] While the Order purports to direct the AO with respect to the preservation and access to the Inquiry's records, the governing legislation provides that it is the Inquiry that is subject to the AO's direction in relation to its records.

7. Ontario's OIC provides that the Inquiry is "authorized and required in the public interest to ensure that all records created or received in the course of the National Inquiry are preserved and archived in accordance with the requirements of Ontario's *Archives and Recordkeeping Act, 2006* and other applicable federal and provincial legislation."[5] Ontario's OIC provides scope for the Inquiry to make "recommendations… concerning confidentiality" in relation to Commission records[6], but no authority whatsoever to make mandatory orders against the AO.

8. Ontario submits that the Inquiry's reliance on *Canada (Attorney General) v. Fontaine*[7] to justify the Order is misplaced. In *Fontaine*, the Supreme Court found that provincial and territorial superior courts had the authority, by virtue of either

[3] *ARA*, s.11(2) and 12
[4] *ARA*, s.13(3)
[5] Ontario's OIC, ¶16.
[6] Ontario's OIC, ¶17.
[7] 2017 SCC 47, quoted at ¶8 of the Notice.

their statutory supervisory jurisdiction under class proceedings legislation or their inherent jurisdiction, to make orders concerning the disposition of government records. With respect, the Inquiry is not a court of inherent jurisdiction, nor (as stated above) does it have the statutory authority to issue the Order that would "override" privacy, access and archiving legislation.

9. Similarly, the *Legal Path*[8] does not constitute a grant of jurisdiction that would authorize the Order. The *Legal Path* explicitly acknowledges that the procedures of the Inquiry are subject to "federal and provincial/territorial laws" and "counterpart governing legislation or related instruments".[9]

10. Ontario further submits that section "d" of Order in Council PC 2016-0736 does not authorize the Inquiry's pending Order. The authority to "adopt any procedures that they consider expedient for the proper conduct of the National Inquiry" would not permit the Inquiry to issue an order governing the management and operations of a government agency with its own statutory mandate. Such an order does not relate to "the proper conduct of the National Inquiry".

The Order is overbroad

11. Even if the Inquiry had the necessary authority to issue the Order (which is denied), its terms are drastically overbroad in relation to its stated purpose of protecting the dignity and privacy of those who participated before the Inquiry.

[8] Quoted at Schedule B, ¶3; the Order, recital "G".
[9] *Legal Path*, ¶15 and 72.

12. The Order if issued, would, for an as yet indeterminate period, deny access to and deprive the historical record of: "any documents of deliberations by the Commissioners, including minutes"[10]; the entirety of any operational record containing any reference to *in camera* or confidential witness information[11] (without regard to redactions); and "any data within the control of Shared Services Canada that may be found in the future (the transfer of e-mails etc.)".[12]

13. In addition, the Order would create a presumption that any and all Inquiry records that are not specifically "marked" by the Commission as Protected A or B are automatically rendered inaccessible to the public or to the documentary heritage of Ontario.[13] This presumption operates without regard to the nature of the information contained within the "unmarked" records.

14. This Inquiry is unique in Canadian history, with respect to its legal structure, its process, and the importance of its subject matter. Many of its records are of "archival value", and of keen interest to members of Indigenous communities who will want to understand how the Inquiry redressed the crisis of missing and murdered Indigenous women and girls in this country. The Order would defeat the *ARA's* statutory purposes of "foster[ing] government accountability and transparency" and "encourage[ing] the public use of Ontario's archival records as a vital resource for studying and interpreting the history of the province."[14]

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[10] Order ¶5(i)
[11] Order ¶5(k)
[12] Order ¶5(l)
[13] Order¶5(j) and (m)
[14] *ARA*, s.1