Public Inquiry Respecting the Treatment, Experiences and Outcomes of Innu in the Child Protection System

February 12, 2025

Reasons for Decision on Nature and Scope

I. INTRODUCTION

[1] On February 5, 2025, we issued four Orders regarding the Nature and Scope of the investigations into the circumstances of the deaths of Jacob Collins, Kirby Mistenapeo, James Poker, and Faith Rich. At that time, we indicated that our reasons would follow. These are those reasons.

[2] We begin this decision with a brief review of the process used to draft the Nature and Scope Orders. Next, we will address each of GNL's objections in turn, including a summary of the General Standing Parties ("GSP's") and counsel for the Families' submissions. We will then outline our rationale for modifying the Orders or for rejecting GNL's objections. Finally, we will comment on GNL's use of the term Without Prejudice" in its submissions to us.

[3] We begin with a review of the formulation of drafts of the Nature and Scope Orders.

(i) How the Draft Nature and Scope Orders Came to Be

[4] The proposed orders were drafted by lawyers for both the Inquiry and the Family of the each of the four deceased children, working together. This collaboration occurred after each of the Family Lawyers and Inquiry Lawyers had reviewed

28 Pippy Place, St. John's, NL A1B 3X4

Tel: 709-729-7589
Toll Free: 1-833-667-0679
Fax: 709-729-5618

thousands of pages of documents relating to the child. The Inquiry obtained those documents pursuant to summonses.

[5] The documents they reviewed included health records, child protection records, records of third-party care providers, and heartbreakingly, in the case of Kirby Mistenapeo, Kirby's handwritten account of his wishes. The Lawyers for the Inquiry focused on potential systemic issues identified in their proposed drafts, ever mindful of the trust that each Family placed in the Inquiry by sharing their experiences and private records with them. Counsel for the Families undertook the monumental task of reviewing those thousands of pages of documents written about their clients, with their clients.

[6] Each Family, in applying for a death investigation, sought the Inquiry's assistance in learning more about their child's life in care of the child protection system. Each Family understood that they could discontinue the process at any time. It is an understatement to say that the process that each Family has undertaken to get this far has been hard and painful for them. We commend these Families for their courage in seeking the truth for their child. We commend their Lawyers for the careful approach they have taken.

[7] The proposed orders were circulated by Lead Counsel for the Commission ("Lead Counsel") to the General Standing Parities ("GSP's"). The GSP's are the Innu Nation, GNL and the Government of Canada ("Canada")[1]. The purpose of sending the draft orders was to give the GSP's an opportunity to provide input.[2]

[8] We now turn to each of GNL's objections.

II. ISSUES

[9] The need for reasons arises from objections made by the Government of Newfoundland and Labrador ("GNL") to the Nature and Scope Orders.[3] GNL's objection to the Nature and Scope Orders may be summarized as follows:

(1) The Inquiry does not have jurisdiction to issue Orders of any kind, save summonses.

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[1] Orders for General Standing were issued by us in the spring of 2022 to GNL, Canada, and the Innu Nation.
[2] The input was sought in keeping with Part XV of the Inquiry's Rules of Procedure which encourages the parties to collaborate and sets out the procedure for instances where consensus eludes the parties.
[3] In all, the Inquiry issued Investigation Orders regarding the deaths of six children whose families applied for and obtained Investigative Standing. Such standing is permitted under s. 4(2) of the Inquiry's Terms of Reference ("TOR"). While each of the six families met the criteria for an investigation, the above mentioned four were able to negotiate Nature and Scope by the time Commission Counsel sought input from the other parties. Nature and Scope discussions are in process with other two Families.

(2) The Orders state that the death is not to be investigated, and this runs contrary to the Terms of Reference ("TOR").
(3) Some of the Orders state that the child's life prior to coming into care will not be investigated and this will lead to an unfair and unbalanced investigation.
(4) Some of the Orders refer to a facilitated circle process and formal hearings are required by the TOR.
(5) Some of the Orders are too focused on who was at fault, and this is contrary to s. 10(5) of the TOR.

[10] Bearing in mind the thoughtful and painful process of arriving at these Nature and Scope Orders, we considered GNL's objections very carefully.

[11] We turn now to each of these objections.

III. ANALYSIS

(i) Objection One: The Inquiry Does Not Have Jurisdiction to Issue Orders, save Summonses

[12] The GNL submission on this point is:

> *With respect to the use of the term "order" to describe the documents you have provided, the powers of the Commission are set out in the* Public Inquiries Act, 2006 *("Act") and the subsequent Inquiry Respecting the Treatment, Experiences and Outcomes of Innu in the Child Protections System Order ("Order"). While section 9 of the Act allows an inquiry to issue a summons, our interpretation of the Act does not provide the Inquiry with any authority to make "orders". As such it is our position that the Inquiry employ a different term to accurately describe the said documents.*

[13] In response to this objection, Counsel for the Innu Nation, opines that:

> *The Inquiry has wide powers to decide its own procedure and set its own rules, as long as they are consistent with the Act and Terms of Reference...Substantively we see these documents as valid regardless of what they are called.*

[14] Lead Counsel notes that the proposed Orders do not affect third parties' rights and do not contradict the TOR[4].

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[4]Canada and the Rich Family did not respond to GNL's comments. The Mistenapeo/Piwas Family, the Collins Family, and the Poker Family did not make submissions on this issue.

> *"Order" conveys that the Inquiry's decision to focus the issues to be investigated is a binding expression of the authority conveyed by the Terms of Reference....*

Analysis of Objection One

[15] The combination of the TOR and the *Public Inquiries Act, 2006* ("the *Act*") provide a legislative structure within which we Commissioners must act to carry out our mandate. To date, we have made a series of Orders not specifically authorized by either the TOR or the *Act*. We have issued publication bans, standing orders, and orders authorizing investigations. GNL has been aware of each of these previous Orders and registered no objection.

[16] In our view, Orders are a necessary tool required by inquiries to carry out their processes. Imagine the futility of this Inquiry if we could not make any orders except those specifically set out in the legislation and TOR. The Inquiry would not be able to rule on an objection, to exclude irrelevant evidence or to limit cross examination by parties with limited standing. Naturally, we accept that we cannot make any orders which would be outside our mandate as set out in the TOR. However, it is equally true that we cannot fulfil our mandate without the ability to control the process through the vehicle of orders. Accordingly, we find this objection is without merit.

(ii) Objection Two: The Orders State that the Death is Not to be Investigated, and this Runs Contrary to the TOR.

[17] GNL puts forward this argument thusly:

> *Firstly, three of the draft orders specifically stated that the death of the individual is not to be investigated. A plain reading of these draft orders takes these investigations beyond the scope of what is specifically contemplated in subsection 4(2) above.*
>
> *Through additional conversations with Commission counsel, we have been advised that the intent is not to ignore the death, but rather to not focus on the specific facts of the death. However, the proposed wording still creates the impression that the death will not form part of the investigation in any way.*
>
> *It is our position that if these matters proceed with the wording as proposed, they would more accurately be described as case studies under subsection 4(1) of the Order. Given my client's involvement in the draft of the Order, it was understood that subsection 4(2) death*

> *investigations would not preclude "manner and cause" of deaths. This has implications for document provision and funding of counsel.*

[18] In response to this objection, the Innu Nation, the Poker, Collins and Piwas/Mistenapeo families, and Lead Counsel all contend that the death investigations must be viewed in the context of the TOR overall. While the Inquiry undoubtedly has authority to investigate the circumstances of a death, such is not mandated.

Analysis of Objection Two

[19] This Inquiry is tasked with examining the treatment, experiences and outcomes of Innu in the child protection system. In the six cases that we have decided meet the criteria for a death investigation, the immediate cause of death and the manner of death are not in question. The Families know how their child died.

[20] On the facts of each case before us, there is no need for the Inquiry to investigate the whether the Medical Examiner conducts autopsies correctly. None of the Families are taking issue with the Medical Examiner's conclusions as to cause and manner of death.

[21] We are tasked with inquiring into these tragic deaths bearing in mind that the child protection system intervened in these young people's lives with the mandate to make those children safer. Despite that intervention, these children have died. Did the child protection system protect them? Did it provide them with better outcomes than they would have had, if child protection had not intervened? Did the treatment of the child within the child protection system help the child? These are the questions we are faced with.

[22] However, we take GNL's point that the death must not be ignored. Accordingly, we have changed the wording to state the "manner and immediate cause of death".

[23] As a last comment on this objection, we noted GNL's reference to "*implications for document provision and funding of counsel*". Counsel for the Mistenapeo/Piwas Family has made the following submission:

> *The necessity of the independence of the Commission and the public's confidence in the Inquiry cannot be understated. Commissioners must have full independence over their investigations, conclusions, and recommendations. This independence cannot be freely tampered with by anyone; especially by a party that can exert budgetary influence.*

[24] Admittedly, the Mistenapeo/Piwas Family made this submission in relation to GNL's attempt at a private submission to us. However, we believe it is an understandable

sentiment at this juncture as well and wish to address it directly. There is no doubt that GNL funds the Inquiry and that GNL may decide to cease to do so. Until such time as GNL decides it will no longer fund this Inquiry, we will continue to work towards fulfilling the mandate. Reminders of funding implications – as unseemly as they are – have not had and will not have any effect whatsoever on our work or decisions.

(iii) Objection Three: Some of the Orders State that the Child's Life Prior to Coming into Care Will Not be Investigated Which Will Lead to an Unfair and Unbalanced Investigation

[25] GNL's submission on this objection is as follows.

> *Secondly, some of the orders state that the Inquiry will not investigate a person's life prior to coming into care. This language gives the illogical impression that the child protection context will not form part of the investigation resulting in an unfair and unbalanced investigation. We suggest that greater specificity be used to explain what is trying to be achieved with the investigations. We would like the documents to be clearer as to what will and will not be examined. In discussion with Commission counsel, specific examples were provided with respect to what was investigated. It is our preference that these specific examples be included in the document to ensure all parties have a common understanding with respect to the nature and scope of the investigations and process to be followed.*

[26] The responses to this submission from the Innu Nation, the Families, and Lead Counsel speak as one voice on this issue. Why the children came into care is irrelevant to their treatment, experience, and to outcomes of Innu in the child protection system. Some of the Families remarked upon the voluntary nature of these investigations and declare an unwillingness to participate in a process which focuses on anything other than the child protection system.

Analysis of Objection Three

[27] The TOR set out the areas to be pursued and addressed in the Inquiry's report and recommendations. The TOR dictate that the Inquiry be guided by the Touchstones of Hope process and principles of reconciliation. The TOR require that the Inquiry is to be guided by the principle "do no further harm" which is enacted through its Rules, processes and how the work of the Inquiry is conducted.

[28] Neither are these Families, nor the Innu, interested in investigating those decisions. If a Family wants to challenge the appropriateness of a decision, they are certainly free to do so. This Inquiry is mandated to investigate how the child protection system

responded once the decision was made for the child to be taken into care. The central question to be resolved in these death investigations, is – having taken a child into its care - how well, or how poorly, did the child protection system do its job?

[29] For the four Families to whom these Nature and Scope Orders apply, there is no interest in an investigation into why children came into the care of the child protection system. Had this been a desire of theirs, the Inquiry would have investigated.

[30] We are confident that the lawyers working on these cases are able to provide us with any context we may need. Such context can be broadly worded. For example, we may need to know if a child had a history of trauma, but not what caused that trauma.

[31] We have heard from many Innu at Community Meetings about the harms done to Innu from the time of contact onward. The process of colonization and attempts at assimilation have caused lasting damage, intergenerational trauma, and deep scars that the Innu are continuing to struggle with and heal from. As Commissioners, we will respect the principle of "do no further harm". We will not allow these death investigations to focus on anything other than the child protection system's response. The Families have trusted the Inquiry with their stories, and their experiences; we will honour that trust by focusing on the mandate we were given.

(iv) Objection Four: Circles are not Allowed by the TOR, only Formal Hearings are Permitted

[32] GNL sets out this objection as follows:

> *Thirdly, three of the four orders refer to "a facilitated circle process". Given that the form of proceeding will not be finalized until after the investigation report has been completed, we suggest removing that language all together. In addition, we again question the suitability of proceeding with subsection 4(2) death investigations by this method. As mentioned previously, subsection 4(2) was intended to provide for a death investigation to proceed by way of formal hearing. This was purposeful to allow for the examination of systemic issues of the child protection system and to provide a more balanced way of presenting evidence.*

[33] Again, the Innu, the Families and Lead Counsel disagree in the strongest terms possible with this conclusion.

Analysis of Objection Four

[34] We note with approval, and adopt, the submissions of the Mistenapeo/Piwas Family on this issue. They submit:

> *(6) With respect, it is plainly incorrect to suggest that s. 4(2) of the Inquiry's Terms of Reference designates the process by which the Commission must conduct its investigations. Section 4(2) only specifies that the Inquiry shall investigate the deaths. As an independent body, the Inquiry has full control of its processes.*
>
> *(7) The Province also appears to have conflated the Inquiry's role with the role of a Court. Associate Chief Justice Dennis R. O'Connor of the Ontario Court of Appeal, Commissioner of the Walkerton and Arar Inquiries, specifically addressed this issue in an address to Canadian Institute for the Administration of Justice Annual Conference, "Some Observations on Public Inquiries" (October 10, 2007):*
>
> > Unlike criminal or civil trials, inquiries do not need to be conducted within the confines of the fixed rules of practice and procedures. Inquiries are not trials: they are investigations. They do not result in the determination of rights or liabilities; they result in findings of fact and/or recommendations. Subject to... the need for procedural fairness for those who may be affected by the report of an inquiry, a commissioner has a very broad discretion to craft the rules and procedures necessary to carry out his or her mandate. *[emphasis added]*[5]
>
> *(8) Associate Chief Justice O'Connor also commented that formal hearing processes are not necessary in Inquiries:*
>
> > ...inquiries have, in my view, tended to overuse the evidentiary, adversarial type of hearing process suited for legal trials to gather information. I think that we have yet to take full advantage of all of the possibilities for different processes that can be tailored to meet the need of investigating and reporting on the various types of matters set out in inquiry mandates. I believe that greater creativity and flexibility in fact-determining processes will ultimately improve the inquiry process from the perspective of all participants, increasing responsiveness, decreasing cost, and ultimately improving the process and results of public inquiries. In my view, there is a real advantage to directly involving groups and individuals in the inquiry process, rather than having them participate only through lawyers. This is particularly the case where the participants have experience, expertise and an understanding of issues under consideration. From a cost perspective, minimizing the

[5] The Hon Associate Chief Justice Dennis R O'Connor and Freya Kristjanson, "Some Observations on Public Inquiries" (2007), online (Court of Appeal for Ontario): <https://www.ontariocourts.ca/coa/about-the-court/archives/publicinquiries/>.

> involvement of legal counsel, when not necessary, can result in a significant cost reduction.[6]

9. What is perhaps most concerning is the Province's suggestion that sharing circles are somehow less "suitable," less "balanced," or less capable of examining systemic issues. Sharing circles have been a culturally significant method of information-gathering and community engagement for generations. Sharing circles play a fundamental role in Indigenous tradition, learning, and healing. The Province's insistence on an adversarial hearing process not only ignores the colonial history of the Euro-Canadian legal system that continues to marginalize Indigenous people but ignores the significant barriers to their participation in this Inquiry.

10. Professor Jula Hughes at the University of New Brunswick examined the information-gathering and sharing circle process at the Canadian Truth and Reconciliation Commission (TRC) on Indian Residential Schools. She observed that:

> The TRC deals with witness issues of extraordinary complexity. Most witnesses are indigenous, have a history of abuse that frequently includes sexual abuse, many are elderly, many have or have had substance abuse problems, and many describe a fraught relationship with settler society justice institutions including experiences of criminalization. The TRC is responding to these challenges with a broad range of highly innovative procedures, most of which appear to be designed to increase participation of witnesses. The institutional design literature generally focuses on majoritarian legitimacy and trust. What is missing, however, is a theory of legitimacy and legitimation based on substantive equality principles. Even if a justice system appears legitimate to a societal mainstream, it may lack legitimacy among marginalized groups. To the extent that these groups are significantly represented in the justice system, their perception of legitimacy becomes important... there are very significant barriers to participation in justice processes for marginalized people...
>
> ...traumatized witnesses face peculiar barriers to participation and appreciation. Since practically all witnesses before the TRC will fall into this category, finding culturally appropriate ways to facilitate participation is a pressing concern. The TRC has responded to this in a number of innovative and inspirational ways. Throughout the statements, ceremonial supports through contact with sacred objects, emotional support through touching and encouraging words and empathetic gestures were provided. This is startlingly different from court processes which tend to isolate witnesses and

[6] Ibid.

> where proceedings are typically interrupted when a witness breaks down in tears...[7]

[35] Further, we note that GNL again points to the fact that it participated in drafting the TOR and implies that such participation gives them a superior understanding of the TOR, by citing what was "intended". Such an argument does not hold water. Requiring formal hearings for death investigations may very well have been in the minds of GNL drafters. Holding circles may have been in the mind of the Innu drafters. We cannot see into the minds of the drafters. We can only look at what has been drafted and what has been left to us to decide.

[36] Section 5(1) of the TOR states:

> ***5.*** *(1) The mechanisms by which the inquiry is to be conducted shall include*
> *(a) formal and informal hearings;*
> *(b) research studies;*
> *(c) inspections and investigations;*
> *(d) interviews and surveys; and*
> *(e) written submissions.*

[37] We see no compelling argument that formal hearings are required for the death investigations.

[38] We turn now to GNL's last objection.

(v) Objection Five: Orders Run Afoul of the Prohibition on Making Findings of Civil Liability or Criminal Fault

[39] GNL explains this objection as follows:

> *Fourthly, the draft orders as presented are too focused on attempting to find out the specifics of who was at fault, which is contrary to subsection 10(5) of the Order and have lost sight of the systemic issues of the child protection system that the Inquiry is mandated to examine. While we can certainly understand the families' desires to find answers, we are concerned there is a potential drift away from the Inquiry mandate.*

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[7] Jula Hughes, "Home Truths About Truth Commission Processes – How Victim-Centred Truth and Perpetrator-Focused Adversarial Processes Mutually Challenge Assumptions of Justice and Truth" (2012), online (SSRN): <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231948>.

> *Each of these orders proposed to investigate the role of out-of-province individuals or organizations. We are advised that the Inquiry has received documents from these individuals and organizations, which may be used in your investigations....We are concerned about possible delays...*
>
> *Lastly, we are also concerned that some of the orders are seeking to lay blame in a manner that is problematic in light of the Inquiry's mandate set out in the Order...*
>
> *We have asked the Department of Children, Seniors and Social Development to review the specifics of each "order". As such we may have further comment to provide.*

[40] Lead Counsel notes that the 4(2) does not limit the investigations to systemic issues.

[41] Further, she notes that the Orders do not make findings of civil or criminal liability and that inquiries are permitted to find fault. In support for her argument, she directs us to Cory, J. in *Canda (Attorney General) v. Canda (Commission of Inquiry on the Blood System)*[8] where he says:

> *A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fac and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of the commissioner. They are not enforceable and do not bind courts considering the same subject matter.*

[42] Counsel for the Mistenapeo/Piwas Family also cites this decision in her argument. She says:

> *29.Further, s. 10(5) cannot be so far extended that it prevents the Commission from fulfilling its role; the investigations must still inform the Commissioners about what happened and why. It is misleading to suggest that the Commission is in some way barred from making important findings of fact or from conducting a full investigation because of potential civil or*

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[8] *Canda (Attorney General) v. Canda (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para 34.

criminal liability. If there is a risk of legal liability, the Commission would need to take additional procedural steps to give notices of misconduct and may need to avoid using specific names or language in its final report. However, there is no absolute bar that would limit an investigation, an adverse finding of fact, or a finding of misconduct. We note the Supreme Court of Canada's decision in Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System) (the "Krever Inquiry").[9] *In this decision, Justice Cory summarized a number of basic principles applicable to inquiries:*

> (a)(i) a commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;
>
> (ii) a commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe.
>
> (iii) It follows from (i) and (ii) above that a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made.
>
> (b) a commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals;
>
> (c) a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference;
>
> (d) a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability;
>
> (e) a commissioner must ensure that there is procedural fairness in the conduct of the inquiry. *[emphasis added]*[10]

[43] Likewise, the Innu Nation disagrees that the Order presume blame or attempt to assign criminal or civil liability. It states:

> *The Province stated that the drafts as they currently are written attempt to find out who was at fault, rather than looking at the systemic issues*

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[9] *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 57.

[10] *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 29.

> *of the child protection system. It also suggests that some of the text assumes blame.*
>
> *We do not agree with this assertion. We agree that these documents should be written in way that is not pre-emptive about findings. However, we do not find the current text pre-emptive. Should the Inquiry wish to make edits in specific lines for this purpose we are open to that, but need to move forward now in the interests of time.*
>
> *These are uncomfortable things to talk about in these investigations, and we cannot shy away from it. We do not have a concern with these documents raising questions about certain organizations or certain individuals, as long as the question does not decide the answer. Frankly, it is likely to be more efficient at this stage, so that relevant questions can be examined, and any person or organization who may wish to contribute has a fair opportunity to do so. We do not want any further delay. In the result, Inquiry findings might reference individuals or organizations, that is a normal part of Inquiry reports. This is different than making a finding of civil or criminal liability.*

Analysis of Objection Five

[44] We agree with and adopt the submissions of the Innu Nation, the Mistenapeo/Piwas Family and Lead Counsel. We find that GNL's objections on this matter are without merit.

[45] We note that under Objection Two GNL expresses a desire that the cause and the manner of death be examined. Under their final objection, they suggest systemic issues must be investigated under 4(2). On the one hand they are objecting because the Orders are not specific enough and on the other, that they are not systemic enough.

[46] We further note that GNL expresses concern about delays yet hold out the possibility of making further submissions should the Department of Children Seniors and Social Development ("CSSD") choose to offer comment. One would have thought GNL would have consulted with this key line department before submitting their response.

[47] Nonetheless, the Commissioners share concerns about delay. We have noted throughout the two- and one-half years that the Commission has been operating that GNL has failed to meet deadlines set by the Inquiry.

[48] This concludes our analysis of GNL's objections. Our final comments focus on GNL's use of the term "Without Prejudice".

IV. THE USUAL IMPLICATIONS OF "WITHOUT PREJUDICE"

[49] As an aside, we wish to comment on the use of "Without Prejudice" by GNL in its letter of December 17, 2024 outlining its objections to us, the Commissioners. The correspondence was not sent to Lead Counsel who had invited feedback. IN addition to captioning the letter with the words "Without Prejudice", GNL did not circulate their concerns to the other parties.

[50] Having bypassed Lead Counsel, and having written to us directly, we concluded that GNL was seeking a decision on the matters raised within their correspondence. Accordingly, we directed Lead Counsel to circulate GNL's objections to the other GSP's and to Counsel for the Families.

[51] The words "Without Prejudice" are used between parties to a dispute, case, or inquiry to signify that what follows is subject to settlement privilege. Settlement privilege refers to the inability of one side to produce any admissions (contained within communications aimed at settling a matter) before the trier of fact, judge, arbitrator or Commissioner. The purpose of settlement privilege is to facilitate settlement, by allowing parties to discuss their case with frankness and to make admissions they would not otherwise concede, with the safety of knowing that such frankness and any admissions cannot be introduced before the trier of fact, judge, arbitrator or Commissioner.

[52] The without prejudice rule is discussed by our Court of Appeal in *Meyers v. Dunphy*:[11]

> *17 Resolution of the issues in this appeal is aided by considering the fairly succinct description of the rule, its nature, purpose and application, to be found in the comments of Lord Griffiths writing for a unanimous House of Lords in Rush & Tompkins. At pages 739-740, he wrote:*
>
> *The '**without prejudice** rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts v Head [1984] 1 All ER 597 at 605-606, [1984] Ch 290 at 306:*

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[11] *Meyers v. Dunphy*, 2007 NLCA 1, 2007 CarswellNfld 7.

> *That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed [sic] Clauson J in Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.*

[53] The Alberta Court of Appeal echoes a similar view in *Schwartz Estate v. Kwinter*,[12]

> *23 In* Mahe *the Court of Appeal ruled at paras. 8 and 9:*
>
> *...Offers of settlement are always privileged, which means they cannot be entered into evidence as admissions or otherwise:* ***Leonardis v. Leonardis****, 2003 ABQB 577, 50 Alta. L.R. (4th) 56, 36 C.P.C. (5th) 82, 43 R.F.L. (5th) 144 at para. 3; Holizki Estate v. Alberta (Public Trustee), 2009 ABQB 260, 462 A.R. 127, 75 C.P.C. (6th) 133 at para. 60. Rule 173 [new rule 4.28] confirms that they are not to be disclosed to the court until all questions excepting those relating to costs have been decided. The privilege over settlement offers is subject, however, to an exception that they can be referred to when costs are addressed.*
>
> *Not all privileges are of perpetual duration. For example, the litigation privilege ends when the litigation (and any collateral litigation) is over:* ***Blank v. Canada (Minister of Justice)****, 2006 SCC 39, [2006] 2 S.C.R. 319. The primary purpose of the "without prejudice" settlement privilege is to encourage efforts to resolve the dispute, by giving assurances that any concessions of fact or liability in the negotiations* ***and the offer***

[12] *Schwartz Estate v. Kwinter*, 2011 CarswellAlta 1279.

> ***will not be shown to the trier of fact***. *Once the litigation (and any related litigation) is concluded, the reason for the privilege is ordinarily spent. As the Court held in* ***Blank*** *at para. 34 with respect to litigation privilege: "Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification". So absent any specific agreement between the parties (or other special circumstances) the "without prejudice" privilege is presumed to expire once the merits of the dispute have been decided.* [Emphasis added].

[54] To speak more plainly, "Without Prejudice" could properly be replaced with "not for the judge's eyes"; or in this case, "not for the Commissioners' eyes". Therefore, in the future, submissions to the Commissioners must not be made without prejudice and must be shared with all parties.

V. CONCLUSION

[55] For these reasons, we find that the objections to the Nature and Scope Orders are substantially without merit.

[56] To sum up, we find:

(1) We have the jurisdiction to issue orders that are necessary for us to control our process as long as these orders do not take us outside the TOR;

(2) The decision to not investigate the immediate cause and manner of death does not take the investigations sought by the Families outside the TOR;

(3) Investigations of the child's life prior to coming into care is not the mandate of the Inquiry and will not occur;

(4) Formal hearings are not required for the 4(2) investigations;

(5) The Nature and Scope Orders do not offend s. 10(5) of the TOR which precludes us from making findings of civil or criminal liability.

[57] The Commissioners thank Counsel for their helpful submissions.

DATED at St. John's, NL this 12th day of February 2025.

James Igloliorte
Commissioner

Dr. Michael Devine

Anastasia Qupee