

Form 301

Court File No.

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**FEDERAL COURT**

BETWEEN:

**MAUREEN MILLER and GERVASE MILLER**

Applicants

- and -

**THE ATTORNEY GENERAL OF CANADA,**  
representing His Majesty the King in Right of Canada

Respondent

Application Under Rule 301

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants. The relief claimed by the applicants appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Halifax, Nova Scotia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: \_\_\_\_\_

Issued by: \_\_\_\_\_

Address of local office: 1720-1801 Hollis Street  
Halifax, NS B3J 3N4

TO: **HIS MAJESTY THE KING**  
**C/O THE ATTORNEY GENERAL OF CANADA**  
284 Wellington Street  
Ottawa ON K1A 0H8

## APPLICATION

1. This is an application for judicial review respecting a decision by the Royal Canadian Mounted Police (RCMP), dated September 2, 2022, under section 41 of the *Access to Information Act*, RSC 1985, c A-1 (the “Act”).

### Background

2. On May 4, 1990, 17-year-old Clayton Miller attended a party at the Colliery Lands Park, in an area known as “The Nest” in New Waterford, Nova Scotia. Sometime after 10:00 p.m., at least six members of the New Waterford Police raided the party, arresting ten people in total. Over 36 hours later, on Sunday May 6, 1990, Clayton’s body was found face down, in a shallow stream by The Nest.
3. In January 1991, the Solicitor General of Nova Scotia ordered the RCMP to investigate the death of Clayton Miller.
4. On May 1, 1992, Mr. and Mrs. Miller sent an access to information request to Nova Scotia Information Access and Privacy, asking for statements taken by the RCMP prior to the January 1991 investigation. This request was forwarded by Nova Scotia Information Access and Privacy to the RCMP on May 5, 1992.
5. On May 29, 1992, Mr. Miller received a letter from the RCMP in response to the May 1, 1992, access to information request, stating that the RCMP would not release the information pertaining to RCMP investigations.
6. On September 23, 1993, the RCMP again wrote Mrs. Miller in response to the May 1, 1992, access to information request, stating that information pertaining to the RCMP investigation would not be released until twenty years following Clayton Miller’s death. Because of this letter, Mr. and Mrs. Miller waited twenty years to file another access to information request to the RCMP.
7. On June 18, 2010, Mr. and Mrs. Miller submitted an access to information request to Nova Scotia Information Access and Privacy, asking for statements taken by the RCMP prior to the

January 1991 investigation. This request was forwarded by Nova Scotia Information Access and Privacy to the RCMP on May 5, 1992 (the “First ATI Request”) for:

Statements/Video/Audio of Police and/or RCMP questioning/interviewing Dale MacKinnon, Willie MacNeil, Donald (Duckie) MacNeil (now in prison), all/any people questioned regarding my son, Clayton’s death (including polygraph results).

All video surveillance of New Waterford Police Station Cells for May 4, 1990, and May 5, 1990.

All pictures and/or video taken at the Nest Area when/or after discovery of my son’s body.

All pictures and/or video taken during exhumation and re-autopsy of my son’s body before on December 27, 1993.

All medical/forensic correspondence to and from doctors and officials (including local police, RCMP, Government/and Officials).

All and any information pertaining to Clayton’s clothes and personal possessions when in the hands of the above.

All and any reports/results (in any form) resulting from questioning and/or investigating.

All and any audio recordings (taken by the Cecchetto family) of alleged call/s from my husband.

Audio interview of David (Bree) Cadden with RCMP.

In reference and as requested, we have researched and listed the following locations for the above material:

- RCMP H Division, Halifax, NS
- RCMP Reserve Detachment, Sydney-Glace Bay Highway NS
- RCMP Sydney Detachment, Alexandra St., Sydney, NS (note: at time of this detachment being closed, I phoned Staff Sgt. Bill Fogarty, in charge of Clayton’s file, at that detachment to inquire as to where Clayton’s information/case file would go; he informed me it would be sent to H Division in Halifax.)
- CBRP Department, Sydney, NS (as instructed to me by Jean Gignon of H Division in Halifax.)

8. On June 29, 2010, Mrs. Miller received a letter from RCMP Sgt. Kent Swim acknowledging receipt of the First ATI Request and providing the RCMP file number A-2022-02093 (GA-3951-3-03266/10) (the “RCMP File A-2022-02093”).
9. In October 2011, Mr. and Mrs. Miller contacted the law firm Wagners to request legal assistance with the First ATI Request and investigation of the death of their son. Shortly

thereafter, Wagners informed the RCMP that Wagners was now representing Mr. and Mrs. Miller and to direct all future correspondence to Wagners.

10. On August 1, 2012, the RCMP provided the first disclosure of information to Wagners in response to the First ATI Request (the “First Disclosure”). The First Disclosure was heavily redacted and included a large number of documents which stated “duplicate copies” at the top with the rest of the page blank.
11. On September 19, 2012, Wagners filed a refusal complaint with the Office of the Information Commissioner of Canada (OIC) for items not produced as requested in the First ATI Request.
12. On October 15, 2012, Wagners received correspondence from the OIC confirming receipt of Wagners’ refusal complaint dated September 19, 2012. The OIC assigned file number 3212-00822 to this complaint.
13. On August 12, 2015, the RCMP provided a second disclosure of information to Wagners in response to the First ATI Request (the “Second Disclosure”).
14. On April 12, 2016, Wagners wrote to the RCMP asking to advise whether the negatives, and paraffin blocks and slides from Clayton’s autopsy were in the RCMP Halifax District’s possession at that time or at any time previously. Wagners also requested that the RCMP send Wagners a copy of any and all documentation the RCMP may have had regarding the paraffin blocks and slides from Clayton’s autopsy.
15. On May 4, 2016, the Department of Justice wrote on behalf of the RCMP, informing Wagners that the Halifax District RCMP had gone through their files and did not find any exhibits, exhibit reports, or negatives. Two documents that referred to slides were attached to this correspondence.
16. On April 22, 2016, Christian Picard of the OIC wrote Wagners, informing them that while the RCMP in Nova Scotia had some colour pictures of the autopsy, pictures are usually considered exhibits. To access the originals, Wagners may need to have a court order or have a subpoena issued. Mr. Picard also noted that he was still waiting on a response from the RCMP regarding the paraffin blocks and slides from Clayton’s autopsy. Given this, Mr. Picard asked if Wagners

would consider the complaint as settled and maintained that any additional information could be obtained through a new access request.

17. On April 22, 2016, Wagners wrote Mr. Picard requesting to wait for the response from the RCMP regarding the paraffin blocks and slides before considering if the complaint was settled.
18. On April 22, 2016, Mr. Picard informed Wagners that the RCMP confirmed they do not have paraffin blocks and slides from Clayton's autopsy. Mr. Picard again requested that the complaint be considered closed.
19. On July 6, 2016, Wagners informed Mr. Picard that Wagners did not agree to conclude the complaint as settled.
20. On September 11, 2016, the RCMP provided a third disclosure of information to Wagners in response to the First ATI Request. In the covering letter, the RCMP states that "[t]his completes our review process of the requested records."
21. On February 26, 2019, Mr. Picard again requested that Wagners consider the investigation for the complaint as settled, reiterating that Mr. and Mrs. Miller can make new requests at any time.
22. On April 23, 2019, Wagners informed Mr. Picard that they would seek instructions from Mr. and Mrs. Miller regarding the complaint.
23. On July 4, 2019, Yves Marineau, taking over from Mr. Picard, again requested that Wagners consider the investigation file regarding the complaint as settled, and for Wagners to provide final representations, if any.
24. On July 23, 2019, Wagners wrote Mr. Marineau, stating that Wagners did not consider the complaint concluded.
25. On July 23, 2019, Mr. Marineau wrote Wagners that the OIC had completed its investigation. Therefore, pursuant to section 35 of the Act, the OIC offered Wagners the opportunity to provide the OIC with any additional and final representations or comments Wagners may have before the OIC finalized its investigation and provided its report of findings.

26. On August 19, 2019, Wagners wrote the OIC, informing it that Wagners did not consider the matter concluded or settled and did not consent to the conclusion of the complaint given the continued investigations into the matter by the Nova Scotia Serious Incident Response Team.
27. When Wagners did not receive a response from the OIC or the RCMP, Wagners sought instructions to file a second Access to Information Request. Wagners did not receive correspondence from the RCMP and the OIC regarding the First ATI Request until September of 2022. By this time, a second access to information request and the OIC complaint had already been initiated.
28. On November 27, 2019, Wagners submitted a second access to information request to the RCMP for production of complete, unredacted and unedited copies of the following, held with the Halifax, Reserve Mines, and Sydney, Nova Scotia detachments as well as the Ottawa, Ontario detachment (the “Second ATI Request”):
- All records including reports, photographs, photographic negatives, X-rays and X-ray negatives;  
The original autopsy transcript regarding Clayton Miller.  
All videos and/or recordings taken by RCMP associated with Clayton Miller’s case, including but not limited to statements provided by witnesses, including but not limited to Daniel (Danny) Perfect.
29. On December 5, 2019, the RCMP confirmed receipt of the Second ATI Request, providing RCMP file number A-2019-08871(GA-3951-3-03266/10).
30. On March 1, 2021, the RCMP indicated that it was unable to locate records requested in the Second ATI Request.
31. On April 1, 2021, Wagners filed a complaint to the OIC regarding the Second ATI Request pursuant to subsections 30(1)(a) and 30(2) of the Act.
32. On April 16, 2021, the OIC acknowledged Wagners’ complaint dated April 1, 2021, under the Act regarding the Second ATI Request and provided OIC file number 5820-04503 (the “OIC File 5820-04503”).
33. On January 6, 2022, Wagners was contacted by Jenifer Barton, the OIC investigator assigned to the reasonable search complaint for the Second ATI Request. Ms. Barton inquired if

Wagners was still interested in pursuing the complaint. Ms. Barton wrote that, according to the RCMP, the RCMP did not conduct the substantive inquiry into the death of Clayton Miller. Ms. Barton asked for Wagners to provide details on why Wagners believes the RCMP created or controls the requested records.

34. On January 16, 2022, Wagners spoke with Ms. Barton via telephone. During the conversation, Wagners advised that the Applicants believe the RCMP have access to responsive records that were not disclosed. Though the New Waterford Police began the investigation of Clayton Miller's death, the RCMP took over the investigation early on and undertook a number of subsequent investigations. On the same day, Ms. Barton provided Wagners with a summary of the conversation.
35. On January 20, 2022, Ms. Barton contacted Wagners to confirm (1) that the OIC had permission to share the representations made by Wagners with the RCMP, and (2) that no responsive records were received for the Second ATI Request. Wagners responded the same day to confirm that the OIC had permission to share these representations and that Wagners had not received records related to the Second ATI Request.
36. On February 4, 2022, Ms. Barton contacted Wagners to confirm that the Second ATI Request was for (1) all records including reports, photographs, photographic negatives, X-rays and X-ray negatives; (2) the original autopsy transcript regarding Clayton Miller; and (3) all videos and/or recordings taken by RCMP associated with Clayton Miller's case including but not limited to statements provided by witnesses, including but not limited to Daniel (Danny) Perfect." Wagners responded the same day to confirm that this was an accurate summary of the requested records.
37. In a letter from the RCMP dated September 2, 2022, the RCMP provided a disclosure of information in response to the Second ATI Request. The letter indicated that the RCMP had now provided a copy of all the information to which Mr. and Mrs. Miller were entitled.
38. On November 8, 2022, Wagners received an email from Ms. Barton, clarifying whether the reasonable search investigation could exclude the records that were processed for the First ATI Request.



39. On November 9, 2022, Wagners responded to Ms. Barton confirming that she did not need to investigate records that had already been processed for the First ATI Request to prevent unnecessary duplication of work.
40. On January 25, 2023, the OIC provided Wagners with the final report for the First ATI Request, OIC File 3212-00822 (“First OIC Final Report”), in which the OIC concluded the following:
- a. the complaint by Wagners to the OIC regarding the RCMP’s response to the First ATI Request had been well founded;
  - b. the RCMP had now conducted a reasonable search for records in response to the First ATI Request;
  - c. the information withheld/exempt on pages 2911-2918, 2920-2931, 2948, and 2949 of the records met the requirements of subsection 13(1) without the need to examine discretion;
  - d. the RCMP’s exercise of discretion was reasonable regarding to withhold/exempt page 1981 of the records pursuant to subsection 16(1)(b); and
  - e. the information throughout the records withheld/exempt pursuant to subsection 19(1) met the requirements of the exemption without the need to examine discretion.
41. After receiving the First OIC Final Report, the Applicants made an application for judicial review (T-501-23) regarding the redactions and exemptions made by the RCMP, which was filed with the Federal Court on March 3, 2023, amended May 3, 2023. Given that the final report for OIC File 5820-04503 was outstanding, the Applicants did not include the reasonable search complaint in the March 3, 2023 application for judicial review.
42. On June 8, 2023, the OIC provided Wagners with the final report for OIC File 5820-04503 (“Second OIC Final Report”), in which the OIC concluded the complaint regarding the RCMP’s response to the Second ATI Request had been well founded and that the RCMP had now conducted a reasonable search for records in response to the Second ATI Request.

### **The Relief Requested**

43. Further to the Second OIC Final Report, the Applicants bring an application for an order that the RCMP (i) complete a reasonable search for responsive records, and (ii) disclose any

responsive records and relevant information of the H Division, Reserve Detachment Sydney-Glace Bay, and Sydney RCMP concerning the death of their son, Clayton Miller, on May 5, 1990, that have not been produced.

### **The Grounds for the Application**

44. Subsection 41(1) of the Act provides that a person who makes a complaint described in subsection 30(1) and who receives a final report of the OIC under subsection 37(2) in respect of the complaint, may apply to the Court for a review of the matter that is the subject of the complaint.
45. The subject of the complaint this matter is the reasonableness of the search of records by the RCMP in response to the Second ATI Request.
46. Following an access to information request, institutions have a duty to conduct a reasonable search for records. That is, one or more experienced employees, knowledgeable in the subject matter of the request, must make reasonable efforts to identify and locate all records reasonably related to the request.
47. The obligation to conduct a reasonable search is reflected in the provisions of the Act. Subsection 4(1) of the Act provides that any Canadian citizen or permanent resident has a right to be given access to any record under the control of a government institution. Subsection 4(2.1) of the Act provides that a government institution shall “make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations provide timely access to the record.”
48. With respect to the grounds for judicial review, the Applicants allege that in the RCMP’s response to the Second ATI Request, the RCMP erred in law in
  - a. not taking appropriate steps to locate the responsive records;
  - b. not undertaking a sufficiently broad search for the records;
  - c. not engaging experienced employees with an adequate knowledge of the subject matter of the request to undertake the search; and
  - d. not making reasonable efforts to minimize the number of responsive records that have not been located.

49. The onus is on institutions to provide evidence that they conducted a reasonable search.

50. The RCMP have not provided sufficient evidence concerning the Second ATI Request regarding:

- a. the specific steps made to locate the records;
- b. the scope and parameters of the search;
- c. the retention and disposition schedules that apply to the records;
- d. the employee that completed the search; or
- e. the reason the institution is satisfied that no more responsive records exist.

### **Supporting Material**

51. This application will be supported by the following material:

- a. affidavit evidence of Maureen Miller and supporting documents, including the aforementioned correspondence;
- b. affidavit evidence of Richard Crossman and supporting documents, including the aforementioned correspondence, decisions provided to Wagners regarding the RCMP First ATI Response, the RCMP Second ATI Response, the RCMP Final Report for the First ATI Request, the RCMP Final Report for the Second ATI Request, the First OCI Final Report, and the Second OIC Final Report;
- c. transcript of cross-examinations(s) on affidavit, if any; and
- d. a memorandum of fact and law.

July 12, 2023



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