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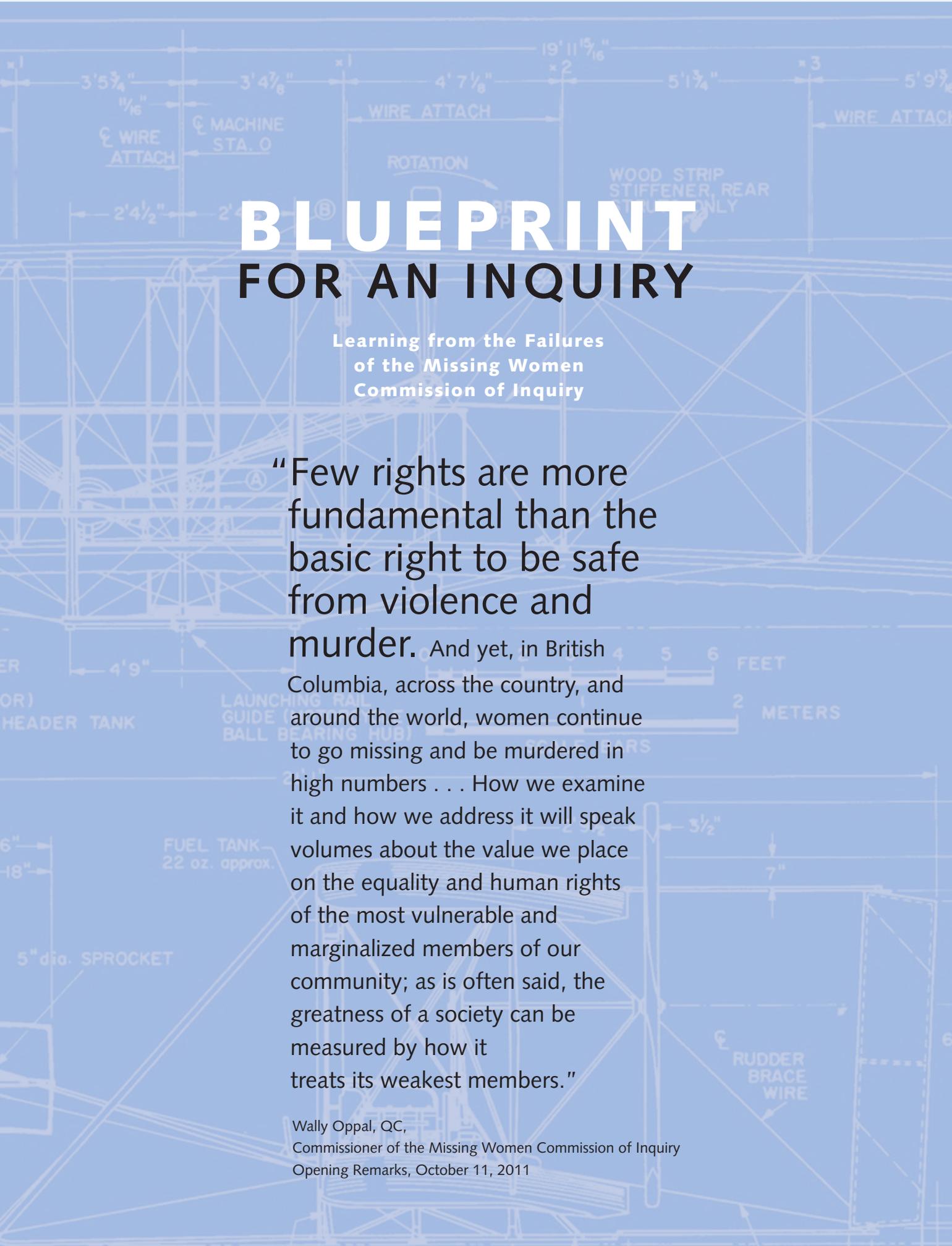
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# BLUEPRINT FOR AN INQUIRY

Learning from the Failures  
of the Missing Women  
Commission of Inquiry

“Few rights are more fundamental than the basic right to be safe from violence and murder. And yet, in British

Columbia, across the country, and around the world, women continue to go missing and be murdered in

high numbers . . . How we examine it and how we address it will speak volumes about the value we place on the equality and human rights of the most vulnerable and marginalized members of our community; as is often said, the greatness of a society can be measured by how it treats its weakest members.”

Wally Oppal, QC,  
Commissioner of the Missing Women Commission of Inquiry  
Opening Remarks, October 11, 2011

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# **BLUEPRINT FOR AN INQUIRY**

Learning from the Failures  
of the Missing Women  
Commission of Inquiry

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## Executive Summary

From the perspective of the hundreds of marginalized women who protested the Missing Women Commission of Inquiry (“the Inquiry”) every morning for the first month of hearings, the Inquiry was an absolute failure. This perspective is shared by the B.C. Civil Liberties Association, Pivot Legal Society and West Coast LEAF, the human and democratic rights organizations that produced this report.

The Inquiry was set up to examine the problems arising from investigations of the disappearance and murder of dozens of women in Vancouver’s Downtown Eastside (“DTES”), and particularly the investigation of serial murderer Robert William Pickton. Out of the failures of the Inquiry, which are well documented and understood in the affected communities, the hope of the authors is that a positive legacy can still be uncovered.

If nothing else, this Inquiry demonstrates what should not be done in conducting a public inquiry involving marginalized communities. It therefore functions as a useful lesson for similar inquiries in the future, no matter where they take place. This report does not focus on the nuances of B.C. provincial law, but instead on broad trends and procedural approaches that future commissioners of inquiry and their staff may usefully adapt to the particularities of their own jurisdictions.

If there were only one recommendation to come from this report, it would be that commissions of inquiry that intend to work with marginalized populations as witnesses, or inquiries that are called in response to the concerns of marginalized communities, must consult thoroughly at every stage with those communities and the organizations that work with those communities.

### **Consultation and Collaboration: Voices of the community excluded**

The Inquiry excluded the voices of individuals and communities that it should have worked the hardest to include: Aboriginal women, sex workers, women who use drugs, and women living in poverty who were most affected by the Pickton murders and the resulting investigations, and who remain at extremely high risk for violence.

The Commission repeated the very mistakes that led to serial murderer Robert Pickton being able to operate with impunity in the first place – the voices of marginalized women were shoved aside while the “professional” opinions of police and government officials took centre stage. The focus of the Inquiry was directed away from systemic issues, targeting instead individual participants in the system who may not have fulfilled their job requirements as expected.

Recommendations:

1. Commissions must ensure that marginalized individuals and groups who could contribute to the Commission's work have meaningful opportunity, including funding and legal representation if necessary, to participate in inquiry processes.
2. Commissions should prioritize using the infrastructure, expertise and staff of existing community organizations to facilitate the participation of marginalized groups by providing those groups with additional resources to support the commission, rather than try to create new resources.
3. The consultation process should include an educational component for commission staff to assist them in understanding culturally appropriate and effective ways to gather evidence and conduct itself.
4. Where the establishing government body fails to support the full participation of marginalized communities, a commissioner must act to protect their participatory rights. These steps should start with consultation with affected groups about best responses to the government interference and end with, if necessary, the resignation of the commissioner.
5. For all future public inquiries, compensation for commissioners of inquiries should be commensurate with judicial salaries and commission counsel salaries should not exceed that of Crown Counsel.

**Terms of Reference: Critical themes left unexplored**

Limitations on the terms of reference, and an artificially narrow interpretation of those terms of reference by the Commission, left systemic concerns around socio-economic marginalization off the table, themes of organized crime and police corruption troublingly unexplored, and key witnesses uncalled. Financially, the Commission spent twenty times the operating budget of the major drop in centre for sex workers in Vancouver, and yet left many of the community's most pressing questions unanswered.

Recommendations:

6. Terms of Reference should be developed in consultation with communities that are directly affected by the prospective inquiry or who have called for the inquiry.

7. Those whose conduct is being investigated by the inquiry should have an extremely limited role in influencing the development of the terms of reference.
8. Given the nature of an inquiry as seeking systemic reforms, terms of reference must be broad enough to capture systemic factors and causes.

**Supporting the Participation of Witnesses:  
Unbalanced legal representation and a lack of support**

The failure to provide funded counsel or adequate support systems deterred potential marginalized witnesses from attending to give evidence. For example, the woman who had been stabbed by Pickton but saw charges against him stayed refused to attend to give testimony, despite her central importance to one of the terms of reference of the Inquiry. Instead of consulting with the community or First Nations when the Province refused funding for recommended legal counsel, the Commission appointed two lawyers who would “represent” the diverse Downtown Eastside community and the equally diverse voices of First Nations people.

Recommendations:

9. Psychosocial, legal and any other supports that are reasonably required to facilitate participation by marginalized witnesses should be provided to them.
10. Supports must be culturally appropriate, adequately resourced, and available from well before a witness gives their testimony until well after their testimony is complete. Inquiries should work in partnership with established community organizations to design and deliver supports, while understanding that these organizations have limited funding that is entirely focused on their core mandates. Additional financial support may be required for these groups to assist.
11. The possibility of amnesty for witnesses must be considered and publicly debated in the context of each individual inquiry.
12. Procedural protections for marginalized witnesses who fall into protected grounds under provincial or federal human rights legislation should be established at the outset of proceedings, and can include anonymity, publication bans, limits on cross examination, and other legal protections.

13. If a marginalized witness claims this protection, the onus should be on any party challenging those protections to demonstrate why the witness is not entitled to the protection requested.

**Quality of Evidence:**

**Compromised by delay, non-disclosure and a lack of fair legal representation**

Although many inquiries have taken place concurrent with, and prior to, criminal investigations and charges, the Inquiry was delayed until after Robert Pickton's criminal trials were complete. Many women died while they waited for the Inquiry to be called, given the harsh and brutal conditions for women in Vancouver's Downtown Eastside. Others who participated in the Inquiry were asked to remember events that had happened ten or fifteen years previously.

While police had comprehensive paper records of their actions at the time, community witnesses only had their own memories to rely upon. Even so, the lawyers for the families saw many of their clients' requests to the Commission for disclosure and witnesses ignored for months and then refused. The results of family requests to the Commission were leaked to the media by Commission staff before they were decided in the hearing.

Recommendations:

14. Inquiries should be launched as soon as is practically possible after the event in question.
15. Except where exemptions already exist in the law or the terms of reference or the rules of the commission itself, commissioners should follow the common law rules around disclosure.
16. Applications by parties for disclosure or the calling of particular witnesses should be decided in a timely manner, as a matter of convenience for all where those applications involve evidence that may impact on upcoming witnesses, but especially where the requests come from marginalized participants.
17. Parties must disclose documents in a timely manner, and documents should be disclosed in advance of the calling of witnesses. Commissioners of inquiry must not hesitate to use court processes to compel timely and complete document disclosure.

### **Rules of Evidence: A missed opportunity for truth and reconciliation**

Instead of restructuring the rules of evidence of the Inquiry when the Province refused to fund the participation of marginalized people in the hearings, the Inquiry instead established a parallel process for community that could – because of its design – have no influence on the fact finding mandate of the Commission.

Recommendations:

18. Procedural protections for marginalized witnesses must not come at the expense of their ability to influence equally the purpose and outcomes of the inquiry.
19. Creative approaches for collecting evidence should be explored, such as trained statement-takers from supportive community organizations, and facilitated to ensure that witnesses are able to share their information completely.

### **Independence: Conflicts of interest and interference abound**

Conflicts of interest and interference were prevalent from the outset. A former Attorney General who had suggested there would be little to learn from an Inquiry was appointed as Commissioner. This Commissioner appointed a former Vancouver Police Department officer as Executive Director, a staff member who would go well beyond the role of Executive Director by participating in the preparation of an “independent” expert report prepared by Peel Regional Police Department. This “independent” report, in part examining RCMP conduct, was prepared by the Peel Police which itself had officials under investigation by the RCMP for corruption. To cap these real and perceived conflicts, the Province directly interfered with the Commission by refusing to fund the full participation of parties the Commissioner identified as central to ensuring the fairness and efficacy of the Inquiry.

Recommendations:

20. When a public inquiry targets in whole or in part the activities of the police, current or former members of the police should not be hired to organize or coordinate the inquiry, or be retained to prepare supposedly “independent” reviews of the evidence that will be heard at the inquiry.
21. Experts chosen by a commission of inquiry should be chosen solely on the basis of qualifications, relevance, availability and independence, not because they are available at no cost and are soliciting participation.

22. When determining funding levels for public interest or community interveners at a public inquiry, a rough balance should be struck between the legal resources available to government and non-government interests represented. The principle of the indivisibility of the Crown should govern when evaluating the amount of public funding dedicated to protecting and promoting government and government agent interests as compared to public funding dedicated to particular community or public perspectives.
23. Organizations and individuals in conflicts of interest, following the definition of the Supreme Court of Canada and the Law Society of the relevant jurisdiction, should not be hired to be experts or staff of an independent inquiry.

## Introduction

Each Valentine's Day since 1991, the women of the Downtown Eastside (DTES) have marched through the streets, demanding justice for their missing and murdered sisters. They, along with thousands of other concerned citizens, mourn the loss of more than 60 women from their neighbourhood. They commemorate the lives of young Aboriginal women that have gone missing along Highway 16, the "Highway of Tears," and the 582 Aboriginal women and girls that are known to be missing across Canada. The memorial march is a powerful reminder of the ongoing epidemic of violence against marginalized women in Canada, particularly against Aboriginal



Fathima Cader photo

women, sex workers and women living with addictions – an atrocity that should be unimaginable in a country that sees itself as a protector of human rights and equality.

For decades, the government, police and criminal justice system have failed to provide meaningful protection to women in the DTES community, who have been subject to extreme violence and abuse. Throughout the 1990s, despite calls from families and members of the community to investigate the disappearance of their loved ones, the police and Crown were unresponsive, treating community concerns in a dismissive and discriminatory manner. As a result, many community members have developed a profound lack of faith in the systems intended to protect us all.

Community concern about the failure of the police and Crown to investigate and address this threat to vulnerable women prompted the launch of the Missing Women Commission of Inquiry (the "Inquiry"), which was mandated to examine what went

wrong during the investigations into the disappearance of women in the DTES from 1997 to 2002. The Inquiry offered an important opportunity for fact finding and healing, truth and reconciliation.

Unfortunately, the structure and direction that was set by the government of British Columbia and many of the subsequent design and implementation decisions made by the Commission were deeply flawed. From the perspective of the community organizations that serve women, Aboriginal people, sex workers, and drug users in the DTES, the Inquiry failed in a number of key respects. As a result, the Inquiry was unable to reconcile law enforcement and the women of the DTES, or uncover what went wrong in the investigation process.

This report will begin with an overview of the role of public inquiries as a tool for truth seeking and reconciliation. It will then offer a brief description of the establishment of the Missing Women Inquiry. Finally, it will describe six procedural problems with the Missing Women Inquiry – lack of consultation with marginalized community members and the organizations that support those communities; omission of key themes in the terms of reference; lack of support for community participation; inadequate supports for witnesses; issues with quality of evidence; and a lack of independence – and identify better practices that could be used to help future inquiries fulfil their mandates in a way that is more responsive to the needs of marginalized communities.

## Public Inquiries: An Overview

Public inquiries generally fall into two categories – investigative inquiries and policy-focused inquiries. Commissions that are primarily investigative aim to examine and report on a specific incident or series of events, and are intended to provide an independent, comprehensive, and transparent account of what happened and why. In other words, investigative inquiries look primarily to the past.<sup>1</sup> Commissions may also focus on developing policy in a specific area of public concern, often arising from a tragedy or controversy; in these cases, the Inquiry serves as a mechanism through which the contributing factors can be fully assessed, independent from the institutions of government, and recommendations can be made to address systemic issues and prevent recurrence.<sup>2</sup> These inquiries look primarily to the future.

Some, including the Missing Women Inquiry at issue in this report, combine both functions. This means that they must find a way to reconcile backward-looking, truth-seeking functions with forward-looking, policy-making functions, all while promoting healing and reconciliation among affected individuals and communities.

Because public inquiries are typically concerned with understanding and addressing systemic failures rather than the attribution of *legal* responsibility to particular individuals, they are not bound by the same legal and procedural rules as more traditional legal mechanisms, such as in civil and criminal litigation. They are often more able to depart from strict evidentiary rules to ensure a complete picture of the events in question and to help foster reconciliation among affected communities; although, they must also ensure procedural fairness to the individuals and organizations whose reputations may be at stake. This task, while certainly presenting challenges, is both possible and necessary to ensuring the success of an inquiry like the Missing Women Inquiry.

Public inquiries are governed by provincial or federal laws that provide broad guidelines. However, a Commission is given the freedom to design its own rules of procedure and interpret its terms of reference, within reason. This means that

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1 Report of the Ipperwash Inquiry—Volume 3, p 2.

2 Report of the Ipperwash Inquiry—Volume 3, p 2.

Inquiries have the flexibility to develop rules of procedure that are targeted at both uncovering the truth about the incident(s) in question and fostering broader reconciliation among affected groups. This freedom is also essential to preserving the independence of the Inquiry from the government that established it.

Justice Albie Sachs of the South Africa Constitutional Court reflected on constructing rules that can meet this challenge in the context of the South African Truth and Reconciliation Commission (TRC):

The problem I had [after the Truth and Reconciliation Commission] was: why does so little truth come out in a court of law, when so much emerged from the TRC? It poured out in huge streams, with overwhelming and convincing force. Many of the details and some of the assessments might have been challengeable, but the basic sweep was incontrovertible. One of its achievements was to eliminate denial. Not even the most ardent defenders of the old order could deny the evil that had been done in its name. Court records, on the other hand, are notoriously arid as sources of information. Outside the specific details under enquiry, you learn little. The social processes and cultural and institutional systems responsible for the violations remain uninvestigated.

The answer to this puzzle must lie in the differing objectives of the respective enquiries. Courts are concerned with accountability in a narrow individualized sense. They deal essentially with punishment and compensation. Due process of law relates not so much to truth, as to proof. Before you send someone to jail there has to be proof of responsibility for the wicked details charged. When the penalties and consequences are grave and personalized, you need this constrained mode of proceeding. The nation wishing to understand and deal with its past, however, is asking much larger questions: How could it happen, what was it like for all concerned, how can you spot the warning signs, and how can it be prevented from occurring again? If you are dealing with large episodes, the main concern is not punishment or compensation after due process of law, but to achieve an understanding and acknowledgement by society of what happened so that the healing process can really start. Dialogue is the foundation of repair. The dignity that goes with dialogue is the basis for achieving common citizenship. It is the equality of voice that marks a decisive start, the beginning of a sense of shared morality and responsibility.<sup>3</sup>

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<sup>3</sup> Sachs, Albie. *The Strange Alchemy of Life and Law*. Oxford: Oxford University Press, 2009 at p.84.



Julia Kozlov photo

The Missing Women Inquiry, unlike the South African TRC, does not mark a transition into democracy. However, as will be discussed in the sections that follow, it could have helped to herald a transition from a relationship (between the governed and the governing) based on colonialism,

criminalization, discrimination, mutual distrust and paternalism into a relationship of cooperation, reconciliation and collaboration. So, while the lessons of the TRC may not wholly apply to the Missing Women Inquiry, it serves as a useful example about how to balance the dual goals of reconciliation and credible fact finding.

Is it possible to achieve such lofty, big-picture goals of healing and reconciliation within the confines of a legal procedure? Are we asking too much from an Inquiry process?

The authors of this paper say yes to the first question and no to the second. This paper seeks to explain how a public inquiry is both capable of, and essential to, the goals of truth and reconciliation. And we believe that much of the answer lies in procedural structure – the blueprint of the inquiry process itself.



## Background: The Missing Women Inquiry

**“Aboriginal women continue to be the most at risk group in Canada for issues related to violence, and continue to experience complex issues linked to intergenerational impacts of colonization, particularly those resulting from residential schools and the child welfare system. Ending violence against Aboriginal women and girls lies with both men and women, with both Aboriginal and non-Aboriginal communities. It ends with recognition, responsibility and cooperation. Violence against women ends with restoring the sacred position of Aboriginal women as teachers, healers and givers of life.”**

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

**“This Commission of Inquiry has been urged for many, many years and many groups have urged an inquiry into missing women . . . We look forward to your advice so that we can make recommendations to the appropriate people so that those tragedies that have taken place in the past may be averted.”**

- Wally Oppal, Commissioner of the Missing Women Inquiry, first day of hearings, January 31, 2012

For more than a decade, the families and friends of the missing women, alongside a broad range of community organizations, demanded a full inquiry into the failure to adequately investigate the disappearances of women from the DTES. In reply, the B.C. government argued that it could not hold an inquiry until the criminal proceedings against Robert Pickton were concluded. Many human rights and community groups expressed concern that the memories and evidence that would inform a meaningful public inquiry would deteriorate over time, as the Pickton trial could carry on for an indefinite number of years.

Despite the serious concerns raised by families and community members, the Province of British Columbia did not call an inquiry until 2010, following the finalization of Robert Pickton's conviction on six counts of murder. On September 28, 2010, pursuant to section 2 of the *Public Inquiry Act*, the Province called the Missing Women Commission of Inquiry and appointed Wally Oppal, Q.C., as the Commissioner.<sup>4</sup>

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<sup>4</sup> *Public Inquiry Act* [SBC 2007] Chapter 9.

In the Terms of Reference set out by the Province, the Commission was asked to:

- (a) Inquire into and make findings of fact respecting the conduct of the investigations conducted between January 23, 1997 and February 5, 2002, by police forces in British Columbia respecting women reported missing from the Downtown Eastside of the city of Vancouver;
- (b) Consistent with the *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, to inquire into and make findings of fact respecting the decision of the Criminal Justice Branch on January 27, 1998, to enter a stay of proceedings on charges against Robert William Pickton of attempted murder, assault with a weapon, forcible confinement and aggravated assault;
- (c) To recommend changes considered necessary respecting the initiation and conduct of investigations in British Columbia of missing women and suspected multiple homicides; and,
- (d) To recommend changes considered necessary respecting homicide investigations in British Columbia by more than one investigating organization, including the co-ordination of those investigations.

The Terms of Reference set the direction and objectives for the Inquiry, which was to make findings of fact and recommendations in two key areas. First, the Inquiry would examine the way in which the Vancouver Police Department (VPD) and the Royal Canadian Mounted Police (RCMP) handled the investigations conducted between January 23, 1997 and February 5, 2002 respecting women reported missing from the Downtown Eastside of the city of Vancouver. Second, the Inquiry would look at the decision of the Attorney General's Criminal Justice Branch to enter a stay of proceedings on charges against Pickton when he was alleged to have attempted to murder a woman from the DTES in 1998.

Despite widespread disappointment with the narrow terms set for the Inquiry, which excluded many broader systemic issues from consideration, the families, friends and organizations that were connected with the missing women remained committed to the Inquiry and its potential to create positive change. The Inquiry offered an opportunity not only to identify the systems and decisions that lead to the failure of law enforcement to address the ongoing disappearances of women on the DTES, but also to make recommendations to help foster a better relationship between the justice system and marginalized members of society, including Aboriginal women, sex workers and women living with addictions.

The potential outcomes of the Inquiry were many.

First, it provided an opportunity for those affected by this tragedy to have their voices heard and their perspectives honoured. With the right procedures and supports in place, the families of the missing women could be heard in a context where their experiences and perspectives were valued. As such, the Inquiry presented an opportunity to build on and develop best practices to support vulnerable witnesses in coming forward and participating in legal proceedings. The Commission could take innovative (and necessary) steps to ensure that women who live with many or all of the same vulnerabilities as the missing women could come forward to share their experiences and insights.

Second, it was an opportunity to create a public record and make findings of fact regarding the failings of the missing women investigations. It was an opportunity for interested parties and the public to learn the truth about the missing women investigations by enabling access to otherwise confidential government information. Further, the Inquiry could serve to educate the public about longstanding issues with the criminal justice system and law enforcement, and the often problematic interactions between police and marginalized communities. Past inquiries, such as the Ipperwash Inquiry, and the Berger Inquiry into the Mackenzie Valley Pipeline, have made public education key objectives of their work, and have successfully raised public awareness about the issues within their mandates.<sup>5,6</sup> Similarly, the Missing Women Inquiry could raise awareness about the way the criminal justice system has failed to serve many vulnerable individuals.

Third, the Inquiry was an important opportunity to hold those who failed to ensure the safety of vulnerable women accountable – vulnerable women who included sex workers, Aboriginal women, women living with addictions and women living in poverty.

Fourth, this type of public Inquiry had the potential to lead to important structural changes to the police and criminal justice system response to violence against women. Even within its narrow terms of reference, it could have provided a meaningful exploration of how and why marginalized women are at such serious

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5 [www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html)

6 [www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=238336&objAction=browse&redirect=3&redirect=4](http://www.neb-one.gc.ca/ll-eng/livelink.exe?func=ll&objId=238336&objAction=browse&redirect=3&redirect=4)



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risk of violence and what social and legal changes are necessary to address the risks they face. The Inquiry held the potential of creating a safer future for women in the Downtown Eastside and throughout British Columbia.

Finally, the Inquiry provided a critical opportunity to foster reconciliation between

the criminal justice system and people directly impacted by the Pickton murders. It also provided an opportunity for reconciliation between the police and the community of the DTES, as well as the broader Aboriginal community; it could have laid the foundation for trust and mutual respect.

There are a number of different procedural decisions that those responsible for the Missing Women Inquiry made that, had they been made differently, would have achieved the more organic approach to truth and justice described by Justice Sachs. Around the world and through modern history, truth and reconciliation commissions and public inquiries have used a variety of approaches to procedural rules, witness and participant support, information gathering, evidentiary standards and offender status. Although these commissions and inquiries differ considerably in scope and context, comparing each of these areas helps us understand what could have been achieved by the Missing Women Inquiry, and how future public inquiries in Canada may be structured to best achieve healing, truth and meaningful systemic reforms.

## Issues and Recommendations

There are many explanations and theories that have been put forward to explain why the Inquiry was such a highly compromised process. From the perspective of individuals and groups most deeply connected to the tragedy of the missing and murdered women, the Inquiry's flaws were a continuation of the ongoing devaluation of marginalized women's lives.

Among the myriad of problematic decisions made over the course of the Inquiry, we have identified six key procedural errors:

1. A failure to consult with marginalized communities and collaborate with the organizations who work with the impacted women and communities;
2. An omission of key themes in the terms of reference;
3. A failure to develop adequate structures and systems to support witnesses, and as a result to include representative numbers of Aboriginal women, sex workers and women living with addiction among Inquiry witnesses;
4. Inadequate or incomplete disclosure that affected the quality of evidence provided to the Commission;
5. a failure to utilize the procedural flexibility inherent in a public inquiry process to further the dual goals of reconciliation and fact-finding; and,
6. A lack of independence from police and government.

These problems have made it impossible for the Inquiry to realize its potential.

Future inquiries – particularly those that work with marginalized communities and individuals – should take the opportunity to learn from the mistakes of the Missing Women Inquiry. In the section that follows, we describe some of these mistakes and highlight practices developed by other public inquiry processes both in Canada and internationally. These practices can be adopted by future inquiries to create space for marginalized individuals and groups in their proceedings to help those inquiries develop a complete and accurate record of the event(s) investigated, and also to ensure relevant recommendations.

## 1. Consultation and Collaboration With Civil Society and Community

**“This incredibly important work can only be done with participation of those individuals and organizations that are knowledgeable about the missing women investigations. This Inquiry represents an important opportunity to make changes in how investigations are conducted, but no changes can be made without effective participation.”**

- Wally Oppal, Q.C., Commissioner of the Missing Women Commission of Inquiry, Opening Remarks, October 11, 2011

Building and sustaining partnerships with organizations that work with marginalized communities and individuals – beginning before the terms of reference of the inquiry are drafted, through to the implementation of its final recommendations – is one of the most effective strategies to promote the inclusion of marginalized groups in public inquiries. Wide input from survivor/victims groups, community activists, representatives of marginalized communities, and frontline workers is essential to ensuring the inquiry’s mandate, terms of reference, processes and procedure are tailored to the needs of vulnerable individuals and marginalized communities. Knowledgeable community organizations can help ensure that inquiry procedures are culturally appropriate, and identify stages in the inquiry process when vulnerable witnesses might require additional support.

Public inquiries are long, resource-intensive enterprises. They can adduce tens of thousands of pages of documentary evidence, and hundreds of witnesses. For instance, the Ipperwash Inquiry gathered evidence from 139 witnesses, and produced over 60,000 pages of transcript. The Commission of Inquiry into Certain Events at the Prison for Women in Kingston (“the Arbour Commission”) interviewed more than 100 people as part of its investigations; the transcripts of these interviews were shared with all parties with standing.<sup>7</sup> In the face of this quantity of material – which is tabled in order to develop a full picture of the incident that prompted the inquiry – it can be extremely challenging, if not impossible, for not-for-profit community organizations to participate in the inquiry in a substantive way without legal representation. Civil society groups, however, are indispensable to a successful inquiry: they are granted standing precisely because they can help the Commission to fulfill its mandate. They provide critical evidence, offer an understanding of the perspectives of different groups affected by the events in question, and help ensure that systemic issues are brought forward.

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<sup>7</sup> Arbour Report is available at [www.elizabethfry.ca/arbours/ArbourReport.pdf](http://www.elizabethfry.ca/arbours/ArbourReport.pdf)

### a. Problems with the Inquiry

**“Oh, no, we are not suggesting that they take instructions from anybody.”**

- Craig Jones, lawyer for the Attorney General, on the role of independent Commission counsel that would represent Downtown Eastside and First Nations interests, June 27, 2011

Upon receipt of applications from interested individuals or groups, the Commissioner of the Missing Women Inquiry had the power to grant participant status to applicants who satisfied one or more of the following three criteria:

1. Will the person/group’s interests be affected by the findings of the Commission?
2. Will the person/group’s participation further the conduct of the Inquiry?
3. Would the person/group’s participation contribute to the fairness of the Inquiry?<sup>8</sup>

The Commissioner received 23 applications for participant status and 13 applications for funding recommendations. On May 2, 2011, Commissioner Oppal handed down his ruling that granted full or limited participant status to all of the applicants, in recognition of the fact that each group met one or more of the above noted criteria and that their participation would lead to a comprehensive and effective Inquiry.<sup>9</sup>

For many groups, however, participant status was meaningless without the necessary funding for legal representation. Despite the Commissioner’s review of the financial circumstances of each organization and his finding that these groups could not participate without government funding for counsel, the Government of British Columbia announced it would not provide financial support to any of the community organizations that had been granted participant status. The Province agreed to fund counsel for the coalition of families of the missing and murdered women, but would not provide any support to the Aboriginal organizations, women’s groups, sex workers’ groups, and human rights organizations that had been granted full or limited standing. There was widespread shock and profound disappointment among participant groups. This was the first time anyone was aware of that a government

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<sup>8</sup> *Public Inquiry Act*, s. 11(4).

<sup>9</sup> “Ruling on Participation and Funding Recommendations”. *Missing Women Commission of Inquiry*, May 2, 2011. [www.missingwomeninquiry.ca/wp-content/uploads/2011/05/RulingonParticipationandFundingRecommendations.pdf](http://www.missingwomeninquiry.ca/wp-content/uploads/2011/05/RulingonParticipationandFundingRecommendations.pdf)

denied funding to participants who had also received a funding recommendation from the Commissioner.

A number of organizations and individuals noted that the refusal to fund recommended participant groups was a direct attack by the Province on the independence of the Commission. The Commissioner had identified groups that were required, in his opinion, to assist in fulfilling the mandate of the Inquiry. By refusing to fund those groups that the Commissioner had deemed essential, the Province was, in effect, refusing to give the Commissioner the resources he required in order to fulfill the duty the Province had placed on him.<sup>10</sup>

As a result of this decision, these groups were effectively shut out of the process, while the public had the illusion that the groups had been allowed to participate. Without legal representation, it was simply impossible for under-resourced non-profit organizations to manage the enormous volume of document disclosure, the months of hearings and the complex legal issues that would arise. Adequate funding for legal counsel was particularly important because the process would be highly adversarial, as police and government interests were well represented by teams of publicly funded lawyers from some of Canada's largest law firms.

The provincial government agreed to fund counsel for the coalition of families, represented by Cameron Ward and Neil Chantler. However, two lawyers – no matter how competent – were not enough to bring forth the breadth of issues and perspectives that were represented among the participant groups. Nor was this the assigned role of these two counsel: they were there to take instructions from their clients, the families of the missing and murdered women, and did not have a broader responsibility to advance the systemic concerns of the community at large. Raising such systemic issues is precisely the role of intervening organizations – those who were denied funding to participate.

Instead of resigning in protest or consulting with these groups on how best to proceed, the Commissioner appointed two independent lawyers: one to represent "the Downtown Eastside" and one to represent "Aboriginal interests." It is perhaps trite to note that these "client" groups are incredibly diverse and have formed their own associations and organizations that have decades of experience working with

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<sup>10</sup> Ruel, Simon. *The Law of Public Inquiries in Canada*, Carswell 2010 at 64.



Fathima Cader photo

and representing the various, and sometimes divergent, perspectives within those communities. Several organizations that represent “Downtown Eastside” interests, for example, have differing views on the laws regarding sex work, on the efficacy of harm reduction, and what remedies are required to deal with the challenges of the

impoverished neighbourhood. As a result, this step was insufficient to ensure that the range of relevant perspectives was canvassed in evidence and in final argument.

Further, by hiring “independent counsel” on their own initiative and without consultation, the Commission denied the organizations counsel of their choice. These groups were now shut out of the process, and official legal spokespeople had been appointed in their absence to speak on their behalf, without the benefits and protections of a solicitor-client relationship. Both of the lawyers appointed by the Inquiry spoke in media interviews of the challenge of proceeding in an Inquiry without being able to gather instructions from a client, or even know who exactly their clients were.

For government organizations and employees, counsel was paid from various public funds. An expert former Vancouver Police Department officer said that he would not attend unless counsel was paid for to assist him as a participant. The Province paid the bill. Ultimately, at least 25 lawyers would be publicly funded to represent police and government interests. Ten of those lawyers would represent the direct personal interests of individual police officers. The full cost of those lawyers to the public has yet to be disclosed, and likely never will be given the diverse array of government funding sources levied to cover the final tab.

When, after the closing of the evidence-gathering stage of the Inquiry, media announced that Commission lawyers had billed almost half a million dollars each

for ten months' work, and further, that a Commission lawyer with one year call to the bar had billed almost \$200,000 for ten months' work, the public outrage further undermined not only the Commission's work, but the work of future commissions to earn public confidence that Commissions of Inquiry can be money well spent.

The cost of a single senior Commission lawyer could have easily funded most, if not all, of the legal representation sought by affected communities. The salary of a single senior Commission lawyer could have also funded, for a year, a drop-in centre for women most at risk of being murdered or disappeared. As this report goes to press, the only women's drug treatment centre in the DTES faces closure due to lack of funding. The wages of Commission counsel, including the most junior counsel, grossly outstripped the salaries paid to those lawyers appointed to represent community interests, on an order of more than three to one.

## **b. Best Practices**

A thorough consultation process is particularly important in the context of Indigenous communities, where imposition of processes without community consent is endemic to these peoples' historic relationship with the Crown in Canada, and their present relationships with various levels of government. This colonial "we know what's best" pattern should not have been perpetuated in any inquiry process that concerns marginalized people at all, but especially Indigenous people whose rights to consultation and participation are constitutionally protected in Canada.

While the process of substantive consultation can be long and difficult, its difficulty does not undermine its necessity: "Regardless of the challenge associated with a thorough and extensive consultation, it should be seen as an essential component of the work of a truth commission – the process is as important as the outcome."<sup>11</sup>

The importance of community consultation has been repeatedly recognized in other jurisdictions. For example, in 2004, the Department of Constitutional Affairs of the UK wrote a memorandum for Parliament regarding the procedures of public inquiries.<sup>12</sup> In it, the Department recognized the benefits of allowing for community

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11 International Centre for Transitional Justice. *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* at p.5. <http://ictj.org/sites/default/files/ICTJ-Truth-Seeking-Indigenous-Rights-2012-English.pdf>.

12 [www.publications.parliament.uk/pa/cm200304/cmselect/cmpublic/606/4052502.htm](http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpublic/606/4052502.htm). At paras. 3.15-3.16.

feedback on the terms of reference for some inquiries. The benefits of community consultation must be weighed against potential delay in producing the final report.

It has been common practice for public inquiries to provide funding for not-for-profit agencies that provide valuable input into their processes, especially those that are granted standing as parties. For example, seven of the seventeen parties granted standing in Phase I of Ipperwash requested funding to assist with their participation; all seven were granted funding. The Arbour Commission into Certain Events at the Women's Prison in Kingston granted standing and funding to support the participation of individual inmates, the Inmate Committee, the Canadian Association of Elizabeth Fry Associations, and the Citizen's Advisory Committee. At the Frank Paul Inquiry, the B.C. Civil Liberties Association, the Union of B.C. Indian Chiefs, the Assembly of First Nations, the B.C. Leadership Summit, United Native Nations and the Pivot Legal Society all had funding to participate in the Inquiry.

### **c. Recommendations**

1. Commissions must ensure that marginalized individuals and groups who could contribute to the commission's work have meaningful opportunity, including funding and legal representation if necessary, to participate in inquiry processes.
2. Commissions should prioritize using the infrastructure, expertise and staff of existing community organizations to facilitate the participation of marginalized groups by providing those groups with additional resources to support the commission, rather than try to create new resources.
3. The consultation process should include an educational component for commission staff to assist them in understanding culturally appropriate and effective ways to gather evidence and conduct legal processes.
4. Where the establishing government body fails to support the full participation of marginalized communities, a commissioner must act to protect their participatory rights. These steps should start with consultation with affected groups about best responses to the government interference and end with, if necessary, the resignation of the commissioner.
5. For all future public inquiries, compensation for commissioners of inquiries should be commensurate with judicial salaries and commission counsel salaries should not exceed that of Crown Counsel.

## 2. Developing the Terms of Reference

**“It’s those types of injustices that have historically taken place that have victimized the Aboriginal communities, and it’s incumbent upon all of us to ensure that we change direction and those unfairness, those incidents of unfairness not be repeated. And so this Inquiry is part and parcel of that, to correct the mistakes of the past.”**

– Wally Oppal, QC, Commissioner of the Missing Women Commission of Inquiry, June 27, 2011

### a. Problems with the Inquiry

At the start of the Missing Women Inquiry process, the government set the Terms of Reference without any community engagement, excluding those who were directly impacted by the issues at the heart of the Inquiry, those who worked with women who had gone missing, and those who had been calling for the Inquiry for years. As a result, the Terms of Reference were unnecessarily limited: the focus was restricted to examining the criminal justice system and its handling of the Pickton investigation, without providing for a full examination of the various systemic issues leading to marginalized women’s particular vulnerability to violence, the lack of protections available, or the broader epidemic of missing and murdered Aboriginal women in British Columbia. The Terms of Reference were also specific to women who had gone missing from the DTES between 1997 and 2002, which meant that the experience of marginalized women from other parts of B.C., such as the Highway of

Tears, would not fall within the scope of the Inquiry, nor would the cases of those women who went missing from this area outside the specified time frame. Finally, the Terms of Reference did not include any explicit reference to creating space for or working with affected individuals or communities.



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Despite strong criticisms from Aboriginal women, sex workers and human rights and Indigenous governance groups, the focus of the terms of reference remained unchanged. The only amendment occurred six months after the Terms of Reference were announced when Commissioner Oppal requested that the Inquiry include a “Study Commission.” His request was approved. The Commission suggested that the Study Commission was of “equal importance to the hearings in the overall mandate of the Commission.”<sup>13</sup> However, the Study Commission had limited powers compared to the hearing Commission. Community groups were concerned that evidence heard in the Study Commission context would be accorded less weight.

#### **b. Best Practices**

The most successful commissions consult widely, early and often. They begin to work with community partners at or before their establishment to set and interpret their terms of reference, and continue to collaborate with partners to make key procedural decisions and conduct outreach activities throughout their life cycle.

The Berger Commission, for instance, which was charged with examining the social, environmental and economic impact of a planned pipeline and energy corridor through the North in the 1970s, pioneered a new consultative approach that gave its findings significant legitimacy in affected communities. Upon his appointment, the Commissioner, Thomas Berger Q.C., wrote to Arctic Gas, the governments of the Northwest Territories and the Yukon, Aboriginal organizations, environmental organizations, the Northwest Territories Chamber of Commerce and the Northwest Territories Association of Municipalities to advise them of the Inquiry and request their submissions on how the Inquiry should proceed. He then held preliminary hearings in Yellowknife, Inuvik, Whitehorse and Ottawa to hear submissions from interested parties about the potential scope and procedures of the Inquiry. Various stakeholders made arguments with respect to the timing of the Inquiry, funding for interveners, access to government and industry information, location and type of hearings, and the nature of the terms of reference.<sup>14</sup> This process of consultation led the Commission to adopt a broad interpretation of its mandate, and to take a holistic view of the pipeline’s impact, which was in line with the view of Northern communities.

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13 [www.missingwomeninquiry.ca/media-releases/](http://www.missingwomeninquiry.ca/media-releases/)

14 Kim Stanton, *Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies*. SJD Thesis, U of T Faculty of Law, 2010, p 161-62.

Similarly, international inquiries, such as truth commissions, have been most effective at reconciliation when they have taken a collaborative approach. For instance, the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR) was proactive in its engagement with civil society, which helped ensure that women were able to participate meaningfully in CAVR's work and shape its findings and recommendations. Women's groups were enlisted to conduct joint research projects to feed into Commission activities. They also collaborated with CAVR to organize gender-focused hearings and to develop processes and mechanisms to support victims testifying before the Commission. The evidence suggests that partnerships with women's organizations were instrumental in helping an overstretched Commission complete its truth-seeking function, producing a significant body of work on the gendered patterns of human rights abuses that had taken place in Timor-Leste.<sup>15</sup>

One way to encourage this kind of partnership is by laying it out in the mandate or terms of reference for the Inquiry. For instance, in Liberia, the legislation establishing the Truth and Reconciliation Committee ("TRC") made clear that gender was a priority for the Commission's work. Article VI, s. 24 of the Truth and Reconciliation Commission Act read: "The TRC shall consider and be sensitive to issues of human rights violations, gender and gender-based violence... [so] that gender mainstreaming characterizes its work, operations and functions, thus ensuring that women are fully represented and staffed at all levels of the TRC and that special mechanisms are employed to handle women and children victims and perpetrators." This explicit mandate led to the creation of a gender committee designed to advise and assist the TRC in its work.<sup>16</sup>

### **c. Recommendations**

6. Terms of Reference should be developed in consultation with communities that are directly affected by the prospective Inquiry or who have called for the inquiry.
7. Those whose conduct is being investigated by the inquiry should have an extremely limited role in influencing the development of the terms of reference.

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15 Vasuki Nesiah, *Truth Commissions and Gender: Principles, Policies and Procedures*, International Centre for Transitional Justice, July 2006, p 15. [http://ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English\\_0.pdf](http://ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf).

16 Anu Pillay, "Truth Seeking and Gender: The Liberian Experience", *Views From the Field*, 2009. p 97. [www.ajol.info/index.php/ajcr/article/viewFile/52174/40800](http://www.ajol.info/index.php/ajcr/article/viewFile/52174/40800)

8. Given the nature of an inquiry as seeking systemic reforms, terms of reference must be broad enough to capture systemic factors and causes.

### 3. Supporting the Participation of Witnesses

“Let’s assume for a minute that the police, or some police officer says, ‘Look, we did all we could and we couldn’t help them and they didn’t turn up and they weren’t very diligent.’ Now, that may be a challengeable position. So, tell me how a person who is poor, disadvantaged, how they’re supposed to cross-examine, cross-examine an experienced officer, having that – if that’s the evidence?”

– Wally Oppal, Q.C., Commissioner of the Missing Women Commission of Inquiry, June 27, 2011

Key to reconciliation is the process of storytelling – what is referred to in the legal context as the giving of evidence by witnesses. But, who should be heard, for how



Julia Kozlov photo

long, and under what conditions?

A key consideration regarding the participation of witnesses is the role of lawyers and support people for witnesses. When witnesses come forward – women who’ve been directly impacted by unimaginable vulnerability and violence; family members

of murdered women; police officers involved in the investigations – they may be putting their personal and professional safety and reputations, emotional well-being, and psychological integrity on the line. Can people who have been traumatized by the subject matter of an Inquiry be expected or forced to subject themselves to cross examination? Can those who are accused of wrongdoing be forced to testify without the protection of a lawyer? Can those who were made vulnerable by the problems at the heart of the Inquiry (such as sex workers who witnessed violence on Pickton’s farm or who currently work on the dangerous streets of Vancouver) be forced to testify without appropriate legal and emotional supports? And who should pay for the lawyers and other essential support workers?

In short, there is a compelling need to recognize that those participating in the Inquiry could face both a compromised reputation as well as a re-traumatization

from having to tell their stories. This raises critical questions about the potential role for lawyers, counsellors, advocates and mental health support workers in an Inquiry process. It also raises the question of how best to balance support for witnesses against the need to have an efficient process that uncovers the truth of what happened and why.

#### **a. Problems with the Inquiry**

For the Commission to fully understand the failures of the investigation into missing women, it was essential that it hear from women who live, and lived, in the DTES. The women in this community could speak to the failure of the police investigation into the missing women, as well as the many systemic problems surrounding the criminal justice response to violence against marginalized women. However, women from the DTES faced, and continue to face, significant barriers to participating in this and any inquiry or court process. Women in this community continue to live in conditions of extreme poverty, addiction, poor health, criminalization and abuse. Testifying before this Commission of Inquiry would place these witnesses at significant risk of re-traumatization, loss of privacy, social alienation and increased risk of violence. They would be asked to relive extremely traumatic evidence and to do so under the pressures of cross-examination. Witnesses also faced the possibility of public exposure.

These risks, combined with the failure of the Commission to engage the agencies that support these women and could have assisted in the Commission's mandate, proved too much for the marginalized women who could have otherwise offered invaluable testimony. Their support agencies and workers lacked the capacity to attend hearings with them and the Inquiry did not have these agencies' support in recruiting and retaining witnesses with important first-hand information given earlier failures. Supporting these and other vulnerable witnesses required the development of concrete and meaningful procedural protections and the provision of extensive supports in order to ensure their voices were heard. Those supports never materialized.

With no time to build a grassroots support network, and after the failed outreach to existing community supports, the Commission hired professional support people with little or no connection to the non-governmental organizations (NGOs) who work daily with the witnesses that were so desperately sought after by the Commission. The professional support people sat idly by, day after day, in the hearing room waiting for witnesses who never showed up. Out front, the agencies and

women whose assistance could not be replicated protested the alienating process in the street, refusing to attend the courtroom in the office tower that overlooked the protest. Most of the marginalized women's voices heard in the Inquiry room were angry chants audible several stories above street level, through the plate glass.

In one example of the failures of the Commission to engage even the most important witnesses, one of the four specific terms of reference of the Inquiry was to investigate the failed prosecution of Robert Pickton in relation to the stabbing of a woman from the DTES. The case failed when a prosecutor stayed the charge after failing to ensure the victim could attend court to testify. The same witness, decades later, ultimately refused to attend the Inquiry to explain the incident, fearing for her personal safety and wellbeing. Crown Counsel's decision to stay the attempted murder charges against Pickton had catastrophic consequences, in that he continued to target and murder women from the DTES in the years that followed. It is impossible to predict the impact the failure of this witness to testify has had on the outcome of the Inquiry and its recommendations and what impact those recommendations could have had in the years to come, but what is unmistakable was the replication by the Inquiry of the exact same process that prevented her from attending court in the first place to testify against William Pickton.

Taken at its greatest potential, the Inquiry was an opportunity to model innovative practices for supporting vulnerable witnesses. Anticipating that a truth commission or public inquiry can pose risks to witnesses, including re-traumatization, loss of physical safety and other mental health consequences, the Commission could have demonstrated the effective use of psycho-social and legal support for witnesses who might be exposed to mental health and legal risks as a result of testifying. For example, the Commission could have ensured that lawyers, counsellors, advocates and mental health workers were available to support witnesses who testified, before, during and after their testimony. Community organizations would have been valuable allies in helping to determine the barriers to participation that might affect members of a particular community, and designing and delivering supports to meet those needs. By providing procedures and protections for witnesses, the Inquiry could have been a model for the police and Crown in their future dealings with vulnerable and marginalized victims and witnesses.

The Inquiry also had the opportunity to demonstrate and build on "best practices" in the support of marginalized and vulnerable witnesses through partnerships with community-based organizations. DTES women's and community organizations have decades of experience in providing effective, comprehensive supports to women and

marginalized populations in the community. The Inquiry could have partnered with these organizations – who were among the organizations granted participant status but then denied funding – to provide support to witnesses, and allocated resources to help them do so. Unfortunately, without adequate resources in place, community organizations could not provide the degree of support that would be necessary to ensure witness safety without compromising their day-to-day programs that house, feed and support people in dire circumstances.

The Inquiry fell far short of any of these aspirations, although the Commissioner took some steps to protect witnesses. In November 2011, a month after the Inquiry began and at the application of counsel for Downtown Eastside interests, Commissioner Oppal granted a motion for a vulnerable witness protocol. The protocol allowed current and former sex workers, survivors of sexual assault and Aboriginal women to apply for designation as “vulnerable.” Counsel had requested that they be assumed to be “vulnerable” if they requested such protections unless proven otherwise. This request was turned down by the Commissioner, who instead preferred a process where vulnerable witnesses apply to the hearing for protection.

If designated as vulnerable, witnesses were entitled to testimonial aids, such as having a support person nearby and testifying behind a screen or in a separate room with a witness; to a publication ban on their identity; and/or to submitting evidence by way of an affidavit (not subject to cross examination). Unfortunately, these steps were both late and insufficient. Although the protocol allowed for the protection of the identity of vulnerable witnesses and for witnesses to be relieved of the burden of cross examination, the cost of these accommodations was that their evidence could not be used for findings of misconduct or uncorroborated findings of fact.<sup>17</sup>

In order to “apply” or prepare an affidavit, a vulnerable witness needed to understand and demonstrate the necessary qualifying criteria to the Commission, a task that was functionally impossible without support from organizations that work with the target witnesses, and lawyers to support those case workers in collecting essential information. Potential witnesses needed to be able to identify, locate and contact the two lawyers appointed to represent First Nations and/or Downtown Eastside witnesses – a challenging task in a room full of 29 lawyers, in a courtroom mere blocks but also worlds away from the Downtown Eastside. An effort by the lawyer

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<sup>17</sup> Ruling On the Application for a Vulnerable Witness Protocol November 16, 2011.  
[www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Signed-ruling-on-the-vulnerable-witness-protection-protocol.pdf](http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Signed-ruling-on-the-vulnerable-witness-protection-protocol.pdf)

for Downtown Eastside interests to establish a temporary office in the neighbourhood was clearly a reaction to the challenges identified in this report; however, it did not appear to increase the number of witnesses available.

The Commission also excluded a number of less vulnerable witnesses who might have helped to provide a fuller picture of the reasons for the police's failure to stop the killings of vulnerable women. Key witnesses requested by counsel for the families were not added to the witness list, and for more than four months no ruling was made on the families' application for their attendance. Instead of deciding on the application, a member of the Commission's senior staff leaked to the National Post that the application would be refused, months before the application was actually refused.<sup>18</sup>

The Commission then refused to hear evidence about possible connections between the Pickton brothers and Hell's Angels, or to look into other allegations of corruption and connections with organized crime that may have prevented vulnerable women from approaching police for fear of retaliation.<sup>19</sup> When connections to organized crime were raised as a barrier to women reporting violence on the Pickton farm, the Commissioner halted proceedings and invited the Department of Justice to object to the question. When they declined to object, the Commissioner himself then objected to the line of questioning and prevented it from advancing. The question of whether women were prevented from coming forward to police with information about Pickton because they were intimidated by organized crime connections was highly relevant to the purpose of the Inquiry and should have been fully explored.

Marginalized witnesses were rendered even more vulnerable by the imbalance of legal support for witnesses – with police and governments relying on publicly funded counsel and community groups and marginalized witnesses being denied funding for representation. This imbalance rested in part on the fact that while evidence presented by a witness at a public inquiry cannot be used to incriminate the witness in criminal proceedings or establish liability in civil proceedings, witnesses

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18 Hutchison, Brian. "Pickton inquiry gives cold shoulder to key witness". National Post, Feb.13, 2012. <http://fullcomment.nationalpost.com/2012/02/13/brian-hutchinson-pickton-inquiry-gives-cold-shoulder-to-key-witness>

19 An e-mail chain that explains something called "the hooker game" links police, politicians, Hells Angels and others to the Picktons in a poorly referenced but influential and widely shared narrative that circulates among DTES communities.



Julia Kozlov photo

are not exempt from future criminal or civil prosecution.<sup>20</sup> With their professional reputations and criminal and civil liability at stake, it is perhaps understandable that police and government “lawyered up”. However, such extensive one-sided legal protection contributed to the adversarial nature of the proceedings and to

the severe imbalance of protections for police and Crown on the one hand and community on the other. Whether a grant of civil or criminal amnesty would have been appropriate is something that would have had to be determined in consultation with community in light of the multi-faceted goals of reconciliation, truth telling, accountability and systemic change – but the question was never publicly considered.

### **b. Best Practices**

Commissions that have been most effective at supporting the participation of vulnerable witnesses and marginalized communities have three things in common: they trained their staff thoroughly to prepare them for working with these groups; they included members of those groups at all levels of the inquiry staff; and, they provided practical and psycho-social supports to facilitate participation and prevent re-traumatization of already vulnerable witnesses. Successful inquiries typically worked closely with community organizations in completing training sessions and providing supports.

Early in the Ipperwash Inquiry, for instance, the Commission held an Indigenous knowledge forum for all parties participating in the hearings, including Commission

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<sup>20</sup> *Public Inquiries Act*, s.13.

counsel and counsel for the parties, to help build awareness of Aboriginal views/ beliefs and how Indigenous worldviews could be respected by and incorporated into Commission proceedings.<sup>21</sup>

The problem of managing a myriad of potential witnesses and their lawyers has been considered internationally as well. At the Special Court of Sierra Leone, the Women Victim Services (WVS) Unit assessed child witnesses to ensure that they were resilient enough to cope with giving testimony.<sup>22</sup> Emotional and psycho-social support was provided before, during and after testimony to ensure that witnesses did not suffer any harm from testifying. The WVS Unit would also conduct at least one follow up visit three months after the testimony to monitor long range impacts, and ensure that witnesses were linked with longer term supports.<sup>23</sup>

The South African Truth and Reconciliation Commission developed a victim accompaniment process based around “briefers”, individuals selected by the TRC from among caring professions such as social work to support victims before, during and after their testimony. The briefers were trained to help explain the process of participating in the TRC and to support victims to cope with the process of testifying.<sup>24</sup> Even with this support, the Commission was criticized for failing to ensure that participants received follow up counselling where needed, through cooperation with local communities.<sup>25</sup> The TRC report noted that:

Participants are being asked to share something they are likely to have spent much of their lives trying to forget. Returning to these memories risks re-traumatization, which is rarely emphasized in transitional justice literature. Culturally appropriate mental health support is an important staffing consideration when planning operations, and efforts should be made to partner with government and civil society support networks. Where access

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21 Report of the Ipperwash Inquiry, Volume 3, p. 12.

22 [www.sc-sl.org](http://www.sc-sl.org)

23 In fact, many of the child witnesses who did not have family remained in touch with the WVS Unit, and would come to them for help if they encountered problems related to their health, education, finances, family or housing. Kyra Sanin and Anna Stirnemann, *Child Witness at the Special Court of Sierra Leone* (Berkeley, 2006) at p. 31.

24 The briefers’ support also enabled witnesses to more effectively contribute the recommendations of the Commission. Glenda Wildshut and Paul Haupt, “I’ll Walk Beside You: Providing Emotional Support for Testifiers at the South African Truth & Reconciliation Commission,” (*New Tactics in Human Rights Tactical Notebook*, 2004, p. 8).

25 TRC report, p.146.

and sustainability of care is constrained, participants should be aware of the options and limitations they face.<sup>26</sup>

Other inquiry procedures have followed a range of procedures in regard to amnesty or immunity for participants, including full amnesty.

In both the Stephen Lawrence Inquiry and the Bloody Sunday Inquiry in the UK – both investigations into systemic racism within the military and police forces – no evidence a person gave to the Inquiry could be used in evidence against him or her in any criminal proceedings (except for providing false evidence before Inquiry).<sup>27,28,29,30</sup> Neither mentioned liability for civil proceedings.

In contrast, the South African TRC granted amnesty for those who made full disclosure of all relevant facts, which applied to both criminal and civil liability and included both individuals and institutions that may have been held vicariously liable. It was considered an essential element of the truth telling process and “provided vital insights into the motives and perspectives of perpetrators and offered important evidence regarding the authorization of gross violations of human rights.”<sup>31</sup> When the amnesty process was challenged in court, the Constitutional Court ultimately upheld the process as constitutionally valid and a necessary incentive to ensure that offenders came forward and disclosed the whole truth.<sup>32</sup> The Commission was

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26 International Centre for Transitional Justice. Strengthening Indigenous Rights through Truth Commissions: A Practitioner’s Resource at p.6. <http://ictj.org/sites/default/files/ICTJ-Truth-Seeking-Indigenous-Rights-2012-English.pdf>

27 The Inquiry was set up in 1997 to examine the events following the murder of black British teenager Stephen Lawrence by a group of young white men whilst waiting at a bus stop on April 22,1993, and in particular any failures on the part of the police to properly investigate this crime.

28 The Inquiry was set up in 1998 to examine the events of January 30, 1972 in Northern Ireland. Following a civil rights march, shots were fired by the British Army, which killed 14 people and injured 12.

29 “The Stephen Lawrence Inquiry: Report of an Inquiry.” By Sir William MacPherson of Cluny. Advised by Tom Cook, the Right Reverend Dr. John Sentamu, Dr. Richard Stone. Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty. February 1999.

30 The Bloody Sunday Inquiry: Questions and Answers at q.18. [www.bloody-sunday-inquiry.org/questions-and-answers/index.html](http://www.bloody-sunday-inquiry.org/questions-and-answers/index.html)

31 TRC p.153.

32 *Azapo and others v. the President of South Africa*. CCT 17/96, Constitutional Court, 25 July 1996.

mandated to give victims reparations, so this also weighed in favour of civil amnesty.

**c. Recommendations**

9. Psychosocial, legal and any other supports that are reasonably required to facilitate participation by marginalized witnesses should be provided to them.
10. Supports must be culturally appropriate, adequately resourced, and available from well before a witness gives their testimony until well after their testimony is complete. Inquiries should work in partnership with established community organizations to design and deliver supports, while understanding that these organizations have limited funding that is entirely focused on their core mandates. Additional financial support may be required for these groups to assist.
11. The possibility of amnesty for witnesses must be considered and publicly debated in the context of each individual inquiry.
12. Procedural protections for marginalized witnesses who fall into protected grounds under provincial or federal human rights legislation should be established at the outset of proceedings, and can include anonymity, publication bans, limits on cross examination, and other legal protections.
13. If a marginalized witness claims this protection, the onus should be on any party challenging those protections to demonstrate why the witness is not entitled to the protection requested.

## 4. Quality of Evidence

Due to a lack of political will or other considerations, there is sometimes a significant time gap between the incidents that motivate an inquiry and the decision to launch one. This delay can affect the quality of evidence available to the commission, and thus its ability to present a full picture of events. Particularly when there is such a delay, a successful inquiry depends on the full and timely disclosure of relevant documents to all parties to an inquiry to ensure they have the opportunity to respond appropriately.



Fathima Cader photo

Similarly, document disclosure can be resisted by a party that is subject to investigation by a commission of inquiry. A commissioner must balance the need to bring an inquiry in on time, and on budget, with the need to follow the evidence and fulfill the terms of reference. In the common law, document disclosure is seen as similar in importance to cross

examination in terms of its ability to ensure that witnesses provide a full and truthful account of the events in question.

### a. Problems with the Inquiry

**“I must point out that while those calls for a Commission of Inquiry may be well intentioned, the fact is it is not possible under our system to hold a Commission of Inquiry while there are legal proceedings outstanding.”**

– Wally Oppal, Q.C., Commissioner of the Missing Women Commission of Inquiry, January 31, 2011

More than eight years passed between the Pickton arrest and the announcement of the Inquiry. Organizations that work closely with women in the DTES expressed serious concerns about this delay, as many women who would have had key evidence to offer the Inquiry were no longer living in the DTES community. Given the reduced

life span of women living in one of Canada's poorest and most drug affected urban postal codes, a significant number of potential witnesses died waiting for the Inquiry. In this case, where the issue before the Inquiry was of such profound importance and many of the witnesses were expected to be marginalized women, this delay severely compromised the range of evidence before the Commissioner.

The quality of evidence gathered by the Commission was further undermined by delays in document disclosure. Counsel for the 25 families brought an application for more complete document disclosure from a number of participants and third parties. The application was brought as a final attempt to get all of the relevant records in order to ensure a comprehensive examination of the evidence. The application requested disclosure of relevant items such as police reports, meeting minutes, and 911 transcripts from the Pickton investigation, videotape interviews with Robert Pickton, and CPIC searches of members of the Pickton family.

Commissioner Oppal acknowledged "the principles of thoroughness, transparency and proportionality as guiding principles for the Inquiry process."<sup>33</sup> He went on, however, to reject the application, arguing that a disclosure order was unnecessary because disclosure was ongoing and some of the documents requested were only "tangentially relevant." This ruling was made just months before the completion of the evidentiary hearings, months after the decision had already been leaked by a senior member of the Commission staff to the National Post, a major newspaper.

#### **b. Best Practices**

There are many examples of governments moving quickly in the wake of human rights violations or other tragedies to establish a public inquiry or transitional justice mechanism. Even war ravaged countries building fragile constitutional democracies manage to conduct hearings in a reasonable time. After the end of apartheid in 1994, for instance, South Africa passed the Promotion of National Unity and Reconciliation Act in 1995, which established and governed its Truth and Reconciliation Commission. Liberia adopted a Comprehensive Peace Agreement in August 2003, and established a Truth and Reconciliation Commission in May 2005.

There are also examples of good practice in extending inquiry timelines to respond to the needs of participating communities. Near the beginning of the Berger Com-

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33 Ruling on Document Disclosure Application March 2, 2012. [www.missingwomeninquiry.ca/wp-content/uploads/2010/10/2012-03-02-Ruling-on-Document-Disclosure-Application.pdf](http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/2012-03-02-Ruling-on-Document-Disclosure-Application.pdf)

mission, people who lived along the proposed pipeline route requested additional time to organize and secure representation. In response to their needs, the Commission extended the timeline for the Inquiry.<sup>34</sup>

There are also many situations where criminal proceedings have operated concurrently or subsequent to a public inquiry. For examples, the Commission of Inquiry into the Sponsorship Program and Advertising Activities (Gomery Commission),<sup>35</sup> Commission of Inquiry on the Blood System in Canada (Krever Commission),<sup>36</sup> the Walkerton Commission of Inquiry,<sup>37</sup> and the Commission of Inquiry into the Westray Mine Tragedy.<sup>38</sup> In British Columbia, under the leadership of Wally Oppal who was Attorney General at the time, the Dziekanski (Braidwood) Inquiry was called, and commenced, before decisions were made regarding criminal charges against the involved RCMP officers.<sup>39</sup>

As discussed above, under British Columbia law, evidence presented by a participant at a public inquiry cannot be used to incriminate him or her in criminal proceedings or establish liability in civil proceedings; however, this does not exempt participants from future criminal or civil prosecution.<sup>40</sup>

### **c. Recommendations**

14. Inquiries should be launched as soon as is practically possible after the event in question.

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34 Stanton. (181)

35 Public Works and Government Services Canada, "Chronology of the Sponsorship Activities". [www.tpsgc-pwgsc.gc.ca/cmmndts-spnsrshp/ctvts-eng.html](http://www.tpsgc-pwgsc.gc.ca/cmmndts-spnsrshp/ctvts-eng.html)

36 CBC News "In Depth: Canada's Tainted Blood Scandal: A Timeline" (Last Updated October 1, 2007). [www.cbc.ca/news/background/taintedblood/bloodscandal\\_timeline.html](http://www.cbc.ca/news/background/taintedblood/bloodscandal_timeline.html)

37 CBC News, "Charges Laid in Walkerton Water Tragedy" (April 24, 2003). [www.cbc.ca/canada/story/2003/04/23/walkerton\\_charges030423.html](http://www.cbc.ca/canada/story/2003/04/23/walkerton_charges030423.html)

38 *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97.

39 British Columbia Ministry of the Attorney General and Ministry Responsible for Multi-Culturalism, "Press Release: Terms of Reference Announced in Dziekanski Inquiry" (February 18, 2008). [www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2008AG0006-000220.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2008AG0006-000220.htm); British Columbia Criminal Justice Branch, "Criminal Justice Branch Clear Statement" (December 12, 2008). [www.straight.com/files/pdf/Dziekanski\\_cjbstatement\\_Dec12.pdf](http://www.straight.com/files/pdf/Dziekanski_cjbstatement_Dec12.pdf). See also Braidwood Inquiry, "Braidwood Commission Prepares to Subpoena RCMP Officers Involved in Robert Dziekanski Incident" (November 4, 2008) [www.braidwoodinquiry.ca/press\\_releases.php](http://www.braidwoodinquiry.ca/press_releases.php)

40 *Public Inquiries Act*, s.13.

15. Except where exemptions already exist in the law or the terms of reference or the rules of the commission itself, commissioners should follow the common law rules around disclosure.
16. Applications by parties for disclosure or the calling of particular witnesses should be decided in a timely manner, as a matter of convenience for all where those applications involve evidence that may impact on upcoming witnesses, but especially where the requests come from marginalized participants.
17. Parties must disclose documents in a timely manner, and documents should be disclosed in advance of the calling of witnesses. Commissioners of inquiry must not hesitate to use court processes to compel timely and complete document disclosure.

## 5. Rules of Evidence

Once the witnesses attend the inquiry, the next procedural question is what rules of evidence are applicable. One of the key advantages of approaching systemic government failures through a public inquiry is the freedom to depart from the strict rules of evidence that would normally bind a court of law. A UK government publication describes the flexibility that the public inquiry process brings with it:

A criminal trial may, through establishing guilt and imposing punishment, be successful in preventing recurrence and may also help to restore public confidence. However, it approaches the case with the primary objective of bringing the guilty to account, whereas the primary purpose of an inquiry is to prevent recurrence. An inquiry identifies ways of preventing recurrence through a thorough exploration of the circumstances of the cases, which it can often do more efficiently and quickly than a criminal trial because it has far greater freedom— it can take an inquisitorial, not adversarial form; lengthy cross-examinations can be avoided, because the evidence is being tested thoroughly by the chairman; it has discretion to admit a wide range of evidence. This freedom is justified precisely because an inquiry does not seek to determine guilt, and must never attempt to do so. An inquiry is not a trial. Its findings have no legal effect.<sup>41</sup>

This raises questions about the extent to which traditional rules of evidence should be applied to public inquiry processes. Relaxing the rules would ensure a more organic storytelling process, which may be a better way to get at the truth, but having evidentiary rules in place can be important in order to test the veracity of the storytelling.

More specifically, the rules of evidence must determine the method of questioning for witnesses. For example:

- Should witnesses be questioned in panels, private interviews or on the witness stand?
- Should they be subject to cross examination?
- Should the process allow for conversation instead of examination?

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41 [www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/606/4052502.htm](http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/606/4052502.htm)

Additionally, the degree to which the evidence and the proceedings are open to the public is an important concern that is also directly related to the weighing of the truth telling and reconciliation functions of the inquiry process. The following questions will need to be considered:

- Does the identity of witnesses need to be made public?
- Is the public nature of the inquiry essential for the reconciliation part of the goals?
- How does this interact with the goal to ensure safety for participants?
- Are witnesses able to testify behind a screen or otherwise out of sight?

#### **a. Problems with the Inquiry**

**“The government appears to misunderstand the way in which the study portion of the Inquiry will function. Participation in the study portion of the Inquiry is not a substitute for participation in the hearings and, as such, participation in the former cannot be used as a justification for not providing the participants funding for the hearing Commission.”**

– Art Vertlieb, Q.C., lead Commission counsel for the Missing Women Commission of Inquiry, June 27, 2011

**“The Public Policy Forums are a component of the Study Commission, which is of equal importance to the hearings in the overall mandate of the Commission.”**

– Press release issued by the Missing Women Commission of Inquiry, April 26, 2012

One of the major problems with the Inquiry was the implementation of what the government, and later the Commission itself, suggested was a separate but equal inquiry for marginalized people. At the formal Evidentiary Hearings, marginalized witnesses were expected to attend without counsel present to protect their individual interests, to rely on lawyers hired by the Commission to protect their interests instead, and to subject themselves to cross examination by more than 25 lawyers acting for police, government, and the Commission itself.

In an attempt to solve this problem and address the understandable reticence of marginalized women to participate in such a process, the Commission established less formal Study Commission hearings at which witnesses were supposed to be able to tell their stories in a less threatening environment. At hearings in the North of B.C., police officers present at the hearing, both in and out of uniform, outnumbered participants. Though specifically invited to do so, the Commission did not ask police

not to attend the hearings in order to encourage more complete stories and concerns to be shared without potential fears of intimidation.

In Vancouver, those who testified at the Study Commission were told that their evidence, though informative, could not be used in any final findings of fact that came out of the evidentiary hearings because it had not been tested by cross examination. In short, they were told that their evidence was worth less, legally, than the highly managed testimony of former and current police officers presented through multiple layers of legal counsel. Thus, the rules of evidence were used to ensure that the only avenue truly available to marginalized people was the avenue that could have no significant impact on the findings of fact regarding the failures of the RCMP and Vancouver Police missing women investigations.

The manner in which the Inquiry was set up led to its adversarial nature. Without immunity (which may or may not have been appropriate depending on the witness and community sentiment, which was never canvassed), police officers sought representation by counsel. Without counsel and appropriate supports, witnesses and impacted community members felt betrayed and angry about the process. The goals of community healing and reconciliation appeared nowhere in the terms of reference or procedural set up. A high level of conflict combined with an unmitigated focus on a court-like fact finding process led to the development of more formal rules of evidence than may have otherwise been necessary.

## **b. Best Practices**

Different jurisdictions have taken a wide range of approaches to the rules of evidence, particularly in how evidence is received through witnesses. The differing structures appear to depend on the scope of the problem under enquiry and the different ways in which reconciliation was weighed against truth or justice.

At the Stephen Lawrence Inquiry in the United Kingdom, the police – not marginalized people – were protesting that cross examination of them was too aggressive and that the process was weighted to the community, not to protect the interests of law enforcement officers. The Inquiry responded:

3.16 Cross-examination of many officers was undoubtedly robust and searching. But the harm to the relationship between the police and the black community was the result of police failures, and the answers to the questions rather than the nature of the questioning. It is of central importance that the Commissioner and his officers should recognise and accept this fact. Failure to do so can only reflect a lack of understanding of the essential problem and its

depth, which would make progress difficult if not impossible.

3.17 We hope and believe that the first part of the Inquiry has achieved catharsis. Our Report does focus upon errors and criticisms. This was inevitable, given the origins of the Inquiry. Neither catharsis nor identification of those errors might have been achieved without searching cross-examination.<sup>42</sup>

The Bloody Sunday Inquiry, also in the United Kingdom, was non-adversarial and inquisitorial in nature in an effort to ascertain the truth, rather than to issue judgment on the activities of any one party or side.<sup>43</sup> They received extensive



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evidence, including 2500 written statements and oral testimony from 922 further witnesses, and managed to examine this wealth of evidence without the formal rules of adversarial proceedings.

The South African Truth and Reconciliation Commission developed a protocol by which they employed and trained

designated statement takers from NGOs, community based organizations, religious and civic organizations to take statements from deponents. This served two purposes: first, it was a useful means of information gathering, and second, "it served a therapeutic purpose in that it provided victims with an opportunity to speak about their suffering or that of their families to people who listened sympathetically and acknowledged their pain."<sup>44</sup> The implication of using community organizations for this purpose was that "victims could tell their stories in their mother tongue, often to people they knew, thereby enhancing the quality and reliability of the testimony and reassuring victims who felt apprehensive."

42 "The Stephen Lawrence Inquiry: Report of an Inquiry." By Sir William MacPherson of Cluny. Advised by Tom Cook, the Right Reverend Dr. John Sentamu, Dr. Richard Stone. Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty. February 1999.

43 [www.bloody-sunday-inquiry.org.uk](http://www.bloody-sunday-inquiry.org.uk)

44 Report of the TRC. Methodology and process. Vol.1, Ch.6, p. 140.

The South African TRC cautions, however, that not everyone felt comfortable giving the intimate details of their stories to those from their own communities, so some options in statement takers can be useful. The basic facts of each statement were then corroborated by investigators through a standard list of resources (such as court records, media reports etc.) and ongoing active investigations undertaken by staff investigators of the TRC. Where the facts were verified, those implicated in the statements were given a chance to respond.

By holding public hearings or granting private interviews, the Commission attempted to diminish the legal, and at times adversarial, nature of its work and to focus on the restorative and therapeutic dimensions of its mandate. Witnesses were not cross examined by the Commission and, unless there were glaring inconsistencies and falsehoods, their oral testimony was generally accepted. .... This meant, however, that at times not all relevant information was obtained when the victim testified in public, placing an additional burden on those attempting to corroborate the statement at a later stage. In general, the Commission sought to be both therapeutic in its processes and rigorous in its findings, but sometimes the effort to satisfy one objective made it more difficult to attain the other.<sup>45</sup>

### **c. Recommendations**

18. Procedural protections for marginalized witnesses must not come at the expense of their ability to influence equally the purpose and outcomes of the inquiry.
19. Creative approaches for collecting evidence should be explored, such as trained statement-takers from supportive community organizations, and facilitated to ensure that witnesses are able to share their information completely.

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<sup>45</sup> Report of the TRC, at p.144.

## 6. Independence

To fulfill its mandate effectively, a public inquiry must be balanced; it must create space for and give equal weight to the perspectives of all parties. It must also be independent, from both the government that created it and from the parties who participate in it. In order to produce credible recommendations, it must be, and be seen to be, independent from those into whose behavior it seeks to inquire.

### a. Problems with the Inquiry

**“As an Inquiry Commissioner, I must at all times remain independent and I was, therefore, not involved in the government’s decision to not fund the groups as I recommended and I did not know the reasons for the decision.”**

– Wally Oppal, Q.C., Commissioner of the Missing Women Commission of Inquiry, June 27, 2012

The problems with the independence of the Commission began with the appointment of a former Attorney General of the sitting government to chair the Commission. Community members were immediately concerned that he would act to protect the interests of his former colleagues in government.

That perception issue dogged the Commission when the government refused to fund lawyers for public interest groups and marginalized individuals participating in the Inquiry, and then released an audio tape of the Commissioner calling his former colleagues directly to lobby for funding for the groups. At that stage, the police then raised concerns that the Commissioner had made conclusions that were biased against their interests given some of the comments recorded on a politician’s voice mail by the Commissioner. When the Province refused to fund the organizations that the Commissioner had found were essential for him to complete his task, they hobbled the ability of the Commissioner to complete the terms of reference, and thereby interfered with the Commission directly. Community members pointed out that the groups not funded were those same groups most likely to be critical of the sitting government for failures to protect marginalized women, while police and government groups and officials received full funding.

The level of police involvement behind the scenes in the Inquiry processes also raised concerns about the Commission’s independence. The Commission’s Executive Director of operations and planning, John Boddie, worked directly with key Inquiry witnesses on behalf of the Commission and its lawyers. Mr. Boddie is a former Vancouver Police Department officer. Media reported that he flew to Ontario to work with Peel Regional Police deputy Chief Jennifer Evans as she completed

an “independent” expert witness report about the Vancouver Police Department and RCMP investigations into missing women.<sup>46</sup> With Boddie’s background in one of the two police forces being investigated, these dealings with witnesses and the “independent” document review by the Peel Police Department did not inspire public confidence that the Inquiry was truly independent of the police who were being investigated.

Deputy Chief Evans was one of three police officers from the Peel Police Department who were retained on a “volunteer” basis to review the Commission’s documents, including disclosure from the Vancouver Police Department and RCMP, and prepare a report for the Inquiry on the issues raised in the Inquiry’s Terms of Reference. In a letter to the Commission from B.C. Civil Liberties Association, Pivot Legal Society and Amnesty International, dated June 30, 2012, serious concerns were raised about the arrangement with Peel Regional police undermining the independence of the Commission. These groups not only identified concerns about the police investigating themselves, but also provided specific examples of senior Peel Regional police officers who, at the time the force was conducting an “independent” review of the RCMP, were simultaneously under investigation by the RCMP for corruption.

As discussed earlier in this report, funding and support for the different interests in the Inquiry were also wildly mismatched. There were at least 25 lawyers working on behalf of police and government, and just two representing community interests. Nine lawyers were working for the Commission; two were working for the families of the murdered women. This imbalance in legal resources made it nearly impossible for the Commission to give equal space to the voices of different parties; it was inevitable that police and government interests would dominate the interests of women from the DTES. Even if it were possible to avoid an unbalanced outcome, the resource imbalance nonetheless seriously undermined the Commission’s credibility with affected communities.

## **b. Best Practices**

Many public inquiries in Canada have managed to maintain their independence from government and parties, and to allocate resources and time more equitably

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<sup>46</sup> <http://news.nationalpost.com/2012/04/04/missing-women-Commission-official-told-to-help-on-arms-length-report>

between parties associated with the victims of violence and the police and government. For instance, at the Stonechild Inquiry, an investigation into the death of a young First Nations man who was left to freeze on the outskirts of Saskatoon, police officers and organizations were represented by nine lawyers, while the family and acquaintances of the victim and the Federation of Saskatchewan Indian Nations together had seven.<sup>47</sup>

Generally, the Commissioner's funding recommendations for participants' counsel are regarded as important in protecting the independence of the Commission and ensuring that it may fulfill its mandate. According to the legal textbook *The Law of Inquiries in Canada*:

A funding recommendation made by a commissioner carries considerable weight, and would be dismissed by a government at its peril, as it could be accused of hampering the proceedings of the commission or tampering with its independence.<sup>48</sup>

### **c. Recommendations**

20. When a public inquiry targets in whole or in part the activities of the police, current or former members of the police should not be hired to organize or coordinate the inquiry, or be retained to prepare supposedly "independent" reviews of the evidence that will be heard at the inquiry.
21. Experts chosen by a commission of inquiry should be chosen solely on the basis of qualifications, relevance, availability and independence, not because they are available at no cost and are soliciting participation.
22. When determining funding levels for public interest or community interveners at a public inquiry, a rough balance should be struck between the legal resources available to government and non-government interests represented. The principle of the indivisibility of the Crown should govern when evaluating the amount of public funding dedicated to protecting and promoting government and government agent interests as compared to public funding dedicated to particular community or public perspectives.

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47 [www.justice.gov.sk.ca/stonechild](http://www.justice.gov.sk.ca/stonechild)

48 Ruel, Simon. *The Law of Public Inquiries in Canada*, Carswell 2010 at 64.

23. Organizations and individuals in conflicts of interest, following the definition of the Supreme Court of Canada and the Law Society of the relevant jurisdiction, should not be hired to be experts or staff of an independent inquiry.

## Conclusion

The Missing Women Inquiry excluded the voices of individuals and communities that it should have worked the hardest to include, those women who were most affected by the Pickton murders and the resulting investigations and who remain at extremely high risk for violence: Aboriginal women, sex workers and women living in poverty.

In the most disappointing fashion, the Province and the Commission repeated the very mistakes that allowed to Pickton to operate with impunity for so many years – the voices of marginalized women and their supporters were ignored. These failures can largely be attributed to failures to consult early, and often, with the communities that demanded this Inquiry take place.

The Inquiry had the potential to be transformative. Properly run, it could have promoted healing, fostered reconciliation between law enforcement and the DTES community, and led to change in the systems that allowed the murder and abuse of marginalized women on the DTES to continue unabated. Instead, the Inquiry excluded the voices of those who were most often the victims of violence on the DTES, and who suffered most from the problems in the investigations which allowed that violence to continue. Rather than transforming relationships, it recreated longstanding power imbalances and recreated many of the circumstances that have made it difficult for vulnerable individuals and communities to access legal protections.

Future public inquiries, particularly those that work with marginalized communities, must learn from the errors of the Missing Women Inquiry, and work to implement better practices to ensure they can succeed in their search for truth and reconciliation.

# BLUEPRINT FOR AN INQUIRY

Learning from the Failures  
of the Missing Women  
Commission of Inquiry

The Missing Women Commission of Inquiry began evidentiary hearings on October 11, 2011. In the months that followed, it would see a mass boycott and protests by initially supportive community groups and marginalized women. This report describes mistakes made by the government of British Columbia and the Commission in structuring the Inquiry, with the aim of identifying specific lessons for future commissions of inquiry involving marginalized people.

The authors of this report have worked with marginalized populations in relation to law and policy for many years. All three of their current non-profit organizations were granted participant status in the Inquiry, but formally withdrew as a result of the inaccessibility of the hearings to sex workers, marginalized women and First Nations organizations and leadership groups.