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Transitional Justice Review, Vol.1, Iss.2, 2013, 59-96

**Intransigent Injustice:
Truth, Reconciliation and the
Missing Women Inquiry in Canada¹**

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Helen Betty Osborne was abducted and brutally murdered near The Pas, Manitoba, early in the morning of November 13, 1971. The high school student, originally from the Norway House Indian Reserve, was 19 years old when she was killed.

Several months later Royal Canadian Mounted Police officers concluded that four young men, Dwayne Archie Johnston, James Robert Paul Houghton, Lee Scott Colgan and Norman Bernard Manger, were involved in the death. Yet it was not until December 1987, more than 16 years later, that one of them, Dwayne Johnston, was convicted and sentenced to life imprisonment for the murder of Betty Osborne. James Houghton was acquitted. Lee Colgan, having received immunity from prosecution in return for testifying

¹ This article was first delivered as a paper presented at the Gender and Transitional Justice Conference at Western University, April, 2012. It has been updated to reflect the intervening publication of the Missing Women Inquiry Report in late 2012: British Columbia. Missing Women Commission of Inquiry/Wally T. Oppal, Commissioner. *Forsaken: Report of the Missing Women Commission of Inquiry* (November 19, 2012) [*Forsaken*]. The article draws upon the author's doctoral work on the relationship between public inquiries and truth commissions: Kim Stanton, "Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies," (Ph.D. diss., University of Toronto, 2010); available from <https://tspace.library.utoronto.ca/handle/1807/24886>.

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against Houghton and Johnston, went free. Norman Manger was never charged.

So begins the report of the Public Inquiry into the Administration of Justice and Aboriginal People (the “Aboriginal Justice Inquiry”), a commission of inquiry struck by the Manitoba provincial government in 1988² to look into the death of Helen Betty Osborne and make recommendations for the justice system that had so obviously failed her family and her community. The Aboriginal Justice Inquiry of Manitoba provided a historical, cultural and legal review of the relationship between the Manitoba justice system and the indigenous peoples of that province in its 1991 report.³

Twenty-two years after that Inquiry began and 39 years after Helen Betty Osborne’s death, the government of British Columbia created the Missing Women Inquiry to investigate and make recommendations for the justice system that had so obviously failed the families and communities of the many women who went missing and/or were murdered in British Columbia over a similar time period, many of whom were abducted from Vancouver’s Downtown East Side (DTES) and killed on Robert Pickton’s infamous pig farm in the suburb of Coquitlam.⁴ This Inquiry was itself plagued with problems:

² The New Democrat government of Harold Pawley created the Inquiry on April 13, 1988, shortly before the April 26 election that saw the Conservatives, led by Gary Filmon, form a minority government. Transformative public inquiries sometimes arise during minority governments, *viz.* the Mackenzie Valley Pipeline Inquiry, as discussed in Stanton, “Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies.”

³ Public Inquiry into the Administration of Justice and Aboriginal People: A. C. Hamilton & Murray Sinclair, Commissioners, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991); [*AJI Report*]. See discussion below of co-commissioner Justice Murray Sinclair, now appointed chair of the Canadian Truth and Reconciliation Commission (TRC).

⁴ See text accompanying note 29 and following, below. Many believe that Robert Pickton is responsible for the murders of dozens of women who mainly lived in the poorest area of Vancouver, British Columbia (one of the poorest in Canada), the Downtown East Side. Women went missing throughout the 1990s from that area and although they were reported missing, it was years before the police began to work on the premise that a serial predator was behind the disappearances. Pickton

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The provincial government and police refused for years to acknowledge that women were going missing or being murdered at an alarming rate; then, when the numbers were irrefutable, they refused to acknowledge that a serial killer may be operating; then, once a serial killer was found, they refused to launch an independent Inquiry into the botched investigation; then, when they finally relented and announced the Missing Women Commission of Inquiry, they refused to allow key organizations input into the design of the Inquiry, which ultimately resulted in unduly narrow terms of reference; then, once the process was underway and a ruling on participant standing made, the Province refused funding despite the Commission's finding that each of the organizations would provide valuable information and insight to ensure that the Inquiry is thorough, meaningful and fair.⁵

Introduction

In the past, I have argued that truth commissions are a specialized form of commission of inquiry⁶ and made the case that the commission of inquiry, long a tool used by Canada and others in the Commonwealth tradition to address grave societal questions, can occasionally perform the role of a truth commission, given the right leadership and the process undertaken. I argued that established democracies need not shy away from having truth commissions, as many seem to have done,⁷ since a truth commission is simply a form of the oft-used and well-known public inquiry tool.

was arrested for the attempted murder of a sex worker on his pig farm in the suburb of Coquitlam in 1997 but later released. He was not arrested for murder until 2002, after which he was convicted for the murders of six of the missing women and sentenced to life imprisonment.

⁵ First Nations Summit, Statement to the Missing Women Inquiry (October 2011), para. 44; available from http://fns.bc.ca/pdf/MWCI_FNS_Statement_Oct_11_2011.pdf; accessed 25 March 2012.

⁶ Stanton, "Truth Commissions and Public Inquiries."

⁷ Indeed, Canada is only holding one now as a result of prolonged and more importantly, exorbitantly expensive, class action lawsuits that were eventually

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The commission of inquiry and the truth commission share two main goals with respect to addressing past human rights violations: to find out what happened and to prevent its recurrence. If we view truth commissions as a specialized form of public inquiry, truth commissions are distinguished from other commissions of inquiry by their symbolic acknowledgement of historical injustices, and their explicit “social function” to educate the public about those injustices in order to prevent their recurrence.⁸ Further, I argued that the social function of a truth commission and its inherent pedagogical possibilities for society can be undertaken by a public inquiry, but as noted above, this is entirely dependent upon their leadership and the process undertaken.

This paper examines the institutional design and work of two Canadian commissions of inquiry, the Manitoba Aboriginal Justice Inquiry (AJI) and the Missing Women Inquiry (MWI), in order to illustrate the ability of a public inquiry to perform the social function of a truth commission in circumstances where a body called a “truth commission” is unlikely to be appointed. The leadership, mandate and processes utilized are explored in order to assess the pedagogical potential or effect of each Inquiry. The AJI stands as a model that, had it been followed in British Columbia, might have averted some of the unnecessarily destructive decisions regarding the MWI. In addition, this paper considers the failure in Canada to connect the underlying issues giving rise to the MWI with the Truth and Reconciliation Commission (TRC) underway in Canada.⁹

settled, with the settlement agreement to include the TRC: Stanton, Kim. “Canada’s Truth and Reconciliation Commission: Settling the Past?” *International Indigenous Policy Journal* 2.3 (2011): Art. 2.

⁸ Gerald Le Dain, “The Role of the Public Inquiry in our Constitutional System,” in *Law and Social Change*, ed. Jacob S. Ziegel (Toronto: Osgoode Hall Law School, York University, 1973), 79.

⁹ As noted above, the AJI was struck in 1988 and reported in 1991. The MWI was appointed in 2010 and reported in 2012. The TRC resulted from the Indian Residential Schools Settlement Agreement, and has a five year mandate that concludes in 2014. See <http://www.residentialschoolsettlement.ca/english.html>.

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The Manitoba Aboriginal Justice Inquiry

The Aboriginal Justice Inquiry (AJI) was appointed to investigate, report and make recommendations respecting the relationship between the administration of justice and Aboriginal peoples in Manitoba. In particular, the inquiry was created to investigate all aspects of the deaths of Helen Betty Osborne and John Joseph Harper.¹⁰ Section 3(1) of the Act establishing the Aboriginal Justice Inquiry allowed for a broad mandate:

The commissioners shall investigate, report and make recommendations to the Minister of Justice on the relationship between the administration of justice and Aboriginal peoples of Manitoba, guided by but not limited to the terms of reference...¹¹

The Schedule to the Act further elaborates upon the terms of reference:

The scope of the commission is to include all components of the justice system, that is, policing, courts and correctional services. The commission is to consider whether and to what extent aboriginal and non-aboriginal persons are treated differently by the justice system and whether there are specific adverse effects, including possible systemic discrimination against aboriginal people, in the justice system.¹²

¹⁰ As noted above, Helen Betty Osborne was a young indigenous woman who was brutally murdered in 1971 in The Pas by four non-indigenous men. It took until 1987 for a criminal trial to occur, at which only two of the men were tried, despite the identity of all four having been widely known in the community shortly after the murder. JJ Harper was executive director of the Island Lake Tribal Council. He died following an encounter with a Winnipeg police officer, who was immediately exonerated by a police department internal investigation. Both incidents had prompted calls for a judicial inquiry into how Manitoba's justice system was failing indigenous people. For the purposes of this paper, I will focus on its review of the Osborne case.

¹¹ *An Act to Establish and Validate the Public Inquiry into the Administration of Justice and Aboriginal People* (S.M. 1989—90, c.1)

¹² *Ibid.*

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As a result of this expansively-worded mandate, the AJI was able to be more than an investigative inquiry that simply looked at what happened. It was able to investigate the larger social context in which the events arose in order to offer an explanation for why they occurred and how they might be prevented in future.

The AJI was mandated to inquire into the “the state of conditions with respect to Aboriginal people in the justice system in Manitoba”¹³ yet it gave these terms of reference a broad interpretation—the inquiry’s report devotes an entire chapter to Aboriginal and Treaty Rights, including discussion of land claims and natural resources.¹⁴

Leadership

Often public inquiries in Canada have a single commissioner. However, the government appointed Court of Queen's Bench Associate Chief Justice A. C. Hamilton and Associate Chief Judge of the Provincial Court of Manitoba Justice Murray Sinclair as co-commissioners of the AJI.

Associate Chief Justice Hamilton had practiced civil litigation and criminal law before his appointment to the bench in 1971. He was founding President of the Brandon branch of the John Howard and Elizabeth Fry Society,¹⁵ a founding Board member of the Indian and Métis Friendship Centre and was a member of the District and Division school boards. As Associate Chief Justice of the Family Division (Manitoba’s new Unified Family Court), he was a member of the Canadian Judicial Council. Chief Justice Hamilton took early retirement in 1993 to do mediation and to work on Aboriginal issues.¹⁶

When he was appointed to the Provincial Court of Manitoba in March of 1988, Justice Sinclair was the first indigenous judge

¹³ *AJI Report*, Appendix II, “Schedule: Terms of Reference,” 763.

¹⁴ *Ibid.*, chapter 5, 115-212.

¹⁵ Both are prison justice organizations in Canada.

¹⁶ Aboriginal Justice Implementation Commission. Biographies available from <http://www.ajic.mb.ca/bio/hamilton.html>.

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appointed in Manitoba.¹⁷ When it bestowed on him an award in 1994, the National Aboriginal Achievement Awards committee noted he is respected in both indigenous and non-indigenous worlds for his ability to balance a successful career in the Canadian legal and judicial system “while at the same time maintaining a reverence for the traditional teachings of the Ojibway people”.¹⁸

The decision to appoint two judges, one indigenous and one non-indigenous, to lead the commission gave credibility to the Inquiry and signalled that the government took the issues at hand seriously. In addition, both men had a background in Aboriginal issues.

Justice Sinclair is now the Chief Commissioner of Canada’s Truth and Reconciliation Commission. The AJI report suggests that Justice Sinclair had a sense at that time of the need to attract broader attention to indigenous issues:

The report... went beyond holding organizations accountable and stressed a sense of social responsibility for the treatment of Aboriginal people. ...Although many of the commission’s recommendations were directed at ‘provincial and federal governments,’ they were in another sense directed at everyone in Canada in an attempt to make known the injustices of the past and create support for Aboriginal self-government in the future.¹⁹

In addition, this quote suggests that Justice Sinclair and his co-commissioner saw the Inquiry as an opportunity to promote social accountability, a feature of the social function of commissions of inquiry discussed above.

¹⁷ He was subsequently appointed to the Court of Queen's Bench of Manitoba in January 2001.

¹⁸ National Aboriginal Achievement Awards, “Judge Murray Sinclair, Justice” (1994); available from http://www.naaf.ca/html/m_sinclair_e.html.

¹⁹ Kent Roach, “Canadian Public Inquiries and Accountability,” in *Accountability for Criminal Justice: Selected Essays*, ed. Philip C. Stenning (Toronto: University of Toronto Press, 1995), 269 at 288.

Process

The AJI held community hearings in 36 indigenous communities including 20 remote communities, seven other Manitoba communities, and five provincial correctional institutions, with over 1,000 people making informal presentations.²⁰ The community hearings were open to the public, written submissions were not necessary, and witnesses were not required to testify under oath, nor were they subjected to examination by Commission counsel or cross-examination. Indeed, the Inquiry decided not to have lawyers at the community hearing level:

We took this approach after considerable deliberation. We believed that Aboriginal people already were alienated from, and intimidated by, the formal court system. We wanted to utilize a process that would encourage frank and open expressions of opinion.²¹

When it reported in 1991, the Aboriginal Justice Inquiry of Manitoba provided a historical, cultural and legal review of the relationship between the Manitoba justice system and the indigenous peoples of that province.²² The commissioners sought to learn about the legal system from the people who had direct contact with it.²³ The AJI also produced a video, in addition to its written reports, produced in English, Cree, Ojibway, Island Lake dialect, Dakota and Dene languages in order to make the report more accessible to indigenous peoples.²⁴ The report provided a thorough discussion of Aboriginal concepts of justice, a history of Aboriginal contact with non-Aboriginal law, and a discussion of treaty rights. The inquiry also reviewed Aboriginal over-representation in the criminal justice system, a discussion of the court system, Aboriginal justice systems, court reform, juries, jails, alternatives to jail, parole and policing. In the course of its hearings, the inquiry heard testimony from many

²⁰ *AJI Report*, vol. 1, 5.

²¹ *Ibid.* See also Roach, “Canadian Public Inquiries and Accountability,” 286.

²² *AJI Report*.

²³ *Ibid.*, vol. 1, 5.

²⁴ *Ibid.*, 14.

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indigenous people about their residential school experience, and wrote about its far-reaching effect in their report.²⁵

The report explicitly considered whether systemic racism was a factor in both the death of Helen Betty Osborne and in the failure of the police to charge anyone for her death for 16 years. The Inquiry devoted a chapter of Volume 1 of its report to the subject of Aboriginal Women²⁶ and Volume 2 of the report focused on the case of Helen Betty Osborne.²⁷

Standing

The AJI granted standing (that is, the right to participate in the Inquiry, including the right to make submissions, cross-examine witnesses, if applicable, etc.) as follows:

We granted standing to: Justine Osborne, the mother of Betty Osborne; the Norway House Indian Band; the Indigenous Women's Collective; and the Royal Canadian Mounted Police. The Swampy Cree Tribal Council also was granted standing on the condition that it, Justine Osborne and the Norway House Band would be treated as one party. Counsel acting for the parties were: John Wilson, for Justine Osborne and the Norway House Band; Monique Danaher, for the Indigenous Women's Collective; and Hymie Weinstein Q.C. and Craig Henderson, for the RCMP. Commission counsel were Perry Schulman Q.C. and Randy McNicol Q.C.

Limited standing was granted to the Manitoba Metis Federation to make a submission at the close of the proceedings. We rejected the application for standing made by Dwayne Archie Johnston, the only person convicted of the murder of Betty Osborne, because we believed he did not have a direct or substantial interest in the matters we were to examine.²⁸

²⁵ Ibid., 512ff.

²⁶ Ibid., vol. 1, chapter 13.

²⁷ The third and final volume related to the death of John Joseph Harper; see note 10.

²⁸ AJI Report, vol. 2, "Introduction", "Mandate of the Inquiry."

This list of parties granted and denied standing provides an interesting insight into the approach taking by the AJI with respect to the picture they sought to construct from the evidence before them. The convicted killer of Ms. Osborne was denied standing, while the community and family were granted standing. The Indigenous Women's Collective was granted standing and had its own legal counsel. In contrast, while the Missing Women Inquiry granted full standing (i.e. the right to make oral submissions, cross-examine witnesses, etc.) to some of the women's families and to a number of police officers, in addition to the police departments, it granted limited standing (i.e. no right of cross-examination, but they could take part in the study hearings) to a number of organizations representing indigenous women, as will be discussed below.

The Missing Women Inquiry

For many years in Vancouver, British Columbia, dozens of women went missing from the Downtown East Side, many of whom were Aboriginal, poor and in the sex trade. Despite their families reporting them missing, and amid tales of a serial killer preying on women and growing alarm among community members about the disappearances, the police resolutely refused to acknowledge any pattern. Vancouver police and RCMP finally struck a joint task force in 2001 looking into the missing women cases. The Joint Missing Women Task Force determined that approximately 65 women had gone missing from Vancouver between 1978 and 2001.²⁹ On February 5, 2002, the Task Force arrested Robert William Pickton at his Coquitlam farm after an independent weapons search warrant was obtained by a junior RCMP officer.³⁰ Pickton was convicted in

²⁹ Missing Women Inquiry, *Status Report on Commission Progress* (3 March 2011); available from <http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Status-Report-March.pdf>.

³⁰ Suzanne Fournier, "Top Mountie stands by review into missing women investigation," *Vancouver Sun* (11 Jan., 2012); available from <http://www.vancouversun.com/news/Mountie+stands+review+into+missing+women+investigation/5981457/story.html>.

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December 2007 and sentenced to life in prison for murdering six women, but another 20 murder charges were stayed and he boasted in jail of killing 49 women to an undercover officer posing as a cellmate on the day of his arrest. DNA evidence has connected him to the death of at least 32 women.³¹ A total of 18 murders occurred after he was arrested and released for the attempted murder of a sex worker in 1997. Of the women missing from the DTES, at least one third were Aboriginal, despite their being only 3% of the population.³²

The British Columbia government created the Missing Women Inquiry on September 27, 2010 after Pickton's criminal appeals were exhausted. The Inquiry was called to examine and report upon the conduct of investigations made 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.

During the period that Pickton was murdering women with impunity, many other women, a disproportionate number of whom were indigenous, disappeared, including along a stretch of highway in northern British Columbia now referred to as the "Highway of Tears."³³ According to research conducted by the Native Women Association of Canada (NWAC) under the Sisters In Spirit initiative, as of March 2010, 580 indigenous women went missing or were

³¹ Ibid.

³² *Forsaken*, vol. 1 "The Women, Their Lives, and the Framework of Inquiry: Setting the Context for Understanding and Change," 94, text accompanying footnote 141.

³³ At least 18 and potentially over 30 women disappeared from the stretch of highway between Prince George and Prince Rupert, BC, over roughly the same period. All but one were Aboriginal: Lheidli T'enneh First Nation, Carrier Sekani Family Services, Carrier Sekani Tribal Council, Prince George Nechako Aboriginal Employment and Training Association, the Prince George Native Friendship Center. *The Highway of Tears Symposium Recommendation Report* (2006), 9; available from <http://www.ubcic.bc.ca/files/PDF/highwayoftearsfinal.pdf>. National media attention ensued when a non-Aboriginal tree planter named Nicola Hoar disappeared from the highway in 2002.

murdered in Canada over roughly the last 30 years.³⁴ In light of these losses, NWAC and other civil society organizations have called for a public inquiry in order to address the heightened levels of violence against indigenous women and in order to address the apparent systemic issues underlying the statistics.³⁵ These systemic issues include poverty, sexism, racism, colonialism and other root causes of extreme violence against indigenous women.

The Mandate

When the British Columbia government yielded to calls for an inquiry, they sought to limit the mandate to a relatively narrow investigation of the Pickton case itself.³⁶ The civil society organizations that sought an inquiry in order to examine the larger structural issues at play in creating a situation where dozens of women went missing over a relatively short period of time, and where many continue to go missing, were sceptical as to whether the narrow mandate could possibly achieve the answers to the larger questions of how Canadian society views and treats indigenous women.

³⁴ Native Women's Association of Canada, *What Their Stories Tell Us: Research findings from the Sisters In Spirit Initiative* (2010), i; available from <http://www.nwac.ca/research/nwac-reports>. Unfortunately, the federal government decided in the fall of 2010 to end funding to Sisters in Spirit. Instead monies in the amount of \$10 million have been dedicated to a central RCMP missing person centre: See <http://www.bwss.org/2011/11/statement-by-womens-and-community-groups-regarding-rcmp-sexual-harassment-allegations/>. It is now clear that the RCMP failed to properly investigate Pickton in 1997. As an aside, the RCMP is also now the subject of a large class action suit filed in 2012 by former female employees seeking damages for systemic sexual discrimination: see <http://www.cbc.ca/news/canada/british-columbia/story/2012/03/27/bc-rcmp-harassment-lawsuit.html>.

³⁵ Native Women's Association of Canada, press release, "NWAC reinforces the call for a national public inquiry," (November 12, 2012); available from http://www.nwac.ca/sites/default/files/download/NWAC/2012-06-11%20NWAC%20release%20re%20MtgOutcome_FINAL-EN.pdf.

³⁶ Order in Council 605/2010, under section 2 of the *Public Inquiry Act*, S.B.C. 2007, c.9. (September 27, 2010).

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The MWI was initially set up as a hearing commission, which under the *Public Inquiry Act* in the province of British Columbia is essentially a fact-finding inquiry. It provides a higher level of procedural protections for participants than a study commission.³⁷ Eventually the mandate of the Inquiry was expanded in March 2011 to include a study component, which provides a more policy-oriented focus. The decision to expand the mandate to include a study commission was a positive one, and came about as a result of pre-hearing conferences that provided community input to the commission. Those conferences were a good start, as they sought community input with respect to the inquiry's process. The Commission heard concerns about the ability to participate if the hearings were too formally legal, the importance of accessibility and inclusion of vulnerable or marginalized individuals, and culturally appropriate processes for indigenous participants.³⁸ Due to the expansion of the mandate to include a study commission, the Inquiry was then able to consider the Highway of Tears investigations as well as those on the Downtown East Side. The expansion of the mandate was a development that might have provided the opportunity for the Inquiry to delve into the larger systemic issues at play. However, the progress of the Inquiry was marred by several important factors.

Leadership

Unfortunately, the Inquiry was plagued from the start with criticisms of illegitimacy. First, the sole Commissioner, retired British Columbia Court of Appeal Justice Hon. Wally Oppal, Q.C., was Attorney General of the Province from 2005 to 2009. When Pickton was tried, the trial judge severed 20 of the 26 counts of murder, saying that the jury would not be able to manage a trial of 26 murders. Commissioner Oppal was Attorney General when the Crown decided to stay the remaining 20 first degree murder charges against Pickton upon his conviction on the initial six charges, determining that the trial would be superfluous given that Pickton was sentenced

³⁷ See *Taser International v. British Columbia* 2010 BCSC 1120, para. 40.

³⁸ Missing Women Inquiry, *Status Report on Commission Progress*, 11.

to life in prison. This left the families of the twenty women without closure or a sense of justice. These families questioned Oppal's appointment since he had been in a position to create a factual record by ordering a trial into the deaths, yet chose not to do so. In addition, the terms of reference required the Inquiry to investigate the Criminal Justice Branch's decision to stay charges of attempted murder, assault with a weapon, forcible confinement and aggravated assault against Pickton in 1997 for the attempted murder of a woman who escaped from his farm. Given that Oppal had been Attorney General, it smacked of the criminal justice system investigating its own. Many saw his appointment as tainted by a perceived conflict of interest.³⁹

Even more challenging was the fact that when Oppal was Attorney General, the Criminal Justice Branch took another inquiry commissioner to court to oppose a review of prosecutorial discretion in the course of the inquiry into the death of Frank Joseph Paul.⁴⁰

³⁹ In addition, Oppal lost his bid for re-election in the 2009 provincial election in the riding of Delta South by 32 votes, after having given up the seat he won in 2005 in the riding of Vancouver-Fraserview. That seat was viewed as a safe seat for Oppal, but he changed ridings to enable another party member to gain a seat (that MLA, Kash Heed, subsequently resigned amidst investigations of election irregularities). Some critics viewed Oppal's appointment as a commissioner as a partisan consolation appointment by the Liberal party: Suzanne Fournier, "Liberal insider denies 'baggage' handicap, vows even-handed approach," *The Province* (29 Sep. 29, 2010); available from <http://www.theprovince.com/news/Oppal+report+2011+year/3595123/story.html>; "[Grand Chief Stewart Phillip] was critical of the appointment, noting Oppal was a government 'insider' owed a favour for giving up his Vancouver seat in the last election, only to lose himself when he ran in Delta South."

⁴⁰ The government of British Columbia appointed a commission of inquiry in 2007 to examine the circumstances surrounding the death of Frank Joseph Paul. Mr. Paul, a Mi'kmaq from New Brunswick, was removed from the Vancouver Police Department lockup on the evening of December 5, 1998, and was left in a nearby alley by a police officer. His body was found in the alley early the next morning. An autopsy concluded he had died from hypothermia due to exposure/alcohol intoxication. The Commissioner was former B.C. Supreme Court Justice William H. Davies, Q.C., and his report, *Alone and Cold: The Davies Commission Inquiry into the Death of Frank Paul*, was issued May 19, 2011: <http://www.frankpaulinquiry.ca/report/Final/>; accessed 25 March 2012.

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Indeed, the MWI's terms of reference specifically take into account the effect of the decision in that matter, wherein the Court determined that the Inquiry should be able to pierce the veil of prosecutorial discretion. However, observers of the MWI would recall that it was Oppal who would have been among those who benefited from the ability to remain behind that very veil. Further, while Attorney General, Oppal had publicly opposed the calls for a public Inquiry into the Pickton investigations. Although he has defended that position as the proper legal position, given that the trial was still underway at the time and therefore an inquiry would not have properly been started until after the trial's conclusion, women's groups heard only his rejection of an inquiry and not the reasons for his objection.⁴¹

Unfortunately, the largest blow to the credibility of the Inquiry was yet to come.

Standing

On May 2, 2011, Commissioner Oppal delivered his ruling on standing of the various parties that sought to participate in the Inquiry. He determined that some parties would have full standing (including the right to cross-examine witnesses, make oral submissions, etc.) while others would have limited standing. He directed that some organizations with similar interests form coalitions in order to appear before the Inquiry, and he directed that all the parties to whom he had granted standing who had requested funding (13 of the parties) should have publicly funded legal counsel to enable them to participate in the inquiry.⁴² Commissioner Oppal found that 18 parties (including some coalitions) should have standing at the Inquiry including the families and the police

⁴¹ APTN National News, "Oppal says he won't resign from Pickton Inquiry," (October 1, 2010); available from <http://aptn.ca/pages/news/2010/10/01/oppal-says-he-wont-resign-from-pickton-inquiry/>.

⁴² Missing Women Inquiry, *Ruling on Participation and Funding Recommendations* (2 May 2011); available from <http://www.missingwomeninquiry.ca/wp-content/uploads/2011/05/RulingonParticipationandFundingRecommendations.pdf>; accessed March 25, 2012.

departments. Ten of the 18 got full standing and the rest got limited standing (i.e. no right of cross-examination, but they could take part in the study hearings). NWAC, organizations from the Downtown Eastside, and various indigenous organizations' presence and participation were found to be essential.

The British Columbia government responded by refusing to provide funds to pay for legal counsel for any of the parties granted limited standing. This was a shocking decision and absolutely unprecedented in the history of Canadian public inquiries. Commissioner Oppal made a public statement to the government⁴³ and a large group of highly respected former commission counsel and members of previous commissions of inquiry wrote an open letter calling upon the British Columbia government to provide funding to the groups that Commissioner Oppal had determined were necessary for him to hear in order to properly conduct the Inquiry.⁴⁴ The government claimed that the decision had been made due to the importance of spending public funds with care in a time of fiscal restraint.⁴⁵ Given that the Deputy Attorney General confirmed the funding decision, and that the Inquiry had a mandate to investigate departments of the Ministry of Attorney General, the optics were not good. It looked as though the government decided not to provide the means of participation to groups alleging

⁴³ Letter from Commissioner Wally Oppal to the Honourable Barry Penner, Attorney General of British Columbia, 30 June 2011.

⁴⁴ Letter to Shirley Bond, Attorney General of British Columbia, September 7, 2011, on file with the author.

⁴⁵ It is difficult to reconcile this sentiment with the fees reportedly paid by the province to Commission counsel. These included, in the fiscal year ending March 31, 2012, \$483,741 billed by Commission Counsel Art Vertlieb; \$482,139 by Associate Counsel Karey Brooks and her firm; \$324,267 by Commissioner Oppal; \$203,134 by first year lawyer Jessica McKeachie; \$236,606 by an unnamed third year lawyer; and \$299,807 by Executive Director John Boddie. In contrast, Cameron Ward, who represented 25 murdered women's families, billed \$60,000 for the same period: Brian Hutchinson, "Missing Women inquiry workers paid more than B.C.'s longest-serving judges," *National Post* (10 Aug., 2012); available from <http://news.nationalpost.com/2012/08/10/missing-women-inquiry-workers-paid-more-than-b-c-s-longest-serving-judges/>.

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government complicity in the deaths of the women. Further, all three of the police departments and Criminal Justice Branch were provided with publicly funded lawyers.⁴⁶

This decision left an extremely negative impression for those who were concerned about the representation of parties other than the police at the Inquiry. The parties that were denied funding withdrew from the Inquiry, given that they did not have the financial means to employ legal counsel to review the thousands of documents involved in the Inquiry or conduct cross-examination of the many witnesses that would be called to the stand. Although some inquiries are viewed as less formal in terms of legal structure, this Inquiry was squarely in the legal tradition of formal hearings to create the factual record, including assessments of credibility of witnesses determined through examination and cross-examination, enormous amounts of documentary evidence and arguments by counsel. These are not tasks that can be undertaken by non-profit organizations without counsel. Indeed, the Inquiry was boycotted by almost every group granted standing due to the denial of adequate funding for legal defense. It was described as a “sham inquiry” by the Downtown Eastside Women’s Centre and Women’s Memorial March Committee, two of the groups granted standing.⁴⁷

As noted by the many commission counsel who protested the government’s funding decision, the groups that withdrew from the Inquiry cited the unacceptable interference with the Inquiry’s independence that the funding decision represented. Commissioner Oppal had ruled that those groups were critical to the Inquiry’s ability to fulfil its mandate, and the government had begged to differ. The decision gravely undermined the legitimacy of the Inquiry. A further

⁴⁶ While the police lawyers numbered around two dozen, one lawyer (Cameron Ward, whose small firm currently has two lawyers) represented 25 families of the missing women.

⁴⁷ “Downtown Eastside Women’s Centre and Women’s Memorial March Committee Announce Non Participation In Sham Inquiry,” available from <http://womensmemorialmarch.wordpress.com/2011/10/03/non-participation-sham-inquiry/> and statement regarding independent counsel: <http://womensmemorialmarch.wordpress.com/2011/08/05/amicusproposal/>

blow was struck when then Attorney General Barry Penner publicly released a voicemail left for him by Commissioner Oppal pleading for the funding. The Attorney General stated that he publicly released the voicemail out of a concern that the Commissioner had predetermined some of the key issues before the Inquiry. Penner asked the Criminal Justice Branch to investigate.⁴⁸

Responding... to concerns raised about his impartiality, Mr. Oppal referred to his credentials as a judge for 23 years to back up his insistence that he understands the need not to come to any conclusion before all the evidence and submissions have been heard. The concerns stem from remarks he made that appear to indicate he had already decided that the police had failed to act appropriately. He made the comments while lobbying the government for funding for community groups that he felt should appear at the inquiry.⁴⁹

Instead of acceding to calls for his resignation,⁵⁰ Commissioner Oppal decided to appoint two “independent counsel” to broadly represent the interests of the groups denied funding. One, Jason Gratl, was appointed to represent interests of the DTES communities. The other, Métis lawyer Robyn Gervais, was appointed

⁴⁸ See Robert Matas, “Pressure on Oppal mounts as integrity of B.C. missing women hearings doubted,” *Globe and Mail* (30 Aug., 2011); available from <http://www.theglobeandmail.com/news/national/british-columbia/bc-politics/pressure-on-oppal-mounts-as-integrity-of-bc-missing-women-hearings-doubted/article2147929/>: “the criminal justice branch of the Attorney-General’s Ministry is closely reviewing remarks by Mr. Oppal that have raised concerns about his impartiality”.

⁴⁹ *Ibid.*

⁵⁰ Gary Mason of the *Globe and Mail* noted that the ensuing loss of credibility prompted calls for Oppal’s resignation. He stated: “It’s hard to recall a major inquiry that has been as badly botched as the one looking into the missing women of British Columbia.” See Gary Mason, “The debacle over B.C.’s missing women,” *Globe and Mail* (20 Oct., 2011); available from www.theglobeandmail.com/news/opinions/opinion/the-debacle-over->bcs-missing-women/article2207032/.

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to represent Aboriginal interests. Gervais was relatively junior⁵¹ and was not an acknowledged expert in the systemic issues that the groups denied funding had sought to raise at the hearings. Nor were the people the independent counsel were to represent consulted in their appointment.⁵² More importantly, the independent counsel were appointed and funded by the Inquiry, accordingly the groups they were supposedly to represent could not in fact instruct them, nor did they have a solicitor client relationship with them. This was an untenable situation for the groups. As noted in an Open Letter reacting to the announcement of these two independent counsel appointments:

The DEWC and Women's Memorial March Committee as a formal Coalition with a full grant of standing before the Missing Women Commission of Inquiry, is opposed to the proposal regarding an independent lawyer to present all the perspectives of the DTES. Our group was not even contacted by the Commission to see if we were amenable to this proposal, rather it was presented as a 'fait

⁵¹ Commissioner Oppal also appointed two senior lawyers, Bryan Baynham Q.C. and Mr. Darrell Roberts Q.C., as *pro bono* support for her: See <http://www.missingwomeninquiry.ca/2011/08/august-10-2011-missing-women-commission-appoints-two-independent-lawyers-two-others-to-participate-pro-bono/>. According to MWI spokesperson Chris Freimond, "the *pro bono* attorneys will assist Gervais because she is less experienced than Gratl and has a broader mandate to tackle, adding that the Aboriginal female community she will represent is 'extremely large and complex'." See <http://theyee.ca/Blogs/TheHook/Rights-Justice/2011/08/10/Missing-Women-Inquiry-Lawyers/>. Baynham is Chair of Vancouver firm Harper Grey LLP's Condo Litigation and Defamation, Media and Privacy Law Practice Groups. Roberts practices commercial litigation, professional malpractice, estate litigation, major personal injury, class actions, environmental law, construction litigation, defamation, aboriginal law, products liability, estate and property law litigation, and constitutional law, according to the profile on his firm's website: See <http://www.millerthomson.com/en/our-people/darrell-w-roberts>. It is unclear what expertise they were able to provide related to Aboriginal women.

⁵² First Nations Summit, Statement to the Missing Women Inquiry, para. 13 (October 2011); available from http://fns.bc.ca/pdf/MWCI_FNS_Statement_Oct_11_2011.pdf; accessed 25 March 2012.

accompli' and expressions of interests from lawyers were sought within three days.

The latest proposal is a further slap in our face, which comes in light of the BC government's decision to shut out participation of DTES, Women's and Indigenous groups and communities. The purpose of the public inquiry is being whittled away—the adversarial process already makes it highly improbable for vulnerable women to provide their testimonies as they will be subjected to rigorous cross examination by the police's lawyers. This is highly objectionable as it revictimizes and traumatizes survivors of violence in an Inquiry that is supposed to bring some level of justice for them.⁵³

Meanwhile the three police departments (RCMP, Coquitlam, Vancouver) had four to six publicly funded outside counsel each, whom they could instruct. The Inquiry would now receive its factual basis from examinations and cross-examination of witnesses by the counsel for the police departments along with the lawyer representing a subset of the families of the missing and murdered women. Counsel for NWAC, Katherine Hensel, described this as a “tremendously unfair and discriminatory result” at the Inquiry.⁵⁴ Indeed, she described the appointment of independent counsel by the Inquiry as introducing a new form of discrimination by denying the parties the ability to instruct counsel and fully engage in the process. NWAC decided that participating would do more harm than good because the result would be unbalanced in favour of the police departments, who would be able to say that they went through the inquiry process and would thus be confident they could proceed with the recommendations made by the Inquiry.

⁵³ Downtown Eastside Women's Centre and Women's Memorial March Committee, “Open Letter” (August 5 2011); available from <http://womensmemorialmarch.wordpress.com/2011/08/05/amicusproposal/>; accessed March 16, 2012.

⁵⁴ Katherine Hensel, presentation at SPINLAW Conference, Panel on the Missing Women Inquiry (3 March 2012) University of Toronto Faculty of Law.

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The message indigenous women received was that they were not considered important enough for the police to seriously investigate their disappearances and nor were they important enough to be heard from at the inquiry investigating the police inaction about their disappearances.⁵⁵ All the parties granted standing but denied funding withdrew from the Inquiry, both because they were unable to participate without legal counsel in a complex, adversarial process, but also because the decision represented government interference in the Inquiry. Amnesty International did have in house counsel and could have participated but withdrew from the Inquiry as well because they viewed the independence and integrity of the Inquiry to have been compromised. None of the organizations with the most insight into the realities for women in the Downtown Eastside were represented at the Inquiry. Given that the parties that could have provided a factual record with respect to the affected women were not part of the Inquiry, the fear was that the systemic issues would not be adequately addressed as the Inquiry moved to the study portion of its mandate.

On March 6, 2012, one of the two independent counsel, Robyn Gervais, resigned, citing the Inquiry's failure to provide adequate hearing time for Aboriginal witnesses. In 53 days of sitting, 39 days of testimony was from police witnesses. The Inquiry called for a recess in order to seek "experienced counsel" to take over the role.⁵⁶ "Oppal told the inquiry he was adjourning the hearings until Gervais is replaced because aboriginal interests are too important not to have a voice at the inquiry."⁵⁷ However, as noted by columnist Ian

⁵⁵ Ibid.

⁵⁶ Neil Hall, "Missing Women inquiry adjourned to April 2 to allow appointment of Aboriginal counsel," *Vancouver Sun* (March 12, 2012); available from <http://www.vancouversun.com/news/Missing+Women+inquiry+adjourned+April+allow+appointment+aboriginal+counsel/6289167/story.html#ixzz1pPMT5ZU8> : "Art Vertlieb, counsel for inquiry, told Oppal that he has contacted an experienced, well-respected lawyer to take over the role of representing aboriginal interests."

⁵⁷ CBC News Online, "Missing Women Inquiry Adjourned to Replace Lawyer," (12 March, 2012); available from <http://www.cbc.ca/news/canada/british-columbia/story/2012/03/12/bc-missing-women-inquiry.html>.

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Mulgrew: “The voice of first nations is being drowned out by the sheer number, collective volume and the aggregate time provided the institutional police voice.”⁵⁸ With the resignation of Gervais, the First Nations Summit formally withdrew its participation from the Inquiry. In an open letter to the Commissioner, the umbrella organization for First Nations involved in the BC treaty process stated:

We want to reiterate our full support for the families of all those women who are missing and murdered. They need to see that justice is not only seen to be done, but that it is done and that the many questions they have are answered fully. The voices of these families and that of our communities must be respected and heard.

We come to the conclusion, given all these developments, together with the conduct of the Inquiry, including your statements to Robyn Gervais today, those voices are not being respected or heard. This continues to reflect what we said in our Statement, a systemic pattern of discrimination. We feel the Inquiry will not be able to fulfill a critical part of its mandate.

Our continued participation has always been subject to review by our Executive and Chiefs. Unfortunately, the fears expressed by our Chiefs and leaders at the outset of this process, have been confirmed. Given the withdrawal of, and the reasons provided by, the Independent Legal Counsel, Robyn Gervais, today and the withdrawal of all First Nations/Aboriginal organizations earlier in the process, we feel we cannot continue to participate. Effective today, we withdraw from participation in this Inquiry. We will seek alternative ways for the voices of the families of the missing

⁵⁸ Ian Mulgrew, “Oppal misses opportunity to make inquiry meaningful process,” *Vancouver Sun* (12 March, 2012); available from <http://www2.canada.com/vancouversun/columnists/story.html?id=cbd8e72a-5167-46fb-aad0-ef351e99beb8>.

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and murdered women and our communities to be heard and respected.⁵⁹

On March 21, 2012, Commissioner Oppal appointed lawyers Suzette Narbonne and Elizabeth Hunt as Independent Co-Counsel:

... to present issues related to Aboriginal interests. Commissioner Oppal believes that this role is crucial to ensure that Aboriginal interests are presented at the Inquiry. Both Ms. Narbonne and Ms. Hunt are respected, experienced legal professionals. Commissioner Oppal has every confidence in each lawyer's ability.⁶⁰

Unfortunately, whatever skill Narbonne and Hill brought to the Commission, they still could not overcome the structural problem that they were appointed by the Commission and not by the parties excluded from the Commission's process, but on whose behalf they were somehow expected to speak.

Process

The Inquiry had some structural components that could have enabled meaningful participation from people not otherwise accessing the Inquiry. For example, it held public forums in the cities of Vancouver and Prince George to hear from communities affected by the

⁵⁹ Letter from First Nations Summit (Grand Chief Edward John, Chief Douglas White III Kwulasultun, Dan Smith) to Commissioner Oppal (March 6, 2012); available from http://fns.bc.ca/pdf/FNS_NR_%20LT_Commission_re_FNS_Withdrawal_0306_12.pdf.

⁶⁰ Missing Women Inquiry, press release (21 March 2012); available from <http://www.missingwomeninquiry.ca/2012/03/march-21-2012-appointment-of-independent-counsel-presenting-issues-related-to-aboriginal-interests-announced/>; accessed March 24, 2012. Narbonne is a sole practitioner whose practice includes criminal and human rights law. According to her webpage, she began practice as a legal aid lawyer in The Pas, Manitoba (site of Helen Betty Osborne's death) and later practiced in Prince Rupert, in northern BC, before moving more recently to the coastal community of Sechelt, BC: <http://narbonnelawoffice.com/bio.html>. Elizabeth Hunt is a member of the Kwakiutl Nation and a sole practitioner in the Esketeme First Nation community.

disappearances and murders of their women. The study commission mandate allowed for hearings that (unlike the hearing commission) did not involve cross-examination in order that people could speak without being questioned by lawyers, and without the need for their own lawyers.

However, without the voices of the communities well-acquainted with the systemic issues that have made indigenous women invisible in this country, the factual record of the Inquiry would be expected to focus instead on the actions or lack thereof of the various police departments with respect to the Pickton investigation.⁶¹ The Inquiry would not be anticipated to have the basis upon which to make recommendations that address the ongoing colonialism that is inherent in how police forces treat indigenous women, how governments direct prosecutorial policy, and how the broader societal community views indigenous women.

In contrast to the MWI process, the AJI process benefited from considerable participation of indigenous women. As the AJI noted in its report:

Aboriginal women and their children suffer tremendously as victims in contemporary Canadian society. They are the victims of racism, of sexism and of unconscionable levels of domestic violence. The justice system has done little to protect them from any of these assaults. At the same time, Aboriginal women have an even higher rate of over-representation in the prison system than Aboriginal men. In community after community, Aboriginal women brought these disturbing facts to our attention. We believe the plight of Aboriginal women and their children must be a priority for any changes in the justice system. In addition, we believe that changes must be based on the proposals that Aboriginal women presented to us throughout our Inquiry.⁶²

⁶¹ Counsel for 25 of the women's families, Cameron Ward, detailed his concerns regarding the lopsided evidentiary record in his closing submissions to the MWI: See <http://www.cameronward.com/wp-content/uploads/2012/08/Missing-Women-Inquiry-Closing-submissions-of-the-Families-public.pdf>.

⁶² AJI Report, Chapter 13, "Aboriginal Women—Introduction".

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As this overview of the MWI illustrates, and as confirmed by the groups with limited standing refusing to lend their own credibility to the process, the Inquiry did not fulfill its potential social function. Instead of acting as an opportunity for discussion of the systemic issues giving rise to the missing and murdered women, the Inquiry process reinforced the problems. The contrast between the AJI and the MWI illustrates the critical importance of the leadership as well as the process undertaken by an inquiry in achieving the goals in their mandates. In a situation where the issues to be addressed raise questions about the ability of the community to acknowledge their existence, these factors become very important indeed. Women's organizations and Aboriginal groups had called for an inquiry for years before the MWI was appointed. These bodies were seeking a process that would reveal the truth of what had occurred in the face of police and government intransigence. The MWI needed to demonstrate that it could fulfill the social function and become a pedagogical process – not just for the police departments and Crown prosecutors, but for the wider society. Instead, the organizations with standing but denied funding stated in a letter to Commissioner Oppal:

We feel that it is important to state our profound disappointment in how this Inquiry has unfolded. Based on our experiences of exclusion from the Inquiry process, as well as our assessment of events occurring throughout the course of the proceedings, we have no confidence that our participation in the Policy Forums or Study Commission will contribute to the *truth, reconciliation and accountability that we fully expected* when this Inquiry was initiated.⁶³

⁶³ "Open Letter: Non-participation in the Policy Forums/Study Commission," (10 Apr., 2012); available from http://www.ubcic.bc.ca/files/PDF/OpenLetterstoMWCI_041012.pdf [emphasis added].

The MWI Report

While the Inquiry has been criticized as a “travesty” and a “debacle”,⁶⁴ the Report is overall a thorough and conscientious document. The Report attempts to do some of the things that the Inquiry process missed the opportunity to do. For example, it memorializes the women by composing brief profiles of each,⁶⁵ makes efforts to acknowledge the women, challenges the narrative dismissing the women, and refers to the need for reconciliation and healing. The Report examines the processes of marginalization and notes that the overrepresentation of indigenous women in the missing and murdered women is related to the legacy of colonialism in Canada.⁶⁶

The framework of analysis for the Report is stated to be based on elements that include the context of the women’s lives, and an understanding of equality rights norms applicable in policing.⁶⁷

⁶⁴ Matas, “Pressure on Oppal mounts.” See also Mason, “The debacle over B.C.’s missing women.”

⁶⁵ *Forsaken*, vol. 1, part 3.

⁶⁶ *Ibid.*, vol. 1, part 4, 94.

⁶⁷ *Ibid.*, Executive Summary, 21. It is apparent that the Inquiry benefited from having staff capacity to consider the systemic issues driving the reasons for so many indigenous women to have gone missing without a massive mobilization of police resources. Policy counsel for the Inquiry was Dr. Melina Buckley, a respected feminist legal practitioner in Vancouver who has written extensively on systemic discrimination against women, including working with the Task Force on Gender Equality that produced the landmark report: Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability, Report on Gender Equality in the Legal Profession*, 1993. In addition, Associate Commission Counsel was Karey Brooks, actively involved in feminist legal work in Vancouver (a former board member of West Coast LEAF, one of the women’s organizations that withdrew from the Inquiry) as well as a partner at the law firm of Janes Freedman Kyle where she practices Aboriginal law. One of the interim policy papers released by the Inquiry in February 2012 cites significant scholarship on systemic reasons for the extreme violence directed toward indigenous women in Canada and it is evident that some members of the Inquiry staff were aware of the larger context for the Inquiry: Missing Women Inquiry. *Protection of Vulnerable and Marginalized Women*; available from <http://www.missingwomeninquiry.ca/reports-and-publications/>. The press release regarding the four reports is available from <http://www.missingwomeninquiry.ca/2012/02/february-21-2012-missing-women->

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In Volume Two of the Report, Oppal reviews the police investigations and draws conclusions with respect to “how we, as a society and through our police forces, failed the missing and murdered women.”⁶⁸ He states that: “Among the questions I have had to consider in the inquiry is whether their status as nobodies also had an impact on the police investigations.”⁶⁹

Notwithstanding these positive aspects of the Report, Oppal’s conclusions are nonetheless problematic since he fails to hold anyone responsible for the harms wrought by the numerous police failures that he identifies: “I focus on systemic failures rather than individual failures. My perspective is foremost oriented to the future: It is aimed at contributing to a safer future rather than attributing blame for past inadequacies and breakdowns.”⁷⁰ He explains:

I agree that hindsight should not be used to judge past efforts of individuals who did not know what is known today. I fully accept the submissions of the VPD, Vancouver Police Union (VPU) and the Government of Canada on behalf of the RCMP that all of the officers involved in the investigations acted in good faith.⁷¹

Commissioner Oppal’s decision to decline making any findings of individual misconduct prompted criticism: “the police investigations were ‘blatant failures,’ there were ‘patterns of error,’ there was an ‘absence of leadership,’ there were ‘outdated policing systems’ ... Yet no one was to blame.”⁷²

commission-of-inquiry-releases-study-reports/; accessed March 17, 2012. However, without the Commissioner’s leadership that interprets the mandate and structures the operations of the commission (appointment of outside counsel, which witnesses to prioritize at hearings, etc.) in such a way as to prioritize these contextual factors, the value brought to the Inquiry by such qualified counsel will necessarily be thwarted.

⁶⁸ Ibid., Executive Summary, 24.

⁶⁹ Ibid., vol. 2A, 2.

⁷⁰ Ibid., vol. 2A, 3.

⁷¹ Ibid., vol. 2A, 4.

⁷² Mulgrew, “Oppal’s Report Leaves the Missing Women Forsaken Once Again.”

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Despite the merits of the report, which obliquely acknowledges some of the Inquiry's failures in process, in statements such as: the "hearing process creates barriers for marginalized individuals,"⁷³ the flawed process of the Inquiry remains a missed opportunity and an injury to the women's families. Moreover, the decision not to hold anyone in particular responsible for the "blatant failures" is also an injurious outcome.

Yet, in the end, the Report does echo the words of the AJI report in some critical respects. The opening paragraphs of the AJI report indicate that the commissioners took a broad view of their mandate and assessed the structural causes of the situations they investigated:

The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated.

It is not merely that the justice system has failed Aboriginal people; justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.

This denial of social justice has deep historical roots, and to fully understand the current problems we must look to their sources. We attempt to provide some of that context in the first part of this report. The mandate of this Inquiry is to examine the relationship between Aboriginal people and the justice system, and to suggest ways it might be improved. In this report we make many recommendations about how

⁷³ *Forsaken*, Executive Summary, 13, referring to vol. 4b.

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existing institutions of justice—the police, the courts, the jails—can be improved. But far more important than these reforms is our conclusion that the relationship between Aboriginal people and the rest of society must be transformed fundamentally. This transformation must be based on justice in its broadest sense. It must recognize that social and economic inequity is unacceptable and that only through a full recognition of Aboriginal rights—including the right to self-government—can the symptomatic problems of over-incarceration and disaffection be redressed.

The problems are daunting and our proposals are far-reaching. But we believe that in the interests of justice, the process of transformation must begin immediately.⁷⁴

As Canadians know, often public inquiries produce very fine reports that make valuable recommendations that then appear to gather dust on shelves. There are two generally acknowledged purposes of a commission of inquiry: to create an accurate historical record of what has occurred, and to offer solutions in order that the tragedy not be repeated.⁷⁵ Although inquiry reports may appear to gather dust, they can nonetheless have enduring value. While some commissions are more successful than others in gaining adoption and implementation of their conclusions and recommendations, all of these processes contribute to the narrative arc about their subjects. Given that the reports may not have the desired immediate effect, it is very important that the inquiries themselves be run in such a way that the process they use creates positive change through their work. Although the MWI echoes the AJI report, it did not succeed in its social function because of the failures in its process. Nonetheless, over time, its report may contribute to achieving necessary changes in Canada's treatment of indigenous women.

⁷⁴ AJI Report, Vol. 1, "Introduction".

⁷⁵ Stanton, "Truth Commissions and Public Inquiries."

The Truth and Reconciliation Commission

The Missing Women Inquiry occurred in the context of a period in which Canada has stated its intention to renew its relationship with Aboriginal peoples. In 2008, Prime Minister Stephen Harper, followed by the leaders of each of the parties in the House of Commons, rose to offer an apology for the government's part in the Indian Residential Schools (IRS).⁷⁶ It was an apology that the government had resisted giving for a very long time, and when it was finally offered, some thought that it might mark a turning point in the relations between Canada and the indigenous peoples to whom it was addressed. In addition to the apology, Canada finally endorsed the UN Declaration on the Rights of Indigenous Peoples on November 12, 2010, after an initial objection and persistent refusal to sign on.

And of course, there is a TRC on the residential schools legacy underway in Canada.⁷⁷

The Truth and Reconciliation Commission on the Residential Schools Legacy is the result of a legal settlement agreement of massive class action lawsuits by survivors of the schools that were jointly operated by the Canadian government and a number of

⁷⁶ As I explained in "Canada's Truth and Reconciliation Commission: Settling the Past?":

For over a century, the Canadian government sought to assimilate Indigenous children into the non-Indigenous culture by promoting and then requiring their attendance at church-run schools.... Children were separated from their families and communities and sent far away to schools where they were forbidden to speak their languages, practice their spirituality or express their cultures.... Indigenous people who never attended an IRS have nonetheless suffered from the harms inflicted there due to the interruption of traditional cultural transmission and parenting skills, the loss of skills enabling traditional life on the land, the pathologies and dysfunction now endemic in many Indigenous communities and the loss of language, culture and spirituality.

See also the *Report of the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Supply and Services Canada, 1996) [RCAP Report], especially vol. 1, part 2, "False Assumptions and a Failed Relationship", c.10 "Residential Schools".

⁷⁷ See also Cheryl Suzack and Elise Couture-Grandin, "The Becoming of Justice: Indigenous Women's Writing in the Pre-Truth and Reconciliation Period," in this volume.

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churches for a period that stretched over a century, the last one closing in 1996. The schools were part of the colonial project to assimilate indigenous peoples into the Canadian politic in order to “get rid of the Indian problem”.⁷⁸ The TRC has a five year mandate and is expected to complete its operations by 2014.

Outside observers may not immediately see Canada as fitting within the rubric of transitional justice, a concept often more associated with a passage from a violent autocratic regime to democratic rule. However, a truth and reconciliation commission is recognized as a transitional justice mechanism, and the Canadian TRC is intended to assist with the reckoning of a mass human rights violations in Canada’s past.

Relationship between the Indian Residential Schools legacy and the missing and murdered women

The missing and murdered women have not been a visible focus of the TRC. However, the connection between the legacy of residential schools and missing and murdered women must be made: “There is broad agreement in the literature that the root causes of the intolerably high levels of violence and vulnerability to violence experienced by Aboriginal women and girls in Canada lie in the colonial policies of historical and contemporary governments.”⁷⁹ This connection was noted by the AJI:

⁷⁸ This was the stated goal of Duncan Campbell Scott, Superintendent of Indian Affairs in 1920: Ottawa, National Archives of Canada, (RG 10, vol. 6810, file 470-2-3, vol. 7, at 55 (L-3) and 63 (N-3)).

⁷⁹ Tracy Byrne, *Stopping Violence Against Aboriginal Women—A Summary of Root Causes, Vulnerabilities and Recommendations from Key Literature* (prepared for the Government of BC, February 23, 2011), 7. NWAC has made the link between IRS and increased likelihood of Aboriginal women experiencing violence: see http://nwac.ca/sites/default/files/imce/NWAC_3F_Toolkit_e.pdf, 5; an MWI policy paper identifies IRS as one factor that makes Aboriginal women vulnerable to systemic racism, 10: see <http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Protection-of-Vulnerable-and-Marginalized-Women-00261663.pdf>; see also Beverley Jacobs and Andrea J. Williams, “Legacy of Residential Schools: Missing and Murdered Aboriginal Women,” in Marlene Brant Castellano, Linda Archibald, and Mike DeGagné, eds., *From Truth to Reconciliation:*

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The very reason that Betty Osborne was compelled to leave her home and move to The Pas also was rooted in racism. Like so many other Aboriginal young people, she was forced by long-standing government policy to move to a strange and hostile environment to continue her schooling.⁸⁰

This kind of analysis was critical for the MWI to incorporate into not only its findings, but into its process. The community and women's organizations all lost hope that such an outcome was possible based on their experience with the process of the Inquiry. Nor are the women's organizations turning to the TRC to address these issues. Instead, NWAC and others have turned to international bodies to investigate the issues of violence afflicting Aboriginal women in Canada.⁸¹ First, there is a call for the Committee on the Elimination of Discrimination Against Women (CEDAW) to hold an inquiry, and more recently NWAC and the Feminist Alliance for International Action (FAFIA) appeared before the Inter-American Commission on Human Rights.⁸² Indigenous women are seeking an inquiry from outside of Canada because Canada has failed to adequately address the matters they are raising. With hundreds of Aboriginal women missing and/or murdered, and the extreme disappointment of the MWI, it is not surprising that they would turn to international bodies for help.

NWAC has also been calling for a national inquiry into the issue of missing and murdered women, however, this will involve the federal Crown and the RCMP investigating themselves, which is not an encouraging prospect. In November 2008, CEDAW requested

Transforming the Legacy of Residential Schools (Ottawa: Aboriginal Healing Foundation, 2008), 121-140 at 138.

⁸⁰ *AJI Report*, vol. 2, chapter 9.

⁸¹ Amnesty International wrote a report on the issue in 2004: Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (October 2004); available from <http://www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf>.

⁸² See <http://fafia-afai.org/blog/2012/03/27/inter-american-commission-on-human-rights-holds-hearing-on-disappearances-and-murders-of-aboriginal-women-and-girls-in-bc/>.

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that Canada report back to the Committee within the year with respect to the reasons for failure to investigate the cases of missing and murdered Aboriginal women and to correct deficiencies in the system.⁸³ Canada did not fulfill the UN Committee's request for follow-up by November 2009, according to the BC CEDAW Group that submitted its shadow report to the United Nations on February 2, 2010. Nine provincial Ministers of Aboriginal Affairs called for a national inquiry into the missing and murdered women on April 17, 2013.⁸⁴ Although the federal government set up a Special Committee on Violence Against Indigenous Women in March, 2013, the independence afforded by a public inquiry is preferable to a parliamentary committee.

Truth, Reconciliation and the Missing Women Inquiry

Public inquiries can be processes that generate social accountability.⁸⁵ There are ways to conduct an inquiry process that will enable people to feel that they are being heard and that will benefit the listeners. An inquiry process will be effective if it has a clear media strategy, engages the public, holds public hearings that are not “lawyer-driven”, tries to conduct them in the witnesses’ first languages, goes to their communities, has different types of hearings, provides opportunities for civil society engagement, welcomes independent research and makes it clear that all the evidence that it hears will be valued.

The journey of a public inquiry is just as important, if not more so, than the destination—that is, the process employed by an inquiry is just as critical as any conclusions it may reach. As noted above, the ability of a public inquiry to fulfill its social function will depend in large part on the inquiry’s leadership and the process used

⁸³ West Coast LEAF *News Alert*, “‘Nothing to Report’ to BC Women,” (Feb 2, 2010). The BC CEDAW Group is a coalition of BC women's and human rights organizations that has been monitoring the status of women's equality in the province since 2001.

⁸⁴ See <http://www.winnipegfreepress.com/canada/Provinces-jointly-call-for-national-inquiry-into-missing-slain-women-203491921.html>.

⁸⁵ Stanton, “Truth Commissions and Public Inquiries.”

for the implementation of the mandate. The process can be conducted in a manner that builds trust, engagement and social cohesion from communities that have been disheartened by the justice system to date. This can in turn create legitimacy for the commission with respect to the broader community. If this occurs, then public interest generated in the commission can translate into political will to adopt the inquiry's recommendations.⁸⁶

The MWI could have been an opportunity to conduct a transitional justice process—it could have been structured more as a truth commission and less as a formal legal inquiry in that the focus should have been on the women instead of on the intricacies of police procedure (though the latter should still have been explored). If the process had been led by a person without a taint of conflict of interest, if the government had not refused to provide a voice to the women's organizations, if the Inquiry had not been dominated by police witnesses and testimony, there might have been an opportunity to begin a process of reconciliation for the women and communities traumatized by the events that precipitated the Inquiry. If the Province had extended funding to all parties with standing, instead of spurning them in the name of cost-saving (decidedly not a gesture of reconciliation), the course of the Inquiry would have been different. Instead, whatever the merits of the final report, the Inquiry process denied a voice in the proceedings to the very communities

⁸⁶ In April of 2011, I wrote a memorandum to MWI Assistant Commission Counsel Karey Brooks to highlight the important opportunity represented by the broadening of the Missing Women Inquiry process to include a study commission. The memorandum, dated April 11, 2011, "Institutional Design Suggestions for the Missing Women Commission of Inquiry," is unpublished, on file with the author, and was not solicited by the Inquiry. It outlines my thoughts with respect to the potential and necessity for the MWI to act as a truth and reconciliation process. I wrote it out of concern for the progress to that time of the Inquiry and my hope that the opportunity the study commission mandate provided might be a positive turn for the Inquiry. While the idea of a public inquiry having a social function was acknowledged in a study paper by Policy Counsel Melina Buckley, she suggested that the MWI terms of reference "constrained that function." Missing Women Commission of Inquiry, *From Report to Substantive Change – Healing, Reconciliation and Implementation*, Policy Discussion Report (April 2012).

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silenced by the horrific systemic abuse directed at indigenous women inherent in Canadian society. As lawyer Cameron Ward, who represented the families of 25 of the women, told the Inquiry during his final submissions:

My clients are disappointed, discouraged and, most of all, angry at the way this commission has unfolded. They feel this commission has perpetuated the attitude of indifference and disrespect that they themselves first experienced when they reported their loved ones missing.⁸⁷

The process an inquiry utilizes has an important role in changing the narrative on a contentious societal issue. A key component of transitional justice is the implementation of processes that deconstruct and reconstruct the national narrative. A dominant Canadian narrative is one of a country that defends human rights and champions the principles of equality and justice for all. Effective transitional justice processes are needed to address the ongoing structural violence created by continued colonialism.

The choice of leadership of an inquiry is absolutely critical to the credibility of that inquiry for the immediate stakeholders and for the broader community. The MWI was hampered from the outset because of the baggage that Commissioner Oppal brought with him to the role.⁸⁸ The AJI was bolstered from the outset by the choice of

⁸⁷ James Keller, "Families of Pickton victims denounce 'missing-evidence inquiry,'" *Globe and Mail* (4 June, 2012); available from <http://www.theglobeandmail.com/news/british-columbia/families-of-pickton-victims-denounce-missing-evidence-inquiry/article4231153/>.

⁸⁸ A further negative factor for the Inquiry was reported April 3, 2012, with a report of staff alleging harassment by a senior staff. The Executive Director, John Boddie, a former Vancouver police officer (in itself a staffing choice that lacked an air of independence), went on leave from the Commission. Vancouver lawyer Delayne Sartison, Q.C. was appointed to investigate the harassment allegations. The independent investigation later found no corroboration of the allegations: Brian Hutchinson, "Missing Women Inquiry beset by 'sexism' – ex-staff," *The National Post* (3 Apr. 2012); available from <http://news.nationalpost.com/2012/04/03/missing-women-inquiry-staff-claim-abuse-highly-sexualized-workplace/>; Neal Hall, "Investigator to probe sexism

co-commissioners with strong reputations for fairness and, it must be said, for the choice of an indigenous co-commissioner. Although Oppal is a member of a minority group, he did not exhibit the depth of understanding of the contextual issues at play that the process required.⁸⁹ Justice Sinclair's work on the AJI suggests that he is well-placed to acknowledge gender dimensions of the IRS legacy in the TRC's work although there is currently no indication as to whether or how the TRC will choose to do so.

The MWI and the AJI are part of a continuum of commissions of inquiry regarding indigenous issues in Canada. Between the two came the Royal Commission on Aboriginal Peoples (RCAP) that provided a comprehensive picture of Canada's relationship with indigenous peoples, including the IRS system.⁹⁰ RCAP contained a chapter dedicated to issues related to indigenous women.⁹¹ In many ways the earlier AJI inquiry is a much more effectively run endeavour than the MWI. The fact that the MWI followed the AJI and RCAP commissions yet was plagued with problems does not send a good message with respect to the growth of Canadian society in terms of its ability to address violence against indigenous women. The tale of these two inquiries illustrates the continued and extreme discrimination suffered by indigenous women in Canada and the state's paltry response.⁹²

claims by former Missing Women Inquiry staff" *The National Post* (4 Apr. 2012); available from <http://news.nationalpost.com/2012/04/04/investigator-to-probe-sexism-claims-by-former-missing-women-inquiry-staff/>; Letter from Delayne Sartison to Wally Oppal (May 29, 2012); available from <http://www.missingwomeninquiry.ca/wp-content/uploads/2012/06/Independent-Investigation-Report.pdf>.

⁸⁹ Mulgrew, "Oppal Misses Opportunity to Make Inquiry a Meaningful Process."

⁹⁰ RCAP Report.

⁹¹ *Ibid.*, vol. 4, chapter 2 "Women's Perspectives". See also vol. 3, chapter 2.3.2, "The Face of Aboriginal Violence."

⁹² As noted in my dissertation, several other inquiries over the years have revealed racism as a pervasive factor in indigenous and non-indigenous relations. In 1989, the Royal Commission on the Donald Marshall, Jr., Prosecution, created in response to the wrongful conviction of a Mi'kmaq man for murder in 1971, made 82 recommendations aimed at improving the administration of justice in Nova Scotia, particularly with respect to racialized communities: *The Royal Commission*

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The failure to connect the underlying issues of the MWI and the TRC while they ran concurrently is a symptom of Canada's deep and persistent denial about the causal connection between colonialism and the fate of the missing women. The deaths of countless indigenous women heighten the need for an inquiry process that fulfills the social function of a truth commission in Canada. Yet the TRC is struggling under the weight of its mandate and the non-indigenous Canadian population has largely ignored its progress. It is no wonder, then, that women have looked beyond Canada for an inquiry into this issue.

Conclusion

I do not measure the value or success of a public inquiry by the implementation of its recommendations—if I did, then I would wonder why the institution continues to exist, given the meagre record of any government in Canada to adopt any inquiry's full set of recommendations. Rather, I measure an inquiry by the pedagogical value of its process and its ability to create or influence the societal narrative about its subject. Did the public become engaged in the work of the inquiry? Was it therefore truly a *public* inquiry? Did this public engagement translate into support for the inquiry's work? If so, did this translate into political will to implement its

on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations* (December 1989). The 2004 Neil Stonechild Inquiry addressed the practice of Saskatoon police of dropping off young indigenous men on the outskirts of the city in the middle of winter and leaving them to freeze to death, known as "Starlight Tours", and the racism ingrained in the police force that allowed such a horror to become a practice. Commission of Inquiry into Matters Relating to the Death of Neil Stonechild, *Report of the Commission of Inquiry into the Death of Neil Stonechild* (October 2004); available from <http://www.stonechildinquiry.ca/>. The Ipperwash Inquiry investigated the death of Dudley George, shot by Ontario Provincial Police while he participated in a protest by indigenous people with respect to a land dispute. Sidney Linden, Commissioner, *Report of the Ipperwash Inquiry*, vol. 1 "Investigation and Findings" (Ontario: Attorney General, 2007), "Conclusion", 677; available from http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_1/pdf/E_Vol_1_Conclusion.pdf.

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recommendations? Did the public conversation about the inquiry's topic change as a result of the inquiry's work? Did the wider community become aware of the issue and did people view the issue differently because of the inquiry? Did the stakeholders involved in the inquiry have to re-evaluate their methods or change their own views of the subject matter? These questions, if answered in the affirmative, indicate to me that the inquiry has contributed to the dialogue on an issue, and given the vagaries of political will and public engagement, that is about as much as we can hope for from any inquiry.

I stated at the outset that the commission of inquiry and the truth commission share two main goals with respect to addressing past human rights violations: to find out what happened and to prevent its recurrence. One might say that in Canada, public inquiries have failed miserably on the second goal.

No single inquiry can fix systemic racism in Canada. This much is obvious. However, a succession of inquiries, if run well, with careful attention to leadership and process, can create awareness and awareness can chip away at the dominant narrative over time. In this way, commissioners who utilize the possibilities of the public inquiry model in order to perform a social function provide something of the truth commission for the affected community. Those inquiries and commissioners that do not see the larger context in which the issues set out in their mandate exist will deny the community the opportunity to learn from or gain some healing from the inquiry process.