

August 23, 2017

Chief Commissioner Marion Buller  
National Inquiry into Missing and Murdered Indigenous Women and Girls

*Via e-mail*

Dear Chief Commissioner,

**Re: Concerns of Non-Governmental Organizations with Standing before the Inquiry**

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We are non-governmental organizations (NGOs) whose national (or national and regional) standing before the Inquiry was affirmed in your omnibus letter of standing dated August 17, 2017.

Being granted standing at the Inquiry proceedings places us at a turning point. On the one hand, we welcome the opportunity to contribute in this way to the analysis and eventual eradication of violence against Indigenous women, girls, and LGBTQ2S people. Our own work has long focussed on the achievement of this goal. Well before the Inquiry's appointment, we were immersed in these issues. That work included many years of campaigning for the appointment of the Inquiry, which we had viewed as one more way of challenging the grisly circumstances of violence against Indigenous women. In that work, we embraced the idea that women's rights are human rights, and that violence against Indigenous women is a violation of human rights, joining human rights advocates around the world in this position. Thus, intervening in the Inquiry's process should provide us with a welcome opportunity to apply our knowledge and our commitment to eradicating violence against Indigenous women and girls.

On the other hand, we have watched in dismay over the past year as the Inquiry has failed to live up to its potential as a powerful mechanism for addressing this tragedy. Twelve months after its establishment, the Inquiry has yet to lay out its full work plan, and the information provided to the public about its work and the process itself has been fragmentary. There has been only one set of hearings with the families, in Whitehorse, Yukon, towards the end of its first year. Given the Commission's commitment to making "families first" we were surprised to learn that the expert panel would be held before the completion of the family hearings. It was our understanding that the evidence in the expert hearings was to be informed by the experience of the families. The first proceeding in phase III, the expert panels, is beginning this week, and there have been no phase II hearings. The plans of the Commission after almost a full year of existence are unclear and because of this we found it difficult to specify in our applications for standing how we could best assist the Commission in carrying out its work. As we outline more

fully below, we are still uncertain about what the Commission, and thus its participants, will be undertaking over the next year until the original end date of the Commission's mandate.

At this juncture, we are faced with a difficult choice. We acknowledge, with deep respect for their courage, the concerns raised by the coalition of families in the open letters of May 15 and August 8, 2017. Many of the concerns are shared broadly. We fully support their calls to get the family hearings underway with a set and known schedule and for supports for their participation, including funds for travel, accommodations, meals, childcare, escorts for those requiring them, mental health supports, legal counsel and other expenses.

The federal Order in Council provides in paragraph (e)(ii) that the Inquiry process is intended, to the extent possible, to provide an opportunity for persons, families and community members to express and share their experiences and views, particularly on ways to increase safety and prevent and eliminate violence against Indigenous women and girls in Canada. This provision clearly mandates that the families and communities be engaged with the Inquiry across its broad scale, including the matters dealt with in your phases II and III. The Order in Council permits the establishment of regional and issue-specific advisory bodies. The Order in Council also authorizes the Commission to conduct the Inquiry, to the greatest extent possible, by means of informal processes and sit in "the places, especially in Indigenous communities" which the Commission considers appropriate. All of these parameters give the Commission the power, and indeed the direction, to engage with the families in a thorough way.

As organizations that worked for many years to have the Inquiry come into being, we are deeply concerned that the Inquiry does not have the confidence of many MMIWG families and communities that are a primary source of insight and knowledge for the Inquiry.

This makes our position exceedingly difficult. We do not wish to lend credibility to what, so far, has been a flawed process. At the same time, having called for an Inquiry, we know that such a mechanism is always a difficult undertaking and has to be viewed as a contribution to a longer-term vision for change in our national fabric. If important stakeholders and constituencies opt not to participate, the ability of the Inquiry to fulfill its mandate will be badly compromised. So, on the one hand, we are concerned that if we engage with a flawed process, we will contribute to harm to MMIWG families and communities. On the other hand, if we do not engage, the Inquiry will proceed without all of the information, knowledge and expertise that we can provide, and thus make for a far less effective outcome.

### **Expert Hearings**

The difficulty of this choice is complicated by a rushed and unpromising start to the expert hearings. Participation of NGOs with national standing at the first expert hearing on August 22 and 23, 2018 in Winnipeg on Indigenous Law and Decolonizing Perspectives has been hampered by process problems that are described in greater detail below. NGOs received informal notice that they had been granted standing on July 17 and formal notice on August 17. NGOs were

provided information regarding the August 22-23 hearing in teleconferences, on August 3 and 10, at which time initial information regarding the content of the expert hearing was also provided. Since funding rules are not clear, and no funding has so far been disbursed, a number of NGOs cannot participate in the initial expert hearing because of lack of adequate notice and time to prepare, and because of lack of funds to attend. Less than three weeks is nowhere near enough time for anyone to prepare for an expert panel, especially given the lack of funding to support such preparation. As a result, it appears that the hearing has been most accessible for representatives of police organizations and governments. This represents a serious imbalance of power, representation and critical input from experts, NGOs and families tainting the expert panel sessions before they begin. We worry that this will lead to an inaccurate and biased depiction of the root causes of violence against MMIWG.

It is very clear that if the process is flawed, then the substance coming from the expert hearing will be compromised. The content deficiencies which will result from a lack of NGO participation will be compounded as each incomplete expert hearing proceeds. In light of this, we are also seriously concerned about the timing, goals, and process for the second expert hearing on human rights, which is scheduled for October 3 to 5, 2017 in Montreal, just over a month away. For the human rights hearings to be an effective tool for setting out the human rights framework for the Inquiry, they must canvass Canada's statutory, constitutional and international human rights law guarantees and mechanisms, and consider their application, and effectiveness, in the human rights crisis of the murders and disappearances of Indigenous women and girls.

The Terms of Reference of the Inquiry direct the Commissioners to consider the reports of investigations undertaken by the United Nations Committee on the Elimination of Discrimination against Women and the Inter-American Commission on Human Rights, and to consider their conclusions and findings of fact (Terms of Reference at (h)). In our view, it is crucial that United Nations and Inter-American experts be called by the Inquiry to testify at the human rights hearings. However, information we have been given so far indicates that these key experts have not been invited yet, and securing their attendance for October 3 to 5 may now be difficult, if not impossible.

We wish to support the Inquiry, but we are concerned at the prospect of human rights hearings that do not include these international human rights experts and that there are still unresolved process and significant participation problems for NGOs.

### **Process Issues**

The Open Letter Coalition drew attention to the colonial nature of the Inquiry. As lawyers and organizations dealing with legal issues, we see the accuracy of this description. The Orders in Council giving the Inquiry its mandate and powers, and the statutes that provide the framework for its operations, are all creations of what can fairly be called the colonial legal system of Canada. If there is to be a Canadian Commission of Inquiry, we acknowledge, it must be

established under and by means of a Canadian legal mechanism. Nonetheless, the relevant statutes and instruments, and the long history of inquiries in Canada, clearly establish one thing: that any inquiry should be conducted in an orderly way that ensures that participants will be treated fairly, and will function in an environment that allows them to make their best contribution to the serious problems under study.

Considering the Commission's communications so far, and its general conduct of its business, we fear that unless changes are made, we will not be working in that orderly productive environment. To be effective participants, we need to know the work plan and the schedule of the Commission, as far into the future as possible. Only in that way are we able to plan our own work and mobilize our resources. Only in that way can the participants work together to identify areas where each of us can make the strongest contribution, and coordinate our activities so as to maximize our effectiveness.

We need to know the framework within which we will be working: for example, the procedural rules, the way the Commission proposes that its own counsel conduct examinations and cross-examinations and relate to the participants, and the extent of the resources available to us. We need to operate in a transparent and accountable environment in order to build trust and be in a position to place reliance upon the credibility of the process. These basic working conditions are a matter of respect for our professionalism, and will, in turn, show us the Commission's professionalism in approaching its difficult task. Clear schedules, firm and well-informed planning, provision of adequate resources, and the other features mentioned above are all matters which the families have also requested.

## **Funding**

Paragraph (f) of the federal Order in Council authorizes the Commissioners to provide "an opportunity to participate in the Inquiry" to any person having a substantial and direct interest in its subject matter. Paragraph (k) authorizes the Commissioners to recommend to the Clerk of the Privy Council that funding be provided, in accordance with approved guidelines respecting the rates of remuneration and reimbursement and the assessment of accounts, to any person described in paragraph (f) where in the Commissioners' view the person would not otherwise be able to participate in the Inquiry.

The provisions of the Order in Council do not seem to dictate that only the outside counsel for a participant with standing may be funded. The "approved guidelines" referred to contemplate both existing guidelines and also new guidelines which may be prepared for the specific purpose of funding at Commission proceedings.

Although we have not yet been provided with a copy, we understand that the Privy Council Office/Treasure Board guidelines impose additional restrictions for participation of organizations. In particular, that any funding being allocated to participants restricts us from covering disbursements for members of the organizations with standing.

The funding agreements apparently require that all organizations with standing who wish to use the allocated funds must retain external counsel, since no funds can be expended even to cover the cost in time or for travel to hearings for internal staff or members of the organization. Many organizations have little or no staff at all, working with volunteers, and there is no funding of either services or disbursements for in-house counsel or knowledgeable non-lawyer staff members or volunteers who possesses valuable expertise that would be of great assistance to the Inquiry.

This policy fails to recognise that the expertise of the organisations granted standing lies in the organisations and not in their external counsel. Without being compensated for the time and other administrative expenses associated with the research and preparation required for the participation in the hearings, many of the organisations with the most information, knowledge and expertise about the issues we anticipate the Commission must consider will be effectively prevented from meaningfully participating in the Inquiry.

The requirement to use funds for external counsel guarantees the ‘lawyering-up’ of the Inquiry, an eventuality that goes against the express advice of multiple prior commissioners and commission counsel in the pre-Inquiry consultation phase.

We are deeply concerned that it appears as if this Inquiry is putting civil society groups in the same position as they were in at the Oppal Inquiry: unable to participate unless extensive *pro bono* representation of counsel over a period of months can be secured. Every individual who represents the government and/or police organizations will have legal representation, since participation of government lawyers and lawyers representing the police will not be restricted due to funding issues that face NGOs. Meanwhile, organizational participation is either entirely precluded, or only possible through the allocation of limited funds available only for external legal counsel. This will place the NGOs at a relative and substantive disadvantage as compared to governments and police organizations – not unlike the Oppal Inquiry. Will the Commissioners challenge the PCO regulations that place unfair restrictions on funding for parties?

Annexed to this letter is a series of questions and concerns relating to scheduling, resources, rules of operation, work plan and terms of reference to which we, as a group, require answers in order to determine whether we can take part in this Inquiry. We would like to have answers within a week of the date of this letter. These answers will be material factors in our decision-making and will determine our ability to continue to take part in this process.

Please be assured that our goal in writing this letter is to improve the process and substantive depth of the Inquiry and to assist the Commissioners in making necessary improvements.

Primarily, our goal is to ensure that the Inquiry is an instrument for ending the human rights crisis of violence against Indigenous women and girls.

Yours truly,

Amnesty International Canada

Canada Without Poverty

Canadian Feminist Alliance for International Action (FAFIA)

Femmes Autochtones du Québec/Québec Native Women

First Nations Child and Family Caring Society

Native Women's Association of Canada

Dr. Pamela Palmater, Ryerson University Chair in Indigenous Governance

Union of BC Indian Chiefs

Women's Legal Education and Action Fund (LEAF)

cc Susan Vella, Commission Counsel

## **Areas of concern/questions for the Inquiry**

### **Inquiry Schedule**

1. Please provide a schedule of hearings for each phase, even if dates are tentative/unconfirmed. The lack of a clear schedule/timetable for Phases II and III, with dates, topics and locations, prevents us from budgeting and planning to what degree we will be able to participate, which will in turn affect our ability to provide the Inquiry with the best information and advice.
2. What is the rationale for starting the expert hearings without having gathered more of the expertise of MMIW families? This ordering causes us considerable discomfort with respect to participating in the expert hearings.
3. How are hearings classified as “National” as set out in the Inquiry’s “Legal Path: Rules of Respectful Practice for the National Inquiry into Murdered and Missing Women and girls” (the “Rules”)? How are hearings classified as “Regional” as set out in the Rules? These questions are important because for parties who only have regional or national standing will help them to determine how much funding is required for legal counsel, travel, etc. The Inquiry may not have a specific hearing schedule yet, but this will at least provide an idea of how it is arranging hearings according to each classification.

### **Process**

4. There is a need to clarify the expectations that the Inquiry has of parties with standing beyond that provided in the August 17 Ruling on Standing and Funding (including exact parameters/procedures for participation in hearings, logistics around cross-examination of expert witnesses, etc.)
5. The Inquiry has made reference to the opportunity to educate Canadians in these hearings. Please clarify the goal of the expert hearings, and what is expected of every Canadian in terms of engagement, what is expected of families and community allies, and what is expected of parties – and the opportunities that will be created to meet each of these expectations.
6. The length of the announced expert hearings (2-3 days) is short and the brief opportunities apparently available for questioning restrict the ability of parties to cross-examine and participate. Further, there seems to be little opportunity for anyone's cross-examination, and a great deal of uncertainty about the way cross-examinations will be done. Asking those with standing for a preview of their questions may be practical, but it is also quite intrusive. It is an extraordinary measure necessitated by the limited time for cross-examination.
7. Are families and their community allies going to be permitted to participate in proceedings in phases II and III and will they receive funding for this purpose?

8. Will parties be provided with documents prior to each hearing? If so, how far in advance of each hearing can the party expect to receive the documents?
9. How will documents be accessed? Will organizations be required to have access to a specific form of technology in order to gain access to the documents?
10. Can parties with standing also be called as witnesses in the Inquiry?

### **Confidentiality agreements**

11. More information is needed regarding the purpose and scope of the confidentiality agreements – they cover a wide swath of information that goes well beyond the two exceptions to disclosure that are commonly excepted: proprietary information and personal information.

### **Funding**

As discussed above, restrictions on funding for participants are posing an extremely high barrier to meaningful participation in the hearings. Some participants have not been allocated any funding, despite receiving standing and being under-resourced organizations. For those who have been granted funding, there are many concerns, including:

12. Is the funding being allocated from the Inquiry's overall budget, or is it being sought from the PCO as an additional budgetary allocation?
13. The low amount of funding, and the apparent restrictions upon it, do not provide for research, preparation, and writing by participants that would be of assistance to the Inquiry.
14. The limited funds available for outside counsel will quickly force a choice between paying for counsel's services and paying for counsel's disbursements. The sums involved virtually guarantee that it will be impossible to cover both.
15. Will funding be provided to cover the costs of MMIW families to attend expert hearings? Given the critical expertise they can contribute to the expert hearings, such funding would be necessary for their participation.
16. Please provide a copy of the PCO guidelines to which you refer in your letter of August 17, 2017.

Further to the letter concerning the grant of standing and funding, we would appreciate knowing the following:

17. When might we expect to be advised as to whether the PCO approves the Inquiry's funding recommendations for the parties granted standing?
18. When might we expect to receive a copy of the contribution agreement which we are expected to sign? Given that this agreement will set out what work we will be able to have funded, it is urgent that we receive it. Already some of us have had to make the

decision to attend the Expert Hearings in Winnipeg August 22 to 24, 2017, without having any information concerning what work of outside counsel we will be able to bill/reimburse.

19. We would like to know the basis upon which the overall amount of funding was allocated (was it calculated, for example, on the basis of an estimated number of total hours of counsel services?), and if so, over what time period did that overall amount extend? Was it calculated with a particular hourly rate in mind?
20. Did the Commissioners consider in its allocation of funding the broader involvement of certain organizations that were granted standing in Phases I, II, and III as compared to those whose participation is more limited?
21. Please explain what is meant by the requirement to “be accountable for each dollar expended”. While this term might be explained by the terms of the PCO guidelines, it is at present unclear. Does it, for example, mean that there is a special mode of accounting that must be followed with respect to these funds, or that the expenditure of the funds is subject to external audit?
22. Please clarify the term over which the sums recommended for participants’ counsel expenses are meant to be expended, and what proceedings of the Inquiry are expected to take place during that time. Based on the PCO guidelines regarding hourly rates, we estimate, for example, that an allowance of \$30,000 will fund 90 hours of the time of senior counsel, without making any provision for disbursements and travel expenses. We expect that there may well be more than 90 hours of hearing time (excluding preparation) over the course of the next 12 months, because 90 hours over 12 months allows for only 7.5 hours of hearing time per month.
23. If an extension is requested, will additional funding be provided to the parties?