

Legal Strategy Coalition on Violence Against Indigenous Women
Statement on the importance of full provincial and territorial cooperation
with the upcoming national inquiry on
Missing and Murdered Indigenous Women and Girls

In early December 2015, the newly elected federal government announced it would establish a national inquiry into missing and murdered Indigenous women and girls (MMIWG). Pre-inquiry consultations ran from December 2015 to February 2016. Through a series of community meetings and written submissions, the federal ministers of Justice, Indigenous and Northern Affairs, and the Status of Women heard from family members of missing and murdered Indigenous women, as well as National Aboriginal Organizations (NAOs), and other stakeholders. This pre-inquiry consultation process was loosely structured around nine questions prepared by the federal government that sought input on who to include in the inquiry process, how best to support participants in an inquiry, and what key issues should be addressed in the inquiry.

However, this pre-inquiry process also raised several practical concerns that remain unresolved. These include whether the federal government will institute an inquiry under the federal *Inquiries Act*, and if so, what role the provinces and territories would have in such an inquiry. (The *Act* and its powers to summon witnesses and demand the provision of evidence apply to areas of federal jurisdiction).

Several organizations have since stressed that all issues of jurisdiction must be resolved before the terms of reference for the inquiry are drafted.¹ It is crucial that the role of provinces and territories and the extent of their participation in the upcoming national inquiry be clearly determined as soon as possible. The full participation and cooperation of all Canadian jurisdictions in the upcoming national inquiry is necessary in order to ensure meaningful outcomes. This will require provinces and territories to take certain formal legal measures well before the inquiry begins and delegate authority to the inquiry to delve into areas of provincial and territorial jurisdiction.

To date, most provinces and territories have expressed the need for a national inquiry into violence against Indigenous women and girls in Canada. Further, over the last two years, most provinces and territories have called for a process in which they and the federal government would jointly address this issue.² More recently, at the second national roundtable in Winnipeg in February 2016, federal, provincial, territorial, and Indigenous governments explicitly recognized:

¹ See: Open letter of behalf of the Native Women's Association of Canada (NWAC), the Canadian Feminist Alliance for International Action, Amnesty International, the Women's Legal Education and Action Fund (LEAF), and KAIROS, <http://www.leaf.ca/wp-content/uploads/2016/01/Letter-to-Ministers-January-20-2016.pdf>. See also: NWAC/FAFIA Symposium, 22 Recommendations on the design of a national inquiry, http://www.nwac.ca/wp-content/uploads/2016/02/NWAC-FAFIASymposium_22recommendations_2016_EN.pdf.

² See: Review of Reports and Recommendations on Violence Against Indigenous Women in Canada, Legal Strategy Coalition on Violence Against Indigenous Women, Analysis of Implementation by Theme, <http://www.leaf.ca/wp-content/uploads/2015/02/Analysis-of-Implementation.pdf>.

“[t]he importance of a national inquiry on MMIWG, with federal, provincial and territorial governments committing to participation and full cooperation in the process”.³ While these statements of support and commitment are important, the legal mechanisms for ensuring this cooperation and collaboration remain unclear.

The LSC urges federal, provincial, and territorial governments to take the required legal steps to ensure that cooperation and collaboration are fully authorized through a provincial or territorial delegation of power.

The remainder of this statement explains in more detail why legally authorized inter-jurisdictional cooperation is required, and how it should be achieved.

Existing Reports have Already Determined that Interjurisdictional Cooperation is Necessary

In February 2015, the Legal Strategy Coalition on Violence Against Indigenous Women (LSC) conducted an extensive literature review of almost sixty reports prepared over the past twenty years concerning violence against Indigenous women in Canada. These reports were prepared by federal, provincial, and territorial governments and government agencies, NAOs, international human rights organizations, and Canadian civil society organizations. The reports collectively contained almost 700 recommendations which were also reviewed and analysed by the LSC.⁴ Through this review, the LSC found that most of the recommendations in existing literature on this issue had not been implemented and for the recommendations that were implemented, there were no standardized criteria to measure the adequacy of implementation.

The LSC has recently re-examined these reports and has found that the majority of recommendations concern areas of shared provincial, territorial, and federal jurisdiction. Many of these recommendations also involve calls for increased inter-jurisdictional cooperation between federal, provincial, territorial, and Indigenous governments to address violence against Indigenous women and girls in Canada. Of the remaining recommendations that do not explicitly address all jurisdictions or the need for greater interjurisdictional collaboration, most were targeted at the provinces and territories, or concerned issues of provincial and territorial jurisdiction.

Since the LSC released its report in 2015, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has drafted a report on its inquiry into the murders and disappearances under Article 8 of the Optional Protocol of the Convention on the Elimination of Discrimination Against Women.⁵ The Committee found that “insufficient coordination between

³ See: Outcomes and Priorities for Action to Prevent and Address Violence Against Indigenous Women and Girls, <https://news.ontario.ca/opo/en/2016/02/outcomes-and-priorities-for-action-to-prevent-and-address-violence-against-indigenous-women-and-girl.html>). See also: Communiqué- Outcomes and priorities for action to address violence against Indigenous women and girls, <http://www.gov.yk.ca/news/16-062.html#.VwV112NiNBw>.

⁴ To access past LSC reports see: <http://www.leaf.ca/legal/legal-strategy-coalition-on-violence-against-indigenous-women-lsc/#LSCResources>.

⁵ United Nations Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional*

the different jurisdictional powers of the State party... exposes women to gaps with regard to both social and judicial protection” and by doing so violates their right to safety and Article 3 the Convention.⁶

It is clear that the majority of existing reports on this issue advocate for greater inter-jurisdictional cooperation on violence against Indigenous women and girls in Canada, as well as considerable involvement and leadership on this issue from the provinces and territories. This highlights the importance of ensuring all jurisdictions fully participate in and assist the work of the upcoming inquiry. All jurisdictions’ action to date on this issue must be thoroughly examined by the future Commissioners and any recommendations for improvement or correction at all levels of government must be implemented.

Interjurisdictional cooperation is necessary for the upcoming inquiry to have the required scope for it to be meaningful

The *Constitution Act*⁷ sets out different spheres of federal and provincial jurisdiction. While some areas of jurisdiction are distinct, others overlap. In the context of violence against Indigenous women, the following divisions of power are relevant.

The *Constitution Act* specifies that the federal government has jurisdiction over “Indians and Lands reserved for the Indians” (s. 91(24)), certain aspects of criminal law within the country (s. 91(27)), and federal prisons (s. 91(28)). This is significant within the context of violence against Indigenous women and girls because many recommendations from past reports note that discriminatory federal laws and policies, including the *Indian Act*, instituted under its s. 91(24) powers are responsible for making Indigenous women more susceptible to violence. Further, RCMP policies and conduct and criminal laws that disadvantage Indigenous women and lead to the disproportionately high representation of Indigenous women in the justice system would fall under the federal government’s jurisdiction to examine under the *Inquiries Act*.

However, issues that fall under provincial jurisdiction would be outside the scope of the *Inquiries Act*. The *Constitution Act* specifies that provinces have jurisdiction over provincial prisons (s.92(6)), hospitals and healthcare (s. 92(7)), municipal institutions (s. 92(8)), certain aspects of civil and criminal justice (s. 91(14)), and education (s. 93). Provinces also generally have jurisdiction over social assistance, housing, employment, and child welfare pursuant to their jurisdiction over “issues of a merely local or private nature” (s. 92(16)) and “property and civil rights in the province” (s. 92(13)).

These areas of provincial jurisdiction are significant in the context of violence against Indigenous women and girls because many root causes for this violence involve the social and

Protocol to the Convention on the Elimination of All Forms of Discrimination against Women CAN/CEDAW/C/O P.8/CAN/1, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf.

⁶ See: Native Women’s Association of Canada (NWAC), the Feminist Alliance for International Action Canada (FAFIA), and the Canadian Journal of Women and the Law 2016 Symposium Report http://www.nwac.ca/2016/02/nwac_fafia_22recommendations_mmiwg/.

⁷ *Constitution Act*, 1867, 30 & 31 Vict, c 3.

economic marginalization of women that makes them more susceptible to, and less able to leave, violent circumstances. The CEDAW Committee report and other existing Canadian reports are virtually unanimous that the social and economic marginalization of Indigenous women contributes to the disproportionately high rates of violence they experience in Canadian society. This includes intergenerational poverty, inadequate housing, food insecurity, lack of access to education, un- and under- employment, poorer access to health services, and underfunded social and legal services for Indigenous women and girls. A national inquiry must fully examine these important areas of provincial and territorial jurisdiction, and be able to hold the provinces and territories to account for their failures and make recommendations for improvement.

The provinces, territories, and the federal government share jurisdiction over policing in Canada. Provincial and territorial authority over police forces is very significant. Provinces can also exercise authority over the RCMP when the RCMP provides contract services under certain pieces of provincial legislation. As such, it would be important for the inquiry to examine and make recommendations about failures to adequately respond to violence against Indigenous women at all levels of policing in Canada.

Inquiry Commissioners should also be able to fully investigate: any circumstances in which federal, provincial, territorial or municipal police perpetrate violence against Indigenous women; delays in investigations of murders or missing persons cases; not laying charges in cases of murders and disappearances; and failures to diligently prosecute cases. An inquiry must also be able to make recommendations for addressing these systemic failures that will be implemented in all police forces.

Several recommendations in the literature on violence against Indigenous women also call attention to the lack of inter-jurisdictional cooperation between police forces across the country. This is another important reason for ensuring provincial and territorial governments permit the future commissioners to thoroughly examine their police agencies in addition to federal police.

Child welfare is another area of complex and overlapping jurisdiction – and one that plays a central role in making Indigenous women and girls more susceptible to violence in Canada. While provinces and territories are generally responsible for child welfare, the federal government funds child and family services on reserves and for First Nations children in the Yukon. A Canadian Human Rights Tribunal decision from January 2016 on a complaint brought by the Assembly of First Nations and First Nations Child and Family Caring Society of Canada found that the federal government underfunded these programs compared to the funding provided for children off-reserve and the needs of First Nations children.⁸

Inequities resulting from the complexities of joint jurisdiction over child welfare for First Nations children are subject to Jordan's principle. This principle states that when there is a jurisdictional dispute between the federal and provincial or territorial governments about responsibility to a status Indian child, the government of first contact must pay without delay. The Truth and Reconciliation Commission has recommended that all jurisdictions fully

⁸ See *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*: <http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do>.

implement Jordan's principle.⁹ The inquiry must study inequities in services to First Nations children and families in the context of violence against Indigenous women and make further recommendations.

Data collection is another example of the need for interjurisdictional cooperation and open information-sharing before, during, and after a national inquiry. It will be crucial for institutions, including police, at all levels of government to share their data on violence against Indigenous women in order for the inquiry to develop a clearer understanding of this issue – including the exact number of murders and disappearances, which is still unknown. A national database of all murders and disappearances of Indigenous women must be produced over the course of the inquiry and continue to be a living resource after the completion of the inquiry. However, this will necessarily require cooperation between provincial, territorial, and federal agencies.

Finally, while the federal government has the authority to enter into international treaties or sign international conventions, these treaties bind all levels of government and are usually entered into after federal, provincial, and territorial consultation and dialogue. As a State party to these treaties, Canada must meet its obligations under international law. Canada has committed to implement the *United Nations Declaration on the Rights of Indigenous Peoples*, and has ratified the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *UN Convention on the Rights of Persons with Disabilities*, the *UN Convention on the Rights of the Child*, the *UN Convention on the Elimination of Racial Discrimination*, and the *UN Convention on the Elimination of Discrimination against Women* (CEDAW). The last of these requires Canada to exercise due diligence to ensure that violence against women is investigated, prosecuted, prevented, and remedied.¹⁰ It is a well-established principle of international law that divisions of powers within federal states cannot be used as an excuse for the failure to meet these obligations, a point reiterated during the CEDAW investigation of violence against Indigenous women and girls in Canada.

Measures to ensure a truly national inquiry

Provincial and territorial support for the inquiry must be unequivocal, clear, and legally enforceable. Provinces and territories must take steps to delegate or otherwise agree to legally authorize the inquiry to include areas of provincial and territorial jurisdiction.

⁹ See the final report of the Truth and Reconciliation Commission:
<http://www.trc.ca/websites/trcinstitution/index.php?p=890>.

¹⁰ In addition, Canada is a member of the Organization of American States and is bound to implement the rights set out in the *Declaration of the Rights of Man*. The Inter-American Commission on Human Rights has also investigated the murders and disappearances of Indigenous women and girls and issued a report specifically focused on British Columbia: *Missing and Murdered Indigenous Women and Girls in British Columbia, Canada*, January 2015, <http://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf> This report concluded that all levels of government bear responsibility to act with due diligence to prevent, investigate, prosecute and remedy violence against Indigenous women and girls and strongly urged “better coordination among the different levels and sectors of government.”

This could take the form of a binding Memorandum of Understanding (MOU) between the federal, provincial and territorial governments that sets out how they will cooperate in order to ensure their full and meaningful involvement in the inquiry. It must spell out clearly the areas of provincial jurisdiction that will be covered by the inquiry's mandate, and make clear commitments to share information and make witnesses available in order for that mandate to be properly fulfilled. Importantly, the MOU must be publicly available and accessible so that Canadians know what has been agreed to and can hold governments accountable for these promises.

Alternatively, federal, provincial, and territorial Ministers of Justice could release independent but complimentary and coordinated directives delineating the ways in which all jurisdictions will cooperate during an inquiry. Both MOUs and ministerial directives can be completed fairly expeditiously.

There are also certain legislative options for legally and explicitly requiring full provincial and territorial involvement and inter-jurisdictional cooperation in the upcoming inquiry. This could include joint resolutions or orders in council from Parliament, the provincial legislatures, and territorial assemblies. This would require all levels of government to express exactly how they will cooperate in order to ensure their full involvement in the inquiry. It could also be possible for each jurisdiction to pass identical but separate legislation specifying how each jurisdiction will cooperate with the inquiry.

Passing this kind of legislation is a more formal way to avoid the jurisdictional concerns that arise with the institution of a national inquiry solely under the federal *Inquiries Act*. However, since these options would require legislative approval, they could be less expeditious.

If correctly worded, MOUs, ministerial directives, and legislative options would promote greater transparency and accountability at all levels of government, ensuring that federal, provincial, and territorial promises to fully participate in the inquiry are clearly and publicly expressed, as well as legally enforceable. Given the support for an inquiry that has already been expressed at every level of government, entering into such MOUs, issuing directives, or passing requisite legislation in a timely manner should not be too challenging.

Any future MOUs, ministerial directives, resolutions, or orders in council concerning the upcoming inquiry should include all the following:

First, federal, provincial, and territorial support for the inquiry should begin before the inquiry starts. The federal government and all provinces and territories should ensure adequate resources and training are made available to support families and communities to prepare for and participate in the inquiry process. The federal government and all provinces and territories must immediately conduct an audit of all previous recommendations from provincial, national and international inquiries, reports and other processes addressing issues that will be explored by the national inquiry. Each jurisdiction must then create a concrete action plan for the immediate steps it should take to ensure greater health and safety for Indigenous women and girls.¹¹

¹¹ These recommendations have been adapted from the Nova Scotia Native Women's Association Ad Hoc Panel on Provincial Support for the National Inquiry into Murdered and Missing Indigenous Women and Girls with

Second, as well as providing the inquiry with the authority for its scope to embrace areas of federal, provincial, and territorial jurisdiction, federal, provincial and territorial support must continue throughout the inquiry's duration. Full participation by the federal, provincial, and territorial governments in the future inquiry would necessarily involve:

- 1) agreeing to provide the future Commissioners with access to all requested internal federal, provincial, and territorial records,
- 2) permitting Commissioners to call federal, provincial, and territorial officials as witnesses during inquiry hearings, and
- 3) undertaking to respond to and develop implementation plans for the inquiry's ultimate recommendations at the federal, provincial, and territorial levels.

Third, federal, provincial, and territorial support must continue after the inquiry's completion with a legally enforceable commitment to implement all recommended action, and to institute standardized criteria on which the quality of implementation can be assessed.

The Legal Strategy Coalition on Violence Against Indigenous Women ([LSC](#)) is a nation-wide ad hoc coalition established in 2014 as a response to the alarming prevalence of violence and discrimination against Indigenous women and girls in Canada. The LSC is comprised of individuals and civil society organizations with interdisciplinary expertise on issues that impact Indigenous women, including human rights, gender equality, and constitutional law.

The LSC is engaged in legal advocacy and research to urgently address the tragedy of missing and murdered Indigenous women and girls (MMIWG). The LSC collaborates on research and other activities in order to achieve appropriate government responses to the continuing violence and discrimination experienced by Indigenous women and girls in Canada.

This statement was endorsed by the following individual and organizational members of the Legal Strategy Coalition:

Aboriginal Commission on Human Rights & Justice
Aboriginal Legal Services (ALS)
Amnesty International Canada
B.C. Civil Liberties Association (BCCLA)
Canadian Association of Elizabeth Fry Societies (CAEFS)
Canadian Feminist Alliance for International Action (FAFIA)
Carrier Sekani Family Services
Professor Aimee Craft, Professor, Faculty of Law, University of Manitoba
Law Office of Mary Eberts
Professor Brenda Gunn, Faculty of Law, University of Manitoba

representatives from the Schulich School of Law, Dalhousie Legal Aid Service, and the Nova Scotia Barristers' Society and other experts.

Indigenous Blacks & Mi'kmaq Initiative Schulich School of Law, Dalhousie University
Institute for the Advancement of Aboriginal Women (IAAW)
Constance MacIntosh, Associate Professor of Law; Director, Health Law Institute, Schulich
School of Law, Dalhousie University
Native Women's Association of Canada (NWAC)
Nova Scotia Native Women's Association (NSNWA)
Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies
Pivot Legal Society, Vancouver
Union of British Columbia Indian Chiefs (UBCIC)
Women's Legal Education and Action Fund (LEAF)
West Coast LEAF