

MISSING WOMEN COMMISSION OF INQUIRY

Practice and Procedure Directive for Evidentiary Hearings

[Authorized by *Public Inquiry Act*, s. 9(1)]

October 26, 2010

Definitions

1. In this directive,
 - a. **“Act”** means the *Public Inquiry Act*, S.B.C. 2007, c. 9,
 - b. **“Commission”** means the Missing Women Commission of Inquiry, a hearing commission established pursuant to Order in Council 605/2010 under section 2 of the *Public Inquiry Act*,
 - c. **“participant”** means persons with a grant of standing,
 - d. **“record”** includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise, and
 - e. **“rule”** means a section in this directive.

Purpose of the evidentiary hearings

2. The Commissioner will inquire into those matters set out in section 4 of the Terms of Reference. On the basis of oral and documentary evidence tendered during the evidentiary hearings, the Commissioner will make findings of fact and may make a finding of misconduct against a person or make a report that alleges misconduct by a person. The Commissioner’s findings of fact or findings of misconduct cannot be taken as findings of criminal or civil liability.

General

3. Notice or service by email shall be considered adequate notice or service. All participants must identify to commission counsel the email address they wish to use for this purpose.

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Public and media access to evidentiary hearings

4. Subject to Rule 5, the Commission must
 - a. ensure that evidentiary hearings are open to the public, either in person or through broadcast proceedings (see *Public Inquiry Act* s. 25(a)), and
 - b. give the public access to information submitted in an evidentiary hearing (see *Public Inquiry Act*, s. 25 (b)).

5. The Commissioner may, by order, prohibit or restrict a person or class of persons, or the public, from attending all or part of an evidentiary hearing, or from accessing all or part of any information provided to or held by the Commission,
 - a. if the government asserts privilege or immunity over the information under section 29 of the Act (see *Public Inquiry Act*, s. 15(1)(a)),
 - b. for any reason for which information could or must be withheld by a public body under sections 15 to 19 and 21 to 22.1 of the *Freedom of Information and Protection of Privacy Act* (see *Public Inquiry Act*, s.15(1)(b)),
 - c. if the Commissioner has reason to believe that the order is necessary for the effective and efficient fulfillment of the Commission's terms of reference (see *Public Inquiry Act*, s. 15(1)(c)), or
 - d. if the Commissioner is satisfied that such an order would make available to the Commission evidence that would otherwise not be available due to a privilege under the law of evidence.

6. In making an order under Rule 5, the Commissioner must not unduly prejudice the rights and interests of a participant against whom a finding of misconduct, or a report alleging misconduct, may be made (see *Public Inquiry Act*, s. 15(2)).

Video and audio recording of the evidentiary hearing proceedings

7. The Commissioner may impose restrictions on the video and audio recording of the evidentiary hearing proceedings and may, on application, order that there be no video or audio recording of some or all of a witness's testimony.

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Reporting the proceedings

8. The public and media may report the evidentiary hearing proceedings that are open to the public, except for testimony and/or submissions in respect of which the Commissioner has ordered that they shall not be published.

Application for standing to participate in the evidentiary hearings

9. A person may apply to be a participant by applying to the Commission in the manner and form it requires. The application must set out the basis upon which participation is sought, and the extent and nature of the participation sought (see *Public Inquiry Act*, s.11(3)).
10. To apply for standing, a person must submit a written application to the Commissioner by 4 p.m. on November 30, 2010 or by such other dates as the Commissioner may determine.
11. The Commissioner may accept an applicant as a participant after considering all of the following:
 - a. whether, and to what extent, the person's interests may be affected by the findings of the commission (see *Public Inquiry Act*, s. 11(4)(a)). ,
 - b. whether the person's participation would further the conduct of the inquiry (see *Public Inquiry Act*, s. 11(4)(b)).,
 - c. whether the person's participation would contribute to the fairness of the inquiry (see *Public Inquiry Act*, s. 11(4)(c)).
12. Where persons are known to have shared interests in the subject matter of the Commission, they should make an application for standing, identifying those persons whose interests are reflected in their application.
13. The Commissioner may direct that a number of applicants share in a single grant of standing.

Application for funding recommendations

#1402 - 808 Nelson Street Vancouver, BC V6Z 2H2 info@missingwomeninquiry.ca
Phone: (604) 681-4470 Toll Free: 1-877-681-4470 Fax: (604) 681-4458

www.missingwomeninquiry.ca

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14. Where the Commissioner is satisfied on the evidence that a participant would not otherwise be able to participate in the Commission, the Commissioner may recommend to the Attorney General that a participant receive financial assistance to pay for legal counsel to facilitate participation appropriate to the extent of a participant's interest.
15. Applications for funding recommendations may be made concurrently with applications for standing. To apply for a funding recommendation, a person must submit a written application to the Commissioner by 4 p.m. on November 30, 2010 or by such other dates as the Commissioner may determine.
16. An application for a funding recommendation must be supported by an affidavit setting out the following:
 - a. facts that demonstrate the person seeking funding does not have sufficient financial resources to participate in the work of the Commission without financial assistance for legal counsel, and
 - b. facts in relation to any other sources of funds received, expected or sought by the person in relation to legal services rendered, or to be rendered, with respect to the Commission.

Affidavits must be in Form 1 to these rules, or in another form as the Commissioner may determine. Guidelines for application format and delivery will be posted on the Commission website: www.missingwomeninquiry.ca
17. The Commissioner will determine the outcome of applications for funding recommendations on the basis of written applications, unless the Commissioner determines that an oral hearing is necessary.
18. Where the Commissioner's funding recommendation is approved, funding shall be in accordance with the terms and conditions approved by the Attorney General respecting rates of remuneration and reimbursement and the assessment of accounts.

Powers respecting participants

19. Subject to Rule 22, the Commissioner may make orders respecting
 - a. the manner and extent of a participant's participation (see *Public Inquiry Act*, s. 12(1)(a)),

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- b. the rights and responsibilities of a participant, if any (see *Public Inquiry Act*, s. 12(1)(b)), and
 - c. any limits or conditions on a participant's participation (see *Public Inquiry Act*, s. 12(1)(c)).
20. In making an order under Rule 17, the Commissioner may
- a. make different orders for different participants or classes of participants (see *Public Inquiry Act*, s. 12(2)(a)), and
 - b. waive or modify one or more of his orders as necessary (see *Public Inquiry Act*, s. 12(2)(b)).
21. In making an order under Rule 17, the Commissioner must ensure that a participant who responds to a notice under section 11(2) of the Act has a reasonable opportunity to be heard by the Commissioner before the Commissioner makes a finding of misconduct against the participant, or makes a report that alleges misconduct by that participant (see *Public Inquiry Act*, s. 12(3)).

Rights of participants

22. A participant may
- a. participate on her or his own behalf (see *Public Inquiry Act*, s. 13(1)(a)), or
 - b. be represented by counsel or, with the approval of the Commissioner, by an agent (see *Public Inquiry Act*, s. 13(1)(b)).
23. A participant
- a. has the same immunities as a witness who appears before the court (see *Public Inquiry Act*, s. 13(2)(a)), and
 - b. is considered to have objected to answering any question that may
 - i. incriminate the participant in a criminal proceeding (see *Public Inquiry Act*, s. 13(2)(b)(i)), or
 - ii. establish the participant's liability in a civil proceeding (see *Public Inquiry Act*, s. 13(2)(b)(ii)).

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Production of records

24. All records provided to the Commission shall be indexed in a form acceptable to the Commission.

Confidentiality of records

25. Commission Counsel shall not provide a record to counsel, a participant or a witness until that person has delivered to Commission counsel a signed undertaking, in a form approved by the Commissioner, that all records disclosed by the Commission will be used solely for the purposes of the Commission.

26. Counsel for a participant or a witness shall not provide a record to the participant or witness until the participant or witness has delivered to counsel a signed undertaking, in a form approved by the Commissioner, and counsel has delivered that signed undertaking to Commission counsel.

27. The Commissioner may:

- a. impose restrictions on the use and dissemination of records,
- b. require that a record that has not been entered as an exhibit in the evidentiary proceedings, and all copies of the record, be returned to the Commission, and
- c. on application, release counsel, a participant or a witness, in whole or in part, from the undertaking in relation to any record, or may authorize the disclosure of a record to another person.

Records

28. A participant must, at the earliest opportunity and in any event at least ten days before using a record in an evidentiary hearing or tendering it as an exhibit, deliver a copy of the record to Commission counsel.

Public access to records

29. Unless the Commissioner orders otherwise:

- a. a record within the Commission's control that has not been entered as an exhibit is not available for public inspection or copying, and

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- b. a record that has been entered as an exhibit may be inspected by the public and the media. The Commission will determine the circumstances in which a charge will be imposed for copying records.

Applications to the Commissioner

- 30. A participant may apply to the Commissioner for an order by:
 - a. preparing the application in writing,
 - b. attaching to the application any supporting materials, and
 - c. delivering the application and supporting materials to the Commission by email, to **applications@missingwomeninquiry.ca** in Microsoft Word or *.pdf format.
- 31. An applicant must deliver the application for an order to the Commission at least four days before the application is to be heard.
- 32. A participant who wishes to receive notice of an application shall provide the Commission with an email address for delivery.
- 33. The Commission shall promptly deliver the application and supporting materials, by email, to each other participant who has provided the Commission with an email address for delivery.
- 34. Any other participant may file written materials in relation to an application made under Rule 30.
- 35. The Commissioner may make an order based on the written material filed or, at his discretion, after hearing oral argument.

Applications for further disclosure of a record

- 36. A participant may seek disclosure of a record from another person (“record holder”) by asking Commission counsel, in writing, to use the powers of the

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Commission to obtain the record.

37. The request must state:

- a. the reasons the participant believes the record holder possesses the record, and
- b. the reasons the participant believes the record is relevant to a matter before the Commission.

38. If Commission counsel accepts the request, Commission counsel will attempt to obtain the record.

39. If Commission counsel rejects the request, Commission counsel shall notify the participant, and the participant may apply to the Commissioner, in accordance with Rules 20 to 23, for an order respecting the request.

40. When the participant applies to the Commissioner under Rule 39, the Commission shall deliver the application and any supporting materials to the record holder, and to each other participant who has provided the Commission with an email address for delivery.

41. The record holder and any other participant may file written materials in relation to an application made under Rule 39.

42. Unless the Commissioner orders otherwise, the procedures set out in Rules 36 to 41, in relation to a particular witness, should whenever possible be completed before that witness commences his or her testimony.

Witnesses

43. Each participant shall provide to Commission counsel at the earliest opportunity the name and address of any person who the participant believes should be called as a witness during the evidentiary hearings, with a statement of the subject matter of their proposed testimony, their experience and background, and the estimated length of their testimony.

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44. The following rules apply to witnesses:

- a. Commission counsel shall decide who shall be called as a witness at the evidentiary hearings,
- b. Subject to Rule 45, Commission counsel shall call and examine witnesses on behalf of the Commission, and may adduce evidence by way of both leading and non-leading questions,
- c. each witness called shall, before testifying, be sworn or affirm,
- d. each witness who testifies may during his or her testimony be represented by counsel or, with the approval of the Commissioner, by an agent,
- e. the Commissioner may, on application by a participant, permit a participant to cross-examine a witness to the extent of that participant's interest. If the participants are unable to agree on an order of cross-examination, the Commissioner will determine the order,
- f. subject to Rule 45, counsel for a participant is entitled to examine that participant last, regardless of whether or not counsel is also representing another participant,
- g. after Commission counsel has called all witnesses on behalf of the Commission, a participant may apply to the Commissioner for permission to call a witness and, if permission is granted, subrules (c) to (e) apply to each witness called by a participant.
- h. Commission counsel has the right to re-examine any witness who has testified.

45. Counsel for a witness may apply to the Commissioner for permission to lead that witness's examination in chief. If permission is granted, counsel will examine the witness in accordance with the normal rules governing the examination of one's own witness in court proceedings, unless the Commissioner directs otherwise.

Power to accept information

46. The Commissioner may receive and accept:

- a. information that he considers relevant, necessary and appropriate, whether or not the information would be admissible in any court (see *Public Inquiry Act*, s. 14(1)), and

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- b. a witness's evidence by way of affidavit or written statement, or by audio or video conference.

47. Without limiting Rule 17, the Commissioner may exclude anything unduly repetitious (see *Public Inquiry Act*, s. 14(2)).

48. Nothing in Rule 46 overrides the provisions of any Act expressly limiting the extent to which or purposes for which any oral testimony, records or things may be admitted or used in evidence (see *Public Inquiry Act*, s. 14(3)).

49. A person cannot be compelled to disclose in an evidentiary hearing anything that, in any court, would be privileged under the law of evidence (see *Public Inquiry Act*, s. 22(2)).

Final submissions

50. Commission counsel, and each participant authorized to do so, may make final oral and written submissions to the Commissioner on any issue within the Commission of Inquiry's Terms of Reference.

51. The Commissioner may set time limits on oral submissions, and page limits on written submissions.

The Commission's process

52. Subject to the Act and the Commission's Terms of Reference, the Commission has the power to control its own process (see *Public Inquiry Act*, s. 9(1)).

Participant's failure to comply with this directive

53. Without limiting any other powers of enforcement, if a participant fails to comply with this directive, including any time limits specified for taking any actions, the Commissioner, after giving notice to the participant, may do any of the following:

- a. schedule a meeting or hearing (see *Public Inquiry Act*, s. 17(a)),
- b. continue with the inquiry and make a finding or recommendation based on the evidence before him, with or without providing an

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- opportunity for submissions from that participant (see *Public Inquiry Act*, s. 17(b)),
- c. make any order necessary for the purpose of enforcing this directive (see *Public Inquiry Act*, s. 17(c)).

Commissioner's discretion

54. The Commissioner retains a residual discretion to amend, add to, vary or depart from any of the Rules in this Directive for the effective conduct of the evidentiary hearings.

FORM 1
(Rule 16)
MISSING WOMEN COMMISSION OF INQUIRY

AFFIDAVIT IN SUPPORT OF APPLICATION FOR FUNDING
RECOMMENDATION

I,[*name*] of[*address*] in the City of
.....[*city of residence*], in the Province of....., MAKE
OATH AND SAY AS FOLLOWS:

1. [*Set out the following in sequentially numbered paragraphs: facts that demonstrate the person seeking funding does not have sufficient financial resources to participate in the work of the Commission without financial assistance for legal counsel, and facts in relation to any other sources of funds received, expected or sought by the person in relation to legal services rendered, or to be rendered, with respect to the Inquiry.*]

SWORN / SOLEMNLY AFFIRMED BEFORE ME at

.....in the Province

of, the day of

....., 2010

.....

[*print name of deponent*]

.....

A Commissioner for taking Affidavits in

[*name of jurisdiction*]