

Submission of the Canadian Human Rights Commission to the United
Nations Office of the High Commissioner for Human Rights

“Access to Justice for Aboriginal Children”

Introduction: The Canadian Human Rights Commission

The *Canadian Human Rights Commission* (the Commission) is Canada's National Human Rights Institution. It has been accredited "A-status" by the *International Coordinating Committee of National Human Rights Institutions*, first in 1999 and again in 2006 and 2011.

The Commission was established by Parliament through the *Canadian Human Rights Act* (CHRA) in 1977.¹ It has a broad mandate to promote and protect human rights. This includes providing access to a complaints process as well as a dispute resolution process.

As part of the Commission's work, it has taken action to protect the human rights of vulnerable groups, including Aboriginal children², by investigating complaints, issuing public statements, tabling special reports in Parliament, and representing the public interest in the mediation and litigation of complaints. The Commission has also submitted reports and statements to UN bodies including the *Committee on the Rights of the Child*, the *Expert Mechanism on the Rights of Indigenous Peoples*, the *Human Rights Council*, the *Committee on the Elimination of Racial Discrimination* and the *Committee on the Elimination of All Forms of Discrimination against Women*.

The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. Self-governing First Nations³ also have responsibilities, as negotiated between the First Nation and the federal government. The Commission has jurisdiction pursuant to the CHRA over federally regulated service providers and employers, including First Nations governments and some other First Nations organizations. Provincial and territorial governments have their own human rights codes and are responsible for provincially/territorially regulated sectors.

This report focuses on access to justice for First Nations and other Aboriginal children. Part I of the submission outlines the social context of Aboriginal children living in Canada as well as good practices in regards to specific obstacles/barriers faced by Aboriginal children in accessing justice. Part II deals with alternatives to judicial proceedings, effective remedies and specific measures to assist Aboriginal children in accessing justice.

¹ *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 2.

² Under Article 35(2) of the *Constitution Act of 1982*, the Aboriginal Peoples of Canada include the Indian, Inuit and Metis Peoples of Canada. Document available at: <http://laws-lois.justice.gc.ca/eng/Const/page-16.html#docCont> . More than one million people in Canada identify themselves as an Aboriginal person, or 4% of the population (as of 2006). Fifty-three percent are registered Indians, 30% are Métis, 11% are Non-status Indians and 4% are Inuit. Over half (54%) of Aboriginal people live in urban areas. <http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795>

³ In this submission "First Nations people" refers to Status and Non-Status "Indian" peoples in Canada. Many communities also use the term "First Nation" in the name of their community. Currently, there are 617 First Nation communities, which represent more than 50 nations or cultural groups and 50 Aboriginal languages. <http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795>

PART I

Social Context of Aboriginal Children Living in Canada

Data indicates that 27.5% of Aboriginal children under 15 years of age live in low-income households, whereas the rate among non-Aboriginal children is 12.9%.⁴ The Government of Canada's 3rd and 4th Periodic Report to the UN Committee on the Rights of the Child recognized that “*High rates of poverty, single-family households, health issues, as well as a lack of social supports, create a gap in life chances between Aboriginal and non-Aboriginal children.*”⁵ A third of Aboriginal children live in low-income families where food security is a concern.⁶ The Auditor General of Canada has also stated that “social problems on reserves, such as alcohol and drug abuse, family violence, and suicide, are also linked to poor housing conditions.”⁷

Specific Obstacles/Barriers in Accessing Justice

For more than 30 years, section 67 of the CHRA prevented people from filing complaints of discrimination, resulting from the application of the *Indian Act* - a law that governs life on reserves for some 700,000 Aboriginal people living in more than 600 communities across Canada. Section 67 was repealed in part in 2008, allowing for human rights complaints to be filed on behalf of Aboriginal children, against the Government of Canada. It was repealed in full in 2011 allowing complaints to be filed against First Nations governments. Some of the areas affected by the repeal of section 67 include:

- Primary and secondary education decisions under sections 114–118 of the *Indian Act*.
- Registration for Status provisions under section 6 of the *Indian Act*.
- Mental competency and guardianship decisions under the *Indian Act*.
- Membership codes approved under the *Indian Act*.

Since the repeal of section 67, there has been a surge in new Aboriginal complaints filed at the Commission. More than 390 complaints have been filed with the Commission. Aboriginal people have embraced the CHRA as a tool to ensure equality.

⁴ A Statistical Profile of Poverty in Canada, Parliament of Canada, September 2009, available online at: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0917-e.htm#a10>.

For more information see the Indigenous Children's Health Report: Health Assessment in Action, available online at: http://www.stmichaelshospital.com/pdf/crich/ichr_report.pdf.

⁵ Third and Fourth Reports of Canada, Convention on the Rights of the Child, available online at: <http://www.pch.gc.ca/ddp-hrd/docs/pdf/canada3-4-crc-reports-nov2009-eng.pdf>

⁶ The government's 3rd and 4th report to the Committee covers the period of January 1998-December 2007. The report states that “An estimated \$272 million a year is provided to address housing needs onreserve. This funding supports housing construction of approximately 2,300 new homes and renovation of 3,300 existing houses, as well as ongoing subsidies for 27,000 rental units. Budget 2005 committed \$295

⁷ Canada, Report of the Auditor General of Canada to the House of Commons, April 2003, (Ottawa: Minister of Public Works and Government Services Canada), available online at:

http://www.oagbvg.gc.ca/internet/English/parl_oag_200304_06_e_12912.html, para 6.15.

The repeal of section 67 was designed to address inequities and a legacy of neglect and discriminatory Government policies. While the repeal of section 67 is considered a good practice, greater financial and human resources are required to ensure its full implementation. The human and financial resources needed by many First Nations to fully comply with the CHRA are substantial. The resources are required to raise awareness of rights and responsibilities, enhance capacity to investigate and resolve human rights complaints and modify policies and infrastructure, for example, by making public buildings and schools accessible to Aboriginal children with disabilities. The Commission considers it imperative that First Nations governments have adequate resources to protect human rights in their communities.

It is hoped that the repeal of section 67 will be a catalyst for positive change for Aboriginal children, many of whom are living in conditions described as “unacceptable” in a country as rich as Canada.

Access to Justice for Child Victims

Inequity of service levels is a human rights issue that affects the well-being and access to justice for Aboriginal children and First Nations children on reserve. Many complaints filed at the Commission allege that federal funding for services delivered on reserves is inequitable and discriminatory when compared to provincial and territorial funding for the same services off-reserve. These services include things such as education, and child welfare and health. Some complaints could be precedent-setting and have the potential to have an impact on formulas used by the Government of Canada to fund services in First Nations communities.

The Commission is representing the public interest in a number of these cases before the courts.

In the *First Nations Child and Family Caring Society of Canada* (FNCFCS) case, the Assembly of First Nations (AFN) filed a complaint at the Commission against the Government of Canada. They allege that the Government of Canada has engaged in prohibited discrimination by under-funding child and welfare services for on-reserve First Nations children, and denying them services available to other Canadian children. As a result, First Nations child welfare organizations cannot provide the programs needed to assist First Nations families in crisis. This often translates into higher rates of foster care and lower prospects of surviving a troubled childhood.

The Commission referred the complaint to the Canadian Human Rights Tribunal for a hearing. The Tribunal concluded that “*one has to compare experience of the alleged victims with that of someone else receiving those same services from the same provider*” and dismissed the case.

On appeal, the Federal Court set aside the decision of the Tribunal ruling that it was substantively unreasonable, and that the Tribunal had adopted a “rigid and formulaic interpretation” of the CHRA, inconsistent with the search for substantive equality. The Federal Court stated that although a “comparator group might be evidence that is helpful on the issue, it is not a prerequisite to a finding of discrimination”. As a result, the Court remitted the case to a differently constituted panel of the Canadian Human Rights Tribunal for re-determination. Although the Attorney General of Canada appealed this Federal Court decision, it was upheld.

The Canadian Human Rights Tribunal is now hearing the complaint on the merits.

In another case, the *Mississaugas of the New Credit First Nation* allege that children from their community are being discriminated against on the basis of national or ethnic origin, race and disability because of the failure of the Government of Canada to provide funding and support to special education on reserve and this constitutes a denial of service to Aboriginal children. The Government (Aboriginal Affairs and Northern Development Canada) denies the allegation and states that it provides funding for a broad range of programs and services, and it is the First Nation that determines how much is spent on education.

The Commission has referred the case to the Canadian Human Rights Tribunal for an inquiry into the complaint.

PART II

Alternatives to Judicial Proceedings

The Commission has created the National Aboriginal Initiative (NAI) in anticipation of the 2008 amendments to the *Canadian Human Rights Act* and the Repeal of Section 67.

In recent years, the NAI has undertaken research, held workshops and adapted internal procedures to ensure the new provisions of the CHRA, which include a non-derogation provision to protect Aboriginal and treaty rights and an interpretive provision to deal with legal traditions and customary laws, are fully understood and implemented.

The non-derogation provision states:

“For greater certainty, the repeal of section 67 of the Canadian Human Rights Act shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.”

The Interpretive Provision states:

“In relation to a complaint made under the Canadian Human Rights Act against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the Indian Act, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.”

As part of its activities, the NAI has also reached out to First Nations governments and other Aboriginal organizations to offer its expertise, and assist in developing their capacity to identify and address human rights issues. Specifically, the NAI has engaged in outreach activities,

partnership initiatives, awareness sessions and webinars, all to provide culturally appropriate information and education about the Commission and its processes to Aboriginal communities.

In addition, the NAI has developed knowledge products targeted to Aboriginal Peoples including the *Human Rights Handbook for First Nations*, *Your Guide to Understanding the Human Rights Act*, and a *Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities*.

Effective Remedies and Specific Measures to Assist Particularly Vulnerable Groups of Children

Community-Based Dispute Resolution Processes

Aboriginal peoples have always had their own systems and processes for addressing human rights within their communities. The Commission, through the NAI, is laying the foundation for the development of community-based dispute resolution processes to address human rights complaints in First Nations communities. Having a community-based dispute resolution process is consistent with Aboriginal peoples' right to self-governance and set out under the *United Nations Declaration on the Rights of Indigenous Peoples*.

To assist First Nations in the development of their own community-based processes, the NAI has developed Guiding Principles, and a Toolkit for Developing Community-Based Dispute Resolution Processes in First Nation Communities.

Systemic Discrimination Committee

Another measure the Commission has taken to assist vulnerable groups, including Aboriginal children, is the creation of a Systemic Discrimination Framework and Committee to guide Commission activities aimed at addressing systemic discrimination. The Systemic Discrimination Committee is an interdisciplinary committee whose primary purpose is to discuss flagged systemic discrimination issues, identify possible solutions, and to promote an integrated approach. The Committee then makes recommendations to a Senior Management Committee. One of the Committee's priorities is to improve access to human rights protection for First Nations and other Aboriginal people.

Complaint Prioritization Process

The Commission has also recently put in place measures to improve access to Commission processes, such as the prioritizing system for fast-tracking cases. This is a process whereby some complaints are identified for priority treatment.