Submission of the Canadian Human Rights Commission to the Expert Mechanism on the Rights of Indigenous Peoples

February 2013
# Table of Contents

1. **THE CANADIAN HUMAN RIGHTS COMMISSION** ................................................................. 3

2. **THE SOCIAL CONTEXT IN CANADA** ........................................................................... 4

3. **CHALLENGES IN ACCESSING CHRC PROCESSES** .................................................. 4
   3.1 **THE APPLICATION OF THE CHRA** ....................................................................... 5
   3.2 **RECOGNITION OF INDIGENOUS PEOPLES’ JURISPRUDENTIAL APPROACHES TO JUSTICE AND ITS ATTAINMENT, INCLUDING THE BALANCING OF INDIVIDUAL AND COLLECTIVE RIGHTS** .................................................. 5
   3.3 **INDIGENOUS WOMEN’S ACCESS TO JUSTICE** ..................................................... 8
   3.4 **ADDITIONAL CHALLENGES IN ACCESSING CHRC PROCESSES** ......................... 9

4. **THE HIGH INCARCERATION RATES OF INDIGENOUS INDIVIDUALS** ....................... 12
   4.1 **FEDERALLY-SENTENCED INDIGENOUS WOMEN** .................................................. 12

5. **INDIGENOUS PEOPLES’ JURISDICTION OVER THEIR TERRITORIES AND MEMBERS: FIRST NATIONS RESIDENCY** ........................................................................... 13
1 THE CANADIAN HUMAN RIGHTS COMMISSION

The Canadian Human Rights Commission (CHRC) is Canada’s national human rights institution (NHRI). It has been accredited “A-status” by the International Coordinating Committee of National Human Rights Institutions (ICC), first in 1999 and again in 2006 and 2011.

The CHRC was established by Parliament through the Canadian Human Rights Act (CHRA) in 1977. 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 CHRC’s work, it has taken action to protect the human rights of vulnerable groups by investigating complaints, issuing public statements, tabling special reports in Parliament, and representing the public interest in the mediation and litigation of complaints. The CHRC also submits shadow reports to UN treaty bodies.

The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The CHRC has jurisdiction pursuant to the CHRA over federally regulated service providers and employers. Provincial and territorial governments have their own human rights codes and are responsible for provincially/territorially regulated sectors.

The CHRC fully supports the implementation of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) and has worked with provincial and territorial counterparts to support its broader application throughout Canadian jurisdictions. Throughout this submission, reference is made to relevant provisions of the UN Declaration, which provides “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” The CHRC welcomes the study on access to justice by the Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism).

The following submission to the Expert Mechanism is focused on how to improve access to justice for Indigenous peoples in the context of NHRI protection processes, and how to increase the range of domestic avenues available through which Indigenous peoples can assert their rights and find effective remedy. It is based on a recognition that those facing discrimination suffer more acutely if they lack access to justice. Accordingly, States and all actors should work with Indigenous peoples to identify and address barriers to access to justice. Throughout this submission, the CHRC has highlighted the specific barriers to access to justice faced by Indigenous women, who are amongst the most vulnerable in Canada.

---

1 Canadian Human Rights Act, RSC 1985, c. H-6, s. 2.
2 UN Declaration, article 43.
3 Throughout this submission, the term ‘Indigenous’ is used to refer to the first peoples of the land or ‘Aboriginal peoples of Canada’ as defined by section 35 of the Canadian Constitution. This includes Inuit, Metis and Indian or ‘First nations” (both status and non-status) peoples.
2  THE SOCIAL CONTEXT IN CANADA

Indigenous peoples represent one of the most disadvantaged segments of Canadian society. Compared with non-Indigenous people, they experience higher unemployment rates, much lower personal income rates, lower educational levels, higher rates of disability and poorer rates of health and overall quality of life, including less access to safe drinking water. Incarceration rates are significantly higher than the national average, and Indigenous prisoners often face systemic and institutional discrimination.

3  CHALLENGES IN ACCESSING CHRC PROCESSES

The CHRA provides the CHRC with a broad mandate to promote and protect human rights. The CHRC has a mandate to receive complaints from individuals or groups of individuals – or to initiate a complaint itself – where there are reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice in the course of employment or the provision of a service.

The CHRC has developed and uses a comprehensive dispute resolution system, where complaints can be voluntarily mediated before a complaint is officially filed or before it is investigated, as well as at any time during the investigation of the complaint.

At any time after the filing of a complaint, the CHRC may request that the Canadian Human Rights Tribunal (CHRT), a quasi-judicial body, institute an inquiry into the complaint. The CHRT may then issue a decision, which is binding on the parties to the complaint. During CHRT proceedings, the CHRC does not represent the complainant, but rather represents the public interest.

Section 67 of the CHRA was repealed in June 2008. This section effectively shielded the federal government and First Nations community governments from complaints of discrimination relating to actions arising from or pursuant to the Indian Act. As a result, the jurisdiction of the CHRC has been extended.

The following section highlights the barriers Indigenous peoples may face in accessing the CHRC’s processes. It provides examples of the measures that the CHRC has taken to address these barriers, as well as examples of relevant provisions of the CHRA. We offer these examples for the Expert Mechanism’s consideration as good practices.

---

3.1 The Application of the CHRA

The repeal of s. 67 brought with it great promise that Indigenous peoples would be able to access their human rights on an equal basis with other Canadians. Since the repeal, several human rights complaints have been filed against the Government of Canada alleging discrimination in the provision of services to Indigenous communities. However, the Government’s position in response to these complaints has been to argue that the funding it provides to First Nations communities – for items like education, child welfare and healthcare – cannot be considered ‘services’ within the meaning of the CHRA.

If the Government is successful, the positive effects of the repeal of s. 67 could be diminished, and consequently, so too could access to the Canadian Human Rights Act for Indigenous peoples. The issue is currently before the courts in Canada\(^5\), with the CHRC representing the public interest.

3.2 Recognition of Indigenous peoples’ jurisprudential approaches to justice and its attainment, including the balancing of individual and collective rights

*Conflict between Indigenous legal traditions and customary laws and ‘western’ human rights concepts*

Many Indigenous peoples harbor a historical distrust of government and government agencies. The CHRC, as is the case with many NHRIs, is a government-created body, though it acts independently.

Indigenous peoples identify an ideological conflict between their legal traditions and customary laws and “western” human rights concepts. This leads to skepticism as to whether the CHRC’s processes are an appropriate venue through which to advocate for their rights. This may prevent Indigenous peoples from filing complaints of discrimination.

In order to address this challenge, with the repeal of section 67, Parliament added an interpretive provision to the CHRA. This provision requires that the CHRC, CHRT and the courts consider First Nations legal traditions and customary laws when applying the CHRA - including the balancing of individual and collective rights – provided these legal traditions or customary laws respect the principle of gender equality\(^6\).

---


\(^6\) The interpretive provision states: “In relation to a complaint under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs or 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 collective rights and interest, to the extent that they are consistent with the principles of gender equality.”
The CHRC has attempted to address this challenge through the creation of the National Aboriginal Initiative (NAI)\(^7\), which has conducted extensive in-person outreach with Indigenous communities. It has also developed a dedicated website with knowledge products targeted to Indigenous peoples\(^8\), partnered with national Aboriginal organizations in various initiatives, and conducted awareness sessions and webinars with Indigenous communities to provide education about the CHRC and its processes.

**Incorporating Indigenous legal traditions and customary laws into existing processes**

For most of its history, the CHRC has not dealt with the issues that have surfaced since the repeal of section 67; consequently, there is a need to increase staff familiarity with Indigenous legal traditions and customs.

In addition to providing staff and Commissioners with training on Indigenous history, legal traditions and customary laws, and the Indian Act, the CHRC has developed important partnerships with individuals and organizations who are experts in these areas. For example, the CHRC has developed a roster of practitioners who have experience mediating disputes in First Nations communities and has utilized the services of these individuals to extend the CHRC’s in-house capacity and to ensure that the process is more accessible to Indigenous peoples. Many of the CHRC’s lawyers have also participated in annual meetings of the Indigenous Bar Association, developing relationships with Indigenous lawyers, judges and others working in the legal profession.

The CHRC has traditionally used a mostly paper-based process in its investigation of complaints. This may impact on the accessibility of the process to Indigenous peoples due to reasons of language, literacy and cultural appropriateness, particularly where knowledge is transmitted through oral traditions\(^9\).

To address this challenge, the CHRC has amended its Policy and Procedures Manual to encourage investigators not to rely too heavily on a paper-based process but to consider conducting interviews by phone or in-person where appropriate and resources allow.

---

\(^7\) For more information on this initiative, see [www.doyouknowyourrights.ca](http://www.doyouknowyourrights.ca).

\(^8\) See, for example: *Your Guide to Understanding the CHRA* [available at: [http://www.doyouknowyourrights.ca/nai-ina/individuals_particuliers/chraguide_guidecldp-eng.aspx](http://www.doyouknowyourrights.ca/nai-ina/individuals_particuliers/chraguide_guidecldp-eng.aspx)] which was developed in partnership with the Native Women’s Association of Canada and is available in three Indigenous languages; and *A Human Rights Handbook for First Nations* [available at: [http://www.doyouknowyourrights.ca/nai-ina/organizations_organisations/handbook_guide-eng.aspx](http://www.doyouknowyourrights.ca/nai-ina/organizations_organisations/handbook_guide-eng.aspx)] which is aimed at assisting First Nations leaders and administrators identify and resolve human rights issues in First Nations communities.

The CHRC is also set to release a "toolkit" for developing community-based dispute resolution processes in First Nations and other Indigenous communities next month. The entire Toolkit is based on the guiding principles for dispute resolution referenced above. Readers are repeatedly reminded to consider how and when they can include women in the development of the process and once it is implemented.

\(^9\) *Supra* note 2, articles 13(2) and 15(2).
**Recommendations:**

It is recommended that the Expert Mechanism encourage States to support NHRI’s measures aimed at addressing historical systemic challenges facing Indigenous peoples in accessing human rights processes. This may include the development of culturally appropriate public education materials and training, to be available in Indigenous languages, and developed in partnership with Indigenous peoples and particularly, Indigenous women. It may also including sensitivity training of NHRI staff regarding Indigenous peoples, with a focus on issues facing Indigenous women.

It is further recommended that Indigenous legal traditions and customs be incorporated into existing human rights processes and in community-based dispute resolution processes. Partnerships formed between NHRIis and Indigenous peoples, and specifically Indigenous women, in overcoming barriers to access to justice should be encouraged and highlighted as good practices by the Expert Mechanism.

**Community Based Dispute Resolution Processes**

The CHRC has developed guiding principles for developing community-based dispute resolution processes. These principles are based on principles of natural justice, with consideration for both individual and collective rights.\(^{10}\)

These principles include: 1) making the process accessible; 2) obtaining community input about the process; 3) making sure the decision-maker knows about human rights; 4) ensuring impartiality and independence; 5) allowing people to bring a representative; 6) giving people the opportunity to be heard; 7) encouraging people to share information; 8) keeping information confidential; 9) giving reasons for decisions; 10) ensuring the process is acceptable to everyone involved in the dispute; and 11) ensuring that there is no retaliation.

The CHRC has also developed *A Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities*, which has just been published.

**Recommendation:**

It is recommended that the Expert Mechanism promote the development of community-based dispute resolution processes that are based on principles of natural justice. Where appropriate, such as in Indigenous communities, such processes should take into account both an individual and collective perspective, and should give special regard to women or other vulnerable groups.

---

\(^{10}\) *Supra* note 2, articles 1, 2, 4, 5, 9, 13, 15, 18, 34, 44 and 46(3).
3.3 Indigenous women’s access to justice

Violence against Indigenous women and girls and other factors

Indigenous women in Canada experience systemic discrimination and bear a disproportionate burden of violence. The Native Women’s Association of Canada has estimated that over the past 30 years, more than 600 Indigenous women and girls across Canada have gone missing or have been murdered. Yet, the majority of these cases remain unresolved.

Moreover, the geographic remoteness of some Indigenous communities contributes to the isolation of many Indigenous women, impacting upon their ability to access the CHRC’s processes. This access may be further impacted by limited availability in many of these communities to appropriate legal assistance\textsuperscript{11}. Furthermore, non-governmental organizations and legal and advocacy support networks face financial constraints, which impede their ability to provide assistance.

Taking these realities into account, the CHRC plans to explore research and dialogue projects to deepen our understanding of barriers faced by Indigenous women in vulnerable circumstances in asserting their rights.\textsuperscript{12} Such barriers may include fear of retaliation, not understanding the processes and not having confidence in asserting their rights\textsuperscript{13}. These initiatives will continue to inform policy, procedures and staff training of the CHRC.

CHRC staff have received training to identify barriers to effective access to human rights protections caused by a complainant’s experiences of violence, as well as how to mitigate such barriers.

On February 14\textsuperscript{th}, 2013, a motion was introduced by the Liberal party of Canada calling for the creation of a parliamentary committee to study the issue of violence against Aboriginal women. It appears at this time that the Government will support the motion.

Recommendations:

It is recommended that the Expert Mechanism focus attention on the need for States and others to address the underlying issues that prevent Indigenous peoples, particularly Indigenous women, from accessing justice on a basis equal with others, including the need for adequately funded legal and advocacy support networks.

It is recommended that the Expert Mechanism underscore the importance of States and others to work in partnership with Indigenous peoples, particularly Indigenous women, to determine the most effective strategies for overcoming barriers to access to justice, including in relation to

\textsuperscript{11} Supra note 2, articles 11(2), 15(2), 18, 19 and 38.
\textsuperscript{12} Supra note 2, article 22(2).
\textsuperscript{13} Supra note 2, articles 15(2), 18, 19, 22(2) and 38.
community-based dispute resolution processes.

It is recommended that the Expert Mechanism encourage States to consider the impact of legislation on Indigenous peoples' access to human rights processes and to institute reform where such legislation interferes with Indigenous peoples, and particularly Indigenous women's, enjoyment of substantive equality in this regard.

It is recommended that the Expert Mechanism encourage States to seek the involvement of NHRIs in legislative reform initiatives that address systemic discrimination facing Indigenous peoples.

Acknowledging the differing experience of Indigenous women in process design and implementation

The lived experiences of Indigenous women and men often differ greatly. This must be taken into account in the design and implementation of NHRI processes to ensure that women can access these processes on an equal basis with men.

The CHRC has developed a Gender Integration Framework to ensure that, where the consideration of gender is integral to the issue that is being considered, this is identified early and acted upon throughout the process. Consideration of the experiences of particular groups of vulnerable women who are impacted by multiple or intersecting grounds of discrimination is integrated into this analysis.

Recommendation:

It is recommended that the Expert Mechanism encourage the application of a gender analysis by States, NHRIs and others involved in the administration of justice. Consideration of the lived experiences of Indigenous women, including the particular experiences of vulnerable groups, such as Indigenous women with disabilities, should be integrated into policies and programs. This will serve to promote gender equality.

3.4 Additional challenges in accessing CHRC processes

Accessibility of documents

To effectively access the protections that CHRC processes provide, potential complainants need access to information about those processes in a way that they understand\textsuperscript{14}.

The CHRC has taken steps to address this challenge, including by:

- improving its use of "plain language" to ensure that its materials use a level of language that is appropriate to the general public;

\textsuperscript{14} Supra note 2, articles 13 and 16.
• translating the publications available on its website into both official languages of Canada (English and French), as well as into some Indigenous languages; and
• re-designing its website to ensure that it is accessible to persons with disabilities, including by making its publications available in multiple formats.

The CHRC also offers assistance in drafting a complaint to individuals whose literacy or disability poses a barrier to accessing the CHRC’s processes.

**Effective protection of complainants**

Complainants attempting to access the protection offered by the CHRA sometimes face retaliation for asserting their human rights\(^\text{15}\).

To address this challenge, the CHRA provides that it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim of the discriminatory practice\(^\text{16}\). Additionally, the CHRA indicates that a person is guilty of an offence who threatens, intimidates or discriminates against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of the complaint\(^\text{17}\).

**Referral to alternate process**

Under the CHRA, the CHRC can refuse to deal with a complaint where the alleged victim ought to exhaust grievance or review procedures otherwise reasonably available. In practice, the CHRC regularly refers complaints to other processes. The CHRC is careful to avoid such referral in cases where it may not be appropriate, and may impact upon the complainant’s ability to receive appropriate redress.

Accordingly, the CHRC ensures that such referrals are not made where there are doubts about the fairness or efficacy of the other process, or where there is a need to proceed with the matter without delay, for example, where:
• the complainant experienced physical violence or is likely to experience physical violence\(^\text{18}\);
• a complaint of harassment has been made and the harassment is ongoing such that there is a risk of continuing harm;
• the complainant is in poor health or has a disability which is life-threatening or which seriously affects her ability to carry out day-to-day activities with dignity;
• the complainant has suffered, or may suffer, serious economic loss should the CHRC not intervene immediately; and

\(^{15}\) This is particularly the case for Indigenous women facing violence. See *supra* note 3, article 22(2) which provides that States and Indigenous peoples shall take measures to ensure, “that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination”.

\(^{16}\) Section 14.1.

\(^{17}\) Sections 59 and 60.

\(^{18}\) *Supra* note 2, Article 34.
the complaint is of systemic discrimination and it is in the public interest for the CHRC and the Tribunal to deal with it\textsuperscript{19}.

Costs to complainants

The CHRC’s processes were designed to be less formal than court proceedings and to allow complainants and respondents to self-advocate without the need to employ lawyers to argue their case. However, with the increased legalization of society in general, many complainants and respondents now feel the need to retain counsel before accessing the CHRC’s processes. This has resulted in increased costs to many complainants, impacting upon their ability to access these processes on a basis equal with others.

At the CHRT, this challenge has been exacerbated by a recent decision of the Supreme Court of Canada,\textsuperscript{20} which has determined that the CHRT cannot award legal costs related to its proceedings.

Recommendations:

It is recommended that the Expert Mechanism promote the accessibility of documents in terms of literacy levels, multiple languages, cultural accessibility, and formats that are accessible to people with disabilities.

It is recommended that the Expert Mechanism promote measures aimed at protecting complainants from retaliation in order to increase accessibility of redress mechanisms for complainants. This may include waiving requirements to exhaust alternate remedies where such a process may increase risks for the complainant (e.g.: violence, ill health or economic loss), or where referral to alternate redress reinforces existing systemic barriers. It is further recommended that the Expert Mechanism urge States to include such protections in the enabling legislation of NHRIs.

It is recommended that the Expert Mechanism encourage States to ensure that human rights mechanisms are designed to be accessible to all complainants, regardless of their economic means.


\textsuperscript{20} Canada (Attorney General) v. Mowat, 2011 SCC 53.
THE HIGH INCARCERATION RATES OF INDIGENOUS INDIVIDUALS

The Supreme Court of Canada has noted that "[t]he drastic overrepresentation of [Indigenous] peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem"\(^\text{21}\). In its 2011-12 Annual Report, Canada’s Office of the Correctional Investigator (OCI) noted that 21.4% of the total federal offender population was Indigenous yet only 4% of the Canadian population identifies as Indigenous\(^\text{22}\). The OCI has also documented systemic barriers that continue to exist in prisons, including Indigenous offenders being released later in their sentence, being classified as higher risk, and being more likely to have their conditional release revoked than non-Indigenous offenders\(^\text{23}\).

4.1 Federally-Sentenced Indigenous Women

Indigenous women in the federal justice system often face discrimination, leading to over-representation in federal prisons. This is complicated by mental health issues and by systemic issues in the administration of prisons. Administrative barriers – including the use of measures such as discipline and solitary confinement (known as “segregation” in Canada) – may exacerbate mental health issues and may limit an inmate’s ability to access their rights, for example by filing a complaint with the CHRC. These barriers may also limit access to inmate advocates – including, but not limited to, legal counsel – who might be able to assist women in identifying administrative policies and decisions as potential violations of the CHRA, and subsequently filing complaints.

Recognizing the gravity of these issues, the CHRC has identified the situation of Indigenous women in corrections with mental health issues as a priority. A high level systemic discrimination team reviews cases currently within the system and makes recommendations on how best to proceed, given the need for distinct approaches to address some of the systemic elements of the complaints that surface\(^\text{24}\).

In 2003, the CHRC published a report entitled Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally-Sentenced Women. In this report, the CHRC made various recommendations to improve the ability of women to access vital processes while deprived of their liberty.

\(^{23}\) The Commission expressed similar concerns in its shadow report to the CERD.
\(^{24}\) *Supra* note 2, articles 21(2) and 22(2).
Recommendation:

It is recommended that the Expert Mechanism consider unique barriers to accessing justice facing women prisoners, particularly vulnerable groups of women, such as Indigenous women and women with disabilities, including mental disabilities. These barriers are often of a systemic nature and require gender-responsive and culturally-appropriate solutions.

5 INDIGENOUS PEOPLES' JURISDICTION OVER THEIR TERRITORIES AND MEMBERS: FIRST NATIONS RESIDENCY

The Senate Standing Committee on Human Rights is currently studying issues pertaining to the human rights of First Nations band members who reside off-reserve, with an emphasis on the current federal policy framework. The CHRC plans to provide input to this study.

This may include focusing on residual gender-related discrimination under the Indian Act. The enactment of Bill C-31 in 1985 remedied direct discrimination facing First Nations women who married non-status men and subsequently lost their status. However, Indigenous peoples have identified that the status classification system under the current section 6.2 of the Indian Act continues to create discriminatory distinctions based on gender. This classification system determines who is entitled to benefits, including health and educational ones and for how many generations these benefits can be passed on to descendants. While the discrimination facing some First Nations women under this scheme has been remedied by the results of the McIvor case and subsequent legislative amendments, Indigenous peoples have identified that residual discrimination remains for some First Nations women and their descendants.

The CHRC has expressed concern that as a whole, the Indian Act may be inconsistent with human rights, and has advocated for meaningful review to address such issues in a way that will achieve positive results and to avoid the need for individual human rights complaints or constitutional court challenges. The CHRC supports calls for substantive legislative reform in consultation with Indigenous peoples of Canada.

Recommendation:

It is recommended that the Expert Mechanism encourage the involvement of NHRIIs in legislative reform initiatives that address systemic discrimination facing Indigenous peoples.

---

26 Supra note 2, articles 1, 2, 15(2), 18, 19 and 38.