Special Report to Parliament on the Impacts of Bill C-21

(An Act to Amend the *Canadian Human Rights Act*)

Canada

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Acting Chief Commissioner
Président par intérim

September 15, 2014

The Honourable Noël A. Kinsella
Speaker of the Senate
The Senate
Ottawa Ontario K1A 0A4

Dear Mr. Speaker:

Pursuant to section 61(2) of the *Canadian Human Rights Act*, I have the honour to transmit to you for tabling in the Senate, the enclosed *Special Report to Parliament on the Impacts of Bill C-21 (An Act to Amend the Canadian Human Rights Act)*.

Sincerely,

David Langtry

Encl.

c.c.: Mr. Gary W. O'Brien
Clerk of the Senate and Clerk of the Parliaments

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Acting Chief Commissioner
Président par intérim

September 15, 2014

The Honourable Andrew Scheer, M.P.
Speaker of the House of Commons
House of Commons
Ottawa Ontario K1A 0A6

Dear Mr. Speaker:

Pursuant to section 61(2) of the Canadian Human Rights Act, I have the honour to transmit to you for tabling in the House of Commons, the enclosed Special Report to Parliament on the Impacts of Bill C-21 (An Act to Amend the Canadian Human Rights Act).

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c.c.: Ms. Audrey Elizabeth O'Brien
Clerk of the House of Commons

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Executive Summary

The Government of Canada's 2008 decision to ensure that Aboriginal peoples in Canada have full access to the protections of the *Canadian Human Rights Act* (CHRA) was a positive step toward achieving equality.

The instrument for making this change was Bill C-21: An Act to Amend the *Canadian Human Rights Act*. Among other changes, Bill C-21 amended the CHRA to repeal section 67, a section of the CHRA that excluded matters under the *Indian Act* from human rights scrutiny. As is well known, the *Indian Act* governs many issues of daily life for residents of the more than 600 First Nations communities across Canada. As a result, this exclusion had effectively denied hundreds of thousands of people the same protections from discrimination and guarantees of equality of opportunity that other Canadians have long taken for granted.

Bill C-21 opened a doorway to human rights justice that had been blocked for over three decades.

This change carries great promise. It carries a promise of tangible improvements in the quality of life of people governed by the *Indian Act*, primarily First Nations. It promises protection for members of these communities from acts of discrimination that are prohibited under the CHRA. It promises to improve the accountability of the federal government in its dealings with Aboriginal communities under federal jurisdiction. Equally and significantly, it promises to improve the accountability of First Nations governments to the people they serve. In short, it carries the promise of positive change for one of the most persistently disadvantaged groups in Canada.

In some cases, Bill C-21 has already had a positive impact. As this report will show, Aboriginal people have brought over 500 discrimination complaints[1] to the Canadian Human Rights Commission (CHRC) since 2008. While dozens of these complaints have been settled, others will require more time, as they raise complex legal questions in new areas of law. Some cases may be argued for years. Decisions could set precedents with major impacts on both the federal government and First Nations communities.

However, barriers to human rights justice persist for many Aboriginal people, and in these situations, protection from discrimination and guarantees of equality of opportunity remain as elusive as ever.

[1] The sudden, dramatic influx of over 500 complaints brought to the CHRC by Aboriginal people since 2008 is the most salient impact of repeal. Some complaints would previously have been shielded by Section 67, others would not. Yet because confusion about the exclusion of the *Indian Act* was widespread prior to 2008, many people governed by the *Indian Act* believed they had no access whatsoever to the CHRA. Increased awareness since 2008 is almost certainly a factor in producing the influx. Therefore the CHRC counts all such complaints together. A more granular breakdown of the data is available on request, however.

The CHRC has heard that in some cases potential discrimination complaints are not filed due to obstacles resulting from poverty, low literacy or limited access to technology. Filing a complaint can be particularly difficult for residents of small, geographically remote First Nations. It is a matter of some concern that significant numbers of Aboriginal people abandon discrimination complaints before they reach the investigation stage. While the precise reasons are not known, one possible explanation is lack of faith in a justice system that some view as hostile or inaccessible. In addition, many First Nations governments lack the capacity to take the actions needed to comply with the CHRA, such as ensuring access to facilities for people with disabilities.

Many of these barriers reflect a much larger challenge. The treatment of Aboriginal peoples in Canada is among the most pressing, if not the most pressing human rights issue facing this country today. Clearly, there is much work to be done towards achieving equality in the day-to-day lives of Aboriginal peoples. Human rights complaints and judicial processes are critical tools for driving change, but the wheels of justice turn slowly. Meaningful change for Aboriginal people in Canada will require action in areas that exceed the scope of the CHRA. The Act is clearly but one among many instruments to drive change and promote equality.

Chapter 1: Overview

Mandate of the Canadian Human Rights Commission and purpose of this Report

The Canadian Human Rights Commission (CHRC) was established under the *Canadian Human Rights Act* (CHRA) of 1977. The CHRC receives, investigates, and resolves complaints of discrimination under federal jurisdiction. It does not have the authority to decide whether discrimination has occurred. When warranted it refers complaints to the Canadian Human Rights Tribunal, which can decide whether discrimination has occurred and if so, order appropriate remedies. The CHRC also has a mandate to promote understanding of the CHRA and the core principles of equality of opportunity and freedom from discrimination in Canadian society.

The purpose of this report is to provide the CHRC's unique perspective on the impacts of amendments to the CHRA under Bill C-21. It is based on the CHRC's experience with the complaints it has received, as well as its ongoing work with Aboriginal peoples and organizations, and First Nations governments. For several years, the CHRC has made the human rights of Aboriginal peoples a priority, not only because of the change to the CHRA, but also because of the seriousness and complexity of the issues affecting them.

The CHRC has heard jarring accounts of the effects of discrimination on some of the most vulnerable members of Canadian society, and has learned first-hand about the obstacles many Aboriginal people encounter in accessing human rights justice.

The CHRC has provided the Government of Canada with data to inform its five-year report on the impacts of Bill C-21. However, the CHRC has chosen to exercise its statutory power to table its own Special Report to Parliament on the impacts of Bill C-21 so as to promote greater understanding of the human rights issues facing many Aboriginal people in Canada.

Extending full human rights protections to people governed by the *Indian Act*

History of section 67 of the CHRA

When the CHRA was drafted in 1977, the federal government was in discussions with First Nations on reforming the *Indian Act*. During these discussions, the government promised to make no changes to the *Indian Act* before consultations were completed.

The government recognized that the proposed human rights legislation had the potential to strike down provisions of the *Indian Act*, thereby changing it. In order to uphold its commitment to First Nations, section 67 was included in the law. It was meant to be a temporary measure.

Section 67 explicitly prevented people from filing discrimination complaints on matters under the *Indian Act*. The *Indian Act* authorizes First Nations governments to hold elections, regulate land use and allocation, and provide housing and other services. As the *Indian Act* governs a plethora of matters that affect the daily lives of hundreds of thousands of people, this meant that First Nations people who are registered Indian and members of Bands, or individuals ordinarily residing on reserves (whether First Nations or non-First Nations) did not have access to the same human rights protections as everyone else in Canada.

Despite subsequent reforms to the *Indian Act*, and a number of attempts to remove the exemption from the legislation, section 67 remained in force until 2008. Bill C-21 repealed section 67 in June 2008 but the change did not take full effect until 2011, due to a three-year transition period designed to allow First Nations to adjust to the change.

At no time did section 67 prevent people from filing complaints to the CHRC for matters **not** directly related to the *Indian Act*, such as denying someone a job because of their age or disability. Only complaints related to the *Indian Act*, such as decisions around land allocation, Band membership, or elections, were shielded prior to Bill C-21.

Despite this fact, the CHRC received few complaints from Aboriginal people in the decades prior to the repeal of section 67. The CHRC has learned that many Aboriginal people were not aware of the protections under the CHRA and did not avail themselves of the remedies and recourses of human rights law even in situations when they were entitled to do so. Despite numerous public education initiatives by the CHRC since repeal, many Aboriginal people are still unaware of their existing rights and the processes available to them today.

Bill C-21: An Act to Amend the *Canadian Human Rights Act*

Bill C-21 received Royal Assent in 2008. The changes were immediately applicable to the federal government, however the three-year transition period gave First Nations until June 2011, at which time they would be fully subject to the CHRA. Aboriginal peoples would finally be fully entitled to the same protections in human rights law as everyone else in Canada.

Bill C-21's amendments include non-derogation and interpretive clauses. The former stipulates that the repeal shall not abrogate or derogate from the protection provided for existing Aboriginal or Treaty rights, while the latter requires that the CHRA 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."

Bill C-21 also requires the Government of Canada to undertake a review of the impacts of the amendments within five years and report the results to Parliament within one year after that.

The Government of Canada recognized that Bill C-21 would have a significant impact on the work of the CHRC, in particular with regard to increased volumes of complaints. To help the CHRC deal with this, the government allocated it an additional $5.7 million over five years – $5.1 million for implementation of the legislative change, and $0.6 million for activities to raise awareness. This special funding peaked in 2011–12 and declined gradually thereafter. It came to an end in 2013–14.

Some of this funding supported the work of the National Aboriginal Initiative (NAI), a small division tasked with strengthening relations with Aboriginal stakeholders and helping the CHRC adjust to the changes triggered by Bill C-21.

Three main constituencies have been identified as being most affected by the repeal of section 67:

- Registered Indians (residing on and off reserves);
- Members of Indian Bands (residing on and off reserves); and
- Residents on reserves (both Aboriginal and non-Aboriginal).

For simplicity's sake, this report uses the more inclusive term "Aboriginal people(s)" in its discussion of the impacts of Bill C-21.

Chapter 2: The positive impacts of extending full human rights protection to people governed by the *Indian Act*

> "The repeal of section 67 will provide first nation citizens, in particular First Nation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their first nation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to programs, access to services, the quality of services that they've accessed, in addition to other issues, such as membership...
>
> "...At this point, these Canadians live in the circumstance of inhabiting what is very much a legislative vacuum, where there are no standards for education, where there are, until we deal with the issue, no standards for water, and so on. This will empower those individual Canadians to stand up and say this is not acceptable, and to challenge governmental authority. It is an extraordinarily important remedy to put in the hands of first nation Canadians."
>
> The Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians
> March 22, 2007

Now that people governed by the *Indian Act* have full access to the protections of the *Canadian Human Rights Act* (CHRA), some have begun to assert their rights by using human rights law to challenge government authority, bringing over 500 complaints to the Canadian Human Rights Commission (CHRC).

Some of these complaints have already resulted in change, while others may take several years to resolve.

In a legal context, the changes to the CHRA are still very new. The Government of Canada and other federally-regulated employers and service providers, such as banks and airlines, have had close to 40 years since the enactment of the CHRA in 1977 to develop and refine systems and policies to meet their obligations under the Act. Many of the cases that have had enduring influence on the policies and workplace cultures of federally regulated organizations have taken years—and in some cases decades—to work their way through the judicial system. Pay equity and family caregiving cases are just two examples of recent court decisions that started with discrimination complaints many years earlier.

Six years after the repeal of section 67, many complaints are still working their way through the system. In some cases, the courts will be called on to provide clarification on how the changes to the CHRA will apply.

This will take time. Some of these cases raise complex issues and could set precedents that could advance equality and improve the quality of life for Aboriginal people for generations to come. For example, some have the potential to have an impact on formulas used by the Government of Canada to provide services in First Nations communities.

This section provides information on the number of complaints that the CHRC has received since the repeal of section 67. It also outlines some of the positive developments that have resulted.

Eliminating confusion and misperceptions

There has long been confusion about whether Aboriginal people had any protection under the CHRA. Many individuals and Aboriginal organizations have told the Commission that prior to the repeal of section 67, many Aboriginal people believed, wrongly, that they had no rights under the CHRA.

In fact, as mentioned earlier, section 67 did not prevent complaints against First Nations governments for matters **not** directly related to the *Indian Act*. Yet in the years before repeal, the CHRC received few complaints from Aboriginal people even though situations may have occurred in which there were grounds for filing discrimination complaints, and even though people in such situations were entitled to avail themselves of the remedies provided in law.

The repeal of section 67 effectively eliminated this confusion. One of the benefits of this change is that it made it explicit that everyone in Canada had full access to human rights protection under the CHRA, without exception.

The CHRC has since seen a dramatic influx in the number of complaints from Aboriginal people. The majority of these would not, in effect, have been shielded by section 67.

Complaints filed with the CHRC

Discrimination complaints can lead to solutions. They can clarify definitions of rights that were previously unknown, misunderstood or not accepted. And they can serve to clarify or change laws. Since Bill C-21 took effect, Aboriginal people and First Nations groups have filed 517 complaints with the CHRC:

- 173 complaints have been filed against the federal government (June 18, 2008 to June 18, 2014).

- 344 complaints have been filed against First Nations governments (June 18, 2011 to June 18, 2014).

Settlements involving First Nations governments

In First Nations communities, as in many small communities, family, employment, and social activities often overlap. This complicates employment relations and questions of access to services when criteria and policies are either unclear or not applied consistently. Given the relatively small size of many First Nations communities, Band Councils often wield considerable power, determining which members live in Band-owned housing, or who receives benefits funded by federal revenues. Many complaints allege that these decisions favour the relatives of band officials.

While many complaints continue to work their way through the system, settlements have been reached in more than 60 complaints involving First Nations governments. Many have involved mediation, which can often result in new policies or a commitment to provide training or education that would prevent a similar situation from happening in the future. People will often say that their complaint could have been avoided if both parties had just sat down to talk earlier.

Here are some examples of complaints that have resulted in change.

Education funding

An Aboriginal woman approached the CHRC with the intention of filing a complaint against her First Nation because her son had been denied financial assistance for post-secondary education. The complainant and her children had moved away from the Nation many years earlier in order to escape an abusive relationship.

Her former husband had since passed away, but his relatives were in positions of authority on Council. Her son, who was a Band member, was accepted by a university, but could not afford to go. He applied for assistance and was denied. CHRC staff assisted the complainant in preparing her complaint form, at her request, but she did not file the complaint. Instead she raised the issue with the Chief directly, and the matter was resolved to her satisfaction.

Awarding of contracts

A Band member who was not awarded a contract for economic development work alleged that he was turned down because of his age and disability. In mediation, the Band representative explained that the contract work in question had a time limit for third-party funding. The complainant's need to be away for medical evaluation or procedures could jeopardize the timelines and thus the funding. The parties acknowledged that there may have been some miscommunication. The parties were able to restore their relationship and to explore other opportunities for employment that were appropriate.

Sexual harassment

An Aboriginal woman who worked at the Band office of her First Nation alleged that she was sexually harassed by a co-worker. The complainant's work environment had become so intolerable that she had taken stress leave and eventually quit her job before coming to the CHRC. The Chief of the First Nation participated in the mediation personally, and expressed outrage that she had been subject to this kind of treatment on his watch. The complaint was settled to the satisfaction of both parties.

Accommodating disabilities

An Aboriginal woman with a disability that restricts her mobility alleged that her First Nation did not accommodate her disability when providing her with housing. The complainant had returned to her First Nation community with her child. She was initially allocated an apartment in an area where teenagers and young adults would often congregate and sometimes participate in criminal activity. She applied for housing, and after a long time on the waiting list, was allocated a house. But people were frequently trespassing on her property, allegedly to participate in criminal activity. With her mobility restrictions, she felt that the house was not safe for her.

During mediation, parties discussed the issues thoroughly and considered the best options to address the complainant's concerns. Among the measures agreed upon, the Band Council agreed to provide a floodlight and a security camera to discourage criminal activity in her backyard. The First Nation also agreed to look into developing a community-based dispute resolution process to address future disputes in a quick and effective way.

Complaints referred to the Canadian Human Rights Tribunal

Since 2008, the CHRC has referred 26 complaints against the federal government and three complaints against First Nations governments to the Canadian Human Rights Tribunal.

One factor that may explain the higher number of complaints against the federal government referred to the Tribunal is that changes to the CHRA were applied immediately to those complaints. There was no waiting period. This means there has been more time to process these complaints compared to ones against First Nations governments. As well, complaints against the federal government tend to not be resolved through settlements if they raise legal questions that need to be dealt with by the Tribunal.

Complex questions raised by both the federal government and First Nations governments

Examples of some of the complex issues that have been raised by both the federal government and First Nations governments before the courts and the Tribunal include:

- Whether the federal government's role in the delivery of programs on reserves constitutes a "service" under the CHRA;
- Whether the CHRA can be used to directly challenge other federal laws, or whether only the Charter can be used to challenge legislation;
- Whether a comparator group is necessary to prove discrimination in on-reserve services (unique nature of federal services on reserves);
- Whether the right to self-government means that the CHRA does not apply or whether the CHRA is a "law of general application" that applies regardless;
- Whether electoral rules and the right to vote in Band elections are services under section 5 of the CHRA;
- Whether non-Treaty and/or Band members are entitled to receive services on reserves;
- Whether First Nations customary laws and legal traditions can be relied on to justify discrimination;
- Whether certain Aboriginal organizations, including some organizations located on reserves, are federally or provincially regulated.

Decisions involving the federal government

While many complaints against the federal government raise complex legal questions that could take several years to resolve, some decisions have already been reached. Here are three examples of complaints that have resulted in change.

1. Leasing land

A case alleging discrimination in how the federal government dealt with the leasing of reserve land resulted in a change to government policy. Status Indians are now treated the same as other Canadians—as capable of making their own determinations of the benefits that may result from leasing their lands.

Louie and Beattie v Canada (Indian and Northern Affairs Canada)

In their complaint against Indian and Northern Affairs Canada, the complainants, James Louie and Joyce Beattie, alleged that the department's policy requirements for leasing reserve land pursuant to the *Indian Act* were discriminatory on the ground of national or ethnic origin.

Ms. Beattie and Mr. Louie made a business arrangement involving the development of a piece of land. Part of the arrangement involved Mr. Louie leasing the plot of land to Ms. Beattie for a nominal fee of $1.00. In return, the two entrepreneurs planned to share the profits from the development project.

This arrangement conflicted with Indian and Northern Affairs Canada's policy that required Indians seeking to lease their land to do so at fair market value, or justify any deviation from fair market value rent to Indian and Northern Affairs Canada. The department's position was that there is a special relationship between First Nations that have rights to on-reserve land and the Government of Canada. This, they argued, results from the fact that the title to the land remains with the Government of Canada and therefore the authority to establish rent lies with the federal government. Indian and Northern Affairs Canada also argued that because it had a responsibility to protect the interests of First Nations, it was required to perform careful review of the leasing details.

The Canadian Human Rights Tribunal found that Indian and Northern Affairs Canada had ". . . attempted to impose unilateral authority over every aspect of the proposed land transaction." It described the department's conduct as "paternalistic" and said that it ". . . demonstrated how the [Indian] Act has become an anachronism that is out of harmony with the guaranteed individual liberty, freedom, and human rights enjoyed by all Canadians."

The Canadian Human Rights Tribunal also stated that the department's process must recognize and accept Status Indians as ". . . personally responsible Canadians capable of making their own determinations of anticipated benefits to be derived from leasing their lands." The failure to do so in this case, the Canadian Human Rights Tribunal ruled, amounts to a breach of the *Canadian Human Rights Act*.

The Canadian Human Rights Tribunal ordered Indian and Northern Affairs Canada to:

- reconsider the lease applications;
- cease its discriminatory practices;
- take measures, in consultation with the CHRC, to redress these practices; and
- amend its land management manual and related policies.

> "…the [Indian] Act has become an anachronism that is out of harmony with the guaranteed individual liberty, freedom, and human rights enjoyed by all Canadians."
>
> Decision of the Canadian Human Rights Tribunal in *Louie and Beattie v Canada (Indian and Northern Affairs Canada)*

2. Eligibility for registration as a “Status” Indian

A case alleging discrimination in the status provisions of the *Indian Act* has raised questions about whether the CHRA can be used to challenge legislation. The CHRC disagrees with the decision and has filed an application for judicial review.

Matson v. Canada (Indian Affairs and Northern Development Canada)

Historically, when a woman with Indian status married a man without status, she lost her status and her children were not entitled to it. Paradoxically, when a man with Indian status married a woman without status, he kept his status. His wife and children were also entitled to Indian status.

While some of this was remedied through two amendments to the *Indian Act* (Bill C-31 - An Act to Amend the *Indian Act* in 1985 and Bill C-3 - Gender Equity in Indian Registration Act in 2011), the complainants alleged that discrimination continues.

Mr. Matson and his siblings gained their Indian status entitlement from their grandmother. They alleged that they were not entitled to pass Indian status entitlements to the children they have had with non-status partners, but that they would be able to do so if their grandparent with status had been male instead of female.

The Tribunal decided that the complaint did not deal with discrimination related to a service, but was a direct challenge to the *Indian Act* itself. The Tribunal said that a complaint based solely on challenging legislation is not possible under the CHRA because law-making is not an activity that is a “service” under section 5 of the CHRA. The Tribunal said that the Charter should be used to challenge legislation.

3. Adoption

A complaint dealing with custom adoptions resulted in a change to a government directive regarding how certain applications for registration under the Indian Act are processed. Now children adopted under Aboriginal customary laws can be registered and recognized as band members on the same basis as their adoptive parents.

Beattie v. Canada (Aboriginal Affairs and Northern Development Canada)

Joyce Beattie was adopted in accordance with Aboriginal customary laws when she was four days old. Although both her biological and adoptive parents are "Indians" as defined in the *Indian Act*, each set of parents belongs to a different band.

Aboriginal Affairs and Northern Development Canada (AANDC) refused to register Ms. Beattie as an Indian and refused to assign Band membership to her based on the entitlements of her adoptive parents.

The Canadian Human Rights Tribunal agreed with Ms. Beattie that AANDC's refusal was discriminatory. Firstly, the narrow definition of "child" used by AANDC amounted to failure by the government to recognize Ms. Beattie's true family relationship. (The term "child" includes children adopted in accordance with Aboriginal custom.) Secondly, because of the registration provisions in the *Indian Act*, it meant that Ms. Beattie could not transmit Indian status to her grandchildren.

The Tribunal awarded $5,000 as special compensation to Ms. Beattie. As requested by the CHRC, it also ordered AANDC to change its directive.

> "I believe an Aboriginal certified custom adoptee is entitled to the same treatment under the law as a legal adoptee."
>
> Decision of the Canadian Human Rights Tribunal in *Beattie v. Canada (Aboriginal Affairs and Northern Development Canada)*

Cases that have the potential to clarify the law and set precedents

Many of the complaints against the federal government 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 cases have the potential to clarify the law and set precedents. In many of these complaints, the CHRC is participating fully in Canadian Human Rights Tribunal proceedings in order to represent the public interest. Here are some examples:

Special education

A First Nation filed a human rights complaint alleging inadequate special education services among First Nations communities. The case focuses on two First Nations children, both with special needs. The CHRC referred the case to the Canadian Human Rights Tribunal.

Key questions: whether the federal government provides sufficient funding to allow First Nations children who live on reserves to receive special education comparable to that provided by the province off reserve, and if not, whether that failure violates Canadian human rights law.

Police services

A Band Council and several First Nations communities filed a complaint regarding the provision of police services and facilities. It is alleged in the complaint that a cramped, unheated shack without plumbing serves as the temporary jail for people taken into temporary custody. The complaint reports slow response times to domestic violence calls and property crime calls. It alleges that the number of officers is inadequate to sufficiently cover the region. As a result, the safety of adults and children is at risk.

Key questions: whether the federal government discriminates in the funding it provides on reserves to police services and facilities in comparison to funding provided by the province off reserve.

Child welfare

This case, currently before the Canadian Human Rights Tribunal, stems from a complaint filed against the Government of Canada by the First Nations Child and Family Caring Society and the Assembly of First Nations. The complaint alleges that federal programs and funding for child welfare services on reserves are inadequate and discriminatory against First Nations children and families.

The Attorney General of Canada has argued that funding for services on reserves is not a “service” and is not within the scope of the CHRA.

This complaint was originally filed in 2007 and referred to the Tribunal. It already has a complicated procedural history due to a preliminary objection by the federal government. In ruling on that objection, the Tribunal agreed with the federal government and dismissed the complaint without a hearing. On an application for judicial review, the Federal Court ordered the Tribunal to proceed with a hearing. Hearings began in 2013 and continued through 2014. The Tribunal will likely deliver its decision in 2015. This case has consumed considerable time and resources for all the parties and interveners involved. Representing the public interest, the CHRC has been a full participant in this case.

Disability supports on reserves

A woman filed a complaint on behalf of her disabled son alleging that he has been denied support services that are reasonably comparable to programs and services provided to persons with disabilities who do not live in First Nations communities. Aboriginal Affairs and Northern Development Canada and Health Canada argue that the First Nations governments, and not the government departments, are the service providers. They also do not acknowledge a constitutional or treaty obligation to provide health services to First Nations. The complaint is before the Canadian Human Rights Tribunal.

Key questions: whether the federal government is appropriately identified as the service provider in cases challenging adequacy of disability support services, and if so, is there a requirement to fund these services to provide a comparable level of service to what would be available to persons living off reserve.

First Nations elections

This complaint involves the specific election code requirement of a First Nation that all candidates for Chief or Council be a blood descendent of one of the original signers of Treaty 4. The complainant in this case, who is a non-blood descendant Band member, alleges that this election code discriminates against her and others based on race, national or ethnic origin, and family status. The First Nation argues that this requirement is a customary law and is justified on the basis that it is necessary to the community's cultural well-being and health.

Protecting Aboriginal and Treaty rights

As part of Bill C-21, Parliament added a non-derogation clause as well as an interpretive provision to the CHRA. The non-derogation clause communicated Parliament's intent that the application of the CHRA would not diminish existing Aboriginal or Treaty rights, consistent with section 35 of the Constitution.

Key questions: whether the blood descendant requirement can be justified and whether the interpretive provision, which requires the Tribunal to give "due regard to First Nations legal traditions and customary laws," applies in this case.

Balancing individual and collective rights

A separate interpretive provision requires that the CHRC, the Canadian Human Rights Tribunal 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.

As a result, the law will be interpreted and applied in a way that reflects the unique history and special status of First Nations. This is a novel approach in Canadian law.

Chapter 3: Barriers to accessing justice

The CHRC has gathered information on barriers to accessing human rights justice from a variety of sources including complaint investigations, research, more than 100 information and training sessions in First Nations communities, and a national series of roundtable discussions with Aboriginal women and groups representing Aboriginal women. These barriers continue to prevent Aboriginal people from using the protections of the CHRA.

While some barriers to human rights justice are unique to circumstances related to the *Indian Act* and life in First Nations communities, others are related to larger issues such as poverty, lack of trust in governments and related institutions, and the complexities of Canada's legal system.

The CHRC's findings are consistent with a 2013 report issued by the the United Nations Expert Mechanism on the Rights of Indigenous Peoples. This report noted that multiple discrimination, structural violence, and poverty are among the root causes of a lack of access to justice. The Canadian Bar Association also recently reported that marginalized people "…consistently described the justice system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people."

This chapter discusses what the CHRC has learned from Aboriginal people and First Nations governments in relation to barriers to human rights justice. It also describes what efforts the CHRC is making to address some of these challenges.

What the CHRC has heard from Aboriginal people

Aboriginal people have told the CHRC that many in their communities are still not aware of the basic human rights protections guaranteed by the CHRA. Consequently, there is also little understanding of how to file a complaint or what remedies might be available.

This low level of awareness was identified by Aboriginal Affairs and Northern Development Canada in 2011 when it tabled its *Report to Parliament on the Readiness of First Nations Communities and Organizations to comply with the CHRA*.

Beyond this fundamental barrier, other reasons why Aboriginal people may choose not to initiate a complaint—or decide to abandon a complaint once it has been filed—are listed below.

Lack of access to technology

The primary source of information for most government programs is the Internet. Aboriginal people in Canada are far less likely than non-Aboriginal people to have access to the web. In many cases, the only available Internet connection is in the Band council office. Many Aboriginal people in remote communities also do not have access to telephones or mail services.

Low literacy and language barriers
Low literacy and language barriers make it exceedingly difficult for many people to understand their rights or how to file a complaint if they believe their rights have been violated.

Poverty and homelessness
Many Aboriginal people are focused on basic issues of survival. People wrestling with the consequences of inadequate housing, food, water, access to employment, or with child and/or elder care obligations, may not have the time, money or energy to file a discrimination complaint.

Lack of confidentiality
In smaller and/or remote communities, complainants might be afraid that due to a lack of confidentiality, speaking out could have negative public, professional and personal repercussions.

Power imbalance
Aboriginal people in vulnerable circumstances, women in particular, may feel that they have no power to effect any kind of change. The issue of power imbalances was raised in relation to bringing complaints against the federal government, Chief and Council in a First Nations community, and other service providers, such as the police or child and family services.

Fear of retaliation
Some Aboriginal women have spoken to the CHRC of their fear that by making a complaint against powerful members of their communities, they or members of their family could be denied access to shelter, or health and social services. Others spoke of fears that their allegations would be met with intimidation or acts of violence. Some said they face the difficult decision of choosing between keeping quiet or leaving their community. These same concerns may also apply to men.

Abandoned complaints – Unanswered questions

In **61 percent of complaints against First Nations governments** and **36 percent of complaints against the federal government**, the complainant has stopped responding to the CHRC's attempts to contact them before the case is formally accepted. This means that in every one of these cases, the complaint did not proceed past the intake stage and the allegations were never investigated.

Without the ability to follow up with the complainant, the CHRC cannot be certain of the reasons why the complaint was abandoned. Was the issue resolved? Did the complainant decide not to pursue the matter? If so, why?

Based on what the CHRC has heard from Aboriginal people over the past six years, there is reason to believe that the obstacles discussed in this chapter may be contributing to the high number of abandoned complaints. In light of this, the CHRC is taking steps to improve access to its processes.

The complexity of the legal system

The CHRA was designed to allow complainants and respondents to represent themselves without need for legal representation. The increasingly complex nature of cases, however, inspires many complainants and respondents to retain counsel. This creates barriers, as not all complainants and respondents can afford legal counsel. Some individuals told the CHRC that for many Aboriginal people, the human rights complaint process does not feel culturally sensitive or safe, which also limits their willingness to file a complaint. Other reasons for not filing a complaint (or for abandoning a complaint) could include:

- perception that the process is lengthy, complex and time-consuming;
- difficulty meeting bureaucratic requirements;
- the need to self-represent with no legal training or experience; and
- the inability to recover legal costs should there be a need to retain counsel.

No support

Many First Nations communities are geographically remote and appropriate legal and non-legal assistance and support are unavailable. In some cases, non-governmental organizations and legal and advocacy support networks provide assistance, but financial constraints limit their capacity to do so.

What the CHRC has heard from First Nations governments

Many of the representatives of First Nations who have met with the CHRC consistently emphasize their right to self-determination, including self-government.

In 2010, the Assembly of First Nations passed a resolution regarding preparedness to accept the CHRA. It read, in part:

> [that the Chiefs] "…affirm that this legislation is imposed on our Nations and is only applicable until such time as First Nations have developed and implemented their own Human Rights models according to their traditions and inherent authority, consistent with the United Nations Declaration on the Rights of Indigenous Peoples."

Not everyone accepts the CHRA

Some First Nations governments argue that human rights are a matter of internal First Nations governance and that the CHRA has no jurisdiction in their community. Others are willing to work with the CHRC to ensure that appropriate human rights protections are in place in their own communities. However, many First Nations governments have raised concerns about the proper application of laws and principles.

No resources to implement change

Many First Nations have said that it is difficult to reallocate scarce resources to meet the requirements of the CHRA, such as making facilities and services accessible to persons with disabilities.

Many also say they lack the capacity and expertise to develop and implement effective policies and programs to prevent discrimination. Fewer still have the capacity to develop effective community-based dispute resolution processes or other systems that might complement or replace the CHRC process, while remaining consistent with human rights principles. Recent reductions in core funding for national, regional and local Aboriginal organizations have strained this limited capacity even further.

Community-based dispute resolution processes

Alternative dispute resolution processes can be used to resolve human rights disputes within an organization or community, precluding the need to address them within a more formal process at the CHRC. If the CHRC receives a complaint that can be dealt by a community-based process, it has the discretion to refer the complaint to that mechanism.

Steps to address barriers

The CHRC continues to take steps to make its complaints process more accessible to Aboriginal people. These efforts are led by the National Aboriginal Initiative (NAI), a small division within the CHRC based in Winnipeg. The NAI works closely with Aboriginal stakeholders to raise awareness about the CHRA and identify challenges to accessing the CHRC complaint process. The NAI's work also informs the CHRC's efforts to adapt its processes to be more responsive and culturally sensitive to the needs of Aboriginal people.

So far, the CHRC has worked toward improving access to justice for Aboriginal people by:

- **Developing and distributing guides on human rights and Alternative Dispute Resolution** in clear language for individuals, managers and First Nations leaders. For example, *Your Guide to Understanding the Canadian Human Rights Act* was developed in partnership with the Native Women's Association of Canada and is available in three Indigenous languages. *A Human Rights Handbook for First Nations* is a publication for First Nations leaders and administrators to help identify and resolve human rights issues in their communities. Lastly, the *Toolkit for Developing Community-based Dispute Resolution Processes in First Nations Communities* provides First Nations leaders with practical advice on developing an Alternative Dispute Resolution process in their community.

- **Launching www.doyouknowyourrights.ca**, a website designed to provide Aboriginal people with information about human rights protection under the CHRA. The site also provides direct access to the CHRC's website.

- **Providing information sessions and training** in First Nations communities across Canada. Since 2008, the NAI has engaged in dialogue with more than 20,000 people in over 115 sessions with First Nations communities across the country.

- **Launching an online self-assessment tool** to allow people to determine if they have grounds for a complaint and to download a complaint form. More than 40% of all complaints now come to the CHRC through this new process. This new approach gives prospective complainants immediate answers to their questions about their situation, freeing up CHRC staff to dedicate more time to calls from complainants who may not have access to a computer or who require additional assistance in filing a complaint.

- **Working with Aboriginal women to find solutions to break down barriers to human rights justice**. The CHRC is working with Aboriginal women from across the country to understand barriers to accessing justice and identify ways to address those barriers.

Conclusion

Bill C-21 has given Aboriginal peoples a new tool to challenge government authority and speak out against discrimination and injustice. However, the burden of this responsibility cannot rest entirely on their shoulders.

Many of the factors that make it difficult for Aboriginal people to fully exercise their human rights and access the protections enjoyed by all other people in Canada need to be addressed with decisive, concrete initiatives involving a wide range of actors.

The *Indian Act* is perhaps the last remaining legislation in a modern democracy that controls people based on their race. It has remained relatively unchanged for 135 years. The Act, along with its regime of regulation, policy, procedure and bureaucracy, is accepted as being discriminatory and paternalistic. Many Aboriginal people have spoken to the CHRC about the negative effects it continues to have on their lives. The *Indian Act* has set a context of social and economic exclusion that has resulted in disproportionate hardship and generally lower levels of well-being for Aboriginal peoples.

Across the country, many First Nations communities continue to live without adequate housing, safe drinking water or access to quality education and other social services most people in Canada take for granted. Aboriginal people and their families continue to struggle with the devastating impacts of the Residential Schools. Years of neglect and abuse have left many Aboriginal people—particularly women and girls—more vulnerable to poverty, homelessness, substance abuse, and violent crime. The RCMP recently reported that since 1980, over 1,100 Aboriginal women have been murdered or gone missing in Canada.

In recent years, the Government of Canada has taken a number of steps aimed at improving relations with Aboriginal peoples. The Indian Residential Schools Settlement Agreement—which included the establishment of the Truth and Reconciliation Commission—the Prime Minister's apology in the House of Commons, along with the repeal of section 67 and the other amendments included in Bill C-21 are all steps toward reconciliation.

Extending full human rights protections to Aboriginal people was a step in the right direction, but it is not a panacea. The treatment of Aboriginal peoples in Canada is one of the most pressing, if not the most pressing human rights issue in this country today. Addressing the social and economic challenges facing Aboriginal peoples requires fundamental societal change that extends well beyond the jurisdiction of the *Canadian Human Rights Act*.

Achieving fundamental societal change will depend on determined, concerted efforts across all levels of government with full participation of Aboriginal peoples as well as respect for Aboriginal and Treaty rights and the United Nations Declaration on the Rights of Indigenous Peoples.