Now a Matter of Rights

Extending Full Human Rights Protection to First Nations

June 2011

Canada

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CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Acting Chief Commissioner
Président par intérim

June 16, 2011

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 of transmitting to you for tabling in the Senate, our Special Report to Parliament: *Now a Matter of Rights: Extending Full Human Rights Protection to First Nations People*.

Yours sincerely,

David Langtry

Encl.

c.c.: Mr. Paul C. Bélisle
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CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Acting Chief Commissioner
Président par intérim

June 16, 2011

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 of transmitting to you for tabling in the House of Commons, our Special Report to Parliament: *Now a Matter of Rights: Extending Full Human Rights Protection to First Nations People*.

Yours sincerely,

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c.c.: Ms. Audrey O'Brien
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On June 18, 2011, people affected by the *Indian Act* will have full access to Canadian human rights law for the first time in history.

In June 2008, Parliament repealed section 67 of the *Canadian Human Rights Act*. For over three decades, this section prevented people from filing discrimination complaints resulting from the application of the *Indian Act*. This meant that discrimination complaints about the *Indian Act* could not be made against the Government of Canada or First Nations governments. The Canadian Human Rights Commission (the Commission) had repeatedly called for this change.

When this change was made in 2008, people could immediately make discrimination complaints about the *Indian Act* against the Government of Canada. First Nations governments were given a three-year transition period to prepare for the change. June 18, 2011, marks the end of the transition period.

The purpose of this special report is to update Members of Parliament, First Nations governments, Aboriginal people, and other Canadians on the steps the Commission has taken over the past thirty-six months to prepare for full repeal.

The Commission's National Aboriginal Initiative has 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. Through dialogue with First Nations and other Aboriginal stakeholders, the Commission has identified five principles that have guided its work and that it views as essential to successfully implementing the repeal of section 67:

1. Respect for self-government, particularly through the development of appropriate First Nations community-based dispute resolution processes.

2. Respect for Aboriginal and treaty rights, and giving due regard to First Nations legal traditions and customary laws.

3. Discrimination prevention through the promotion and protection of human rights, including education and training to help people understand their rights and responsibilities.

4. Freedom from discrimination on grounds such as sex, age, family status and disability, consistent with section 2 of the *Canadian Human Rights Act.*

5. Adequate resources for First Nations governments to fulfill their obligations under the *Canadian Human Rights Act* and increase their capacity to develop the necessary human rights protection policies and processes.

The activities outlined in this special report illustrate the many challenges to ensuring full access to human rights protection for Aboriginal people. These challenges include:

- the requirement to balance the rights of the community with the rights of individuals;

- the need to provide human rights redress in a manner that respects Aboriginal peoples' inherent right to self-government;

- the need to increase awareness among Aboriginal people and First Nations governments of human rights legislation and implement community-based dispute resolution processes;

- the importance of ensuring that First Nations human rights systems are open and accessible to all; and

- First Nations governments' need for adequate resources to ensure their communities and organizations comply with the *Canadian Human Rights Act*.

These challenges exist within an already complex environment. Many of the complaints brought against the Government of Canada or First Nations governments will be the first of their kind and may require clarification from the courts.

The Commission will continue to fulfill its mandate to promote and protect the human rights of people throughout Canada. This includes engagement with First Nations and other Aboriginal stakeholders, and relevant Government of Canada departments. This year the Commission will also be conducting a study to identify inherent discrimination in the *Indian Act*.

For more than 30 years, section 67 of the *Canadian Human Rights Act* prevented people from filing discrimination complaints resulting from the application of the *Indian Act*. During this time, complaints on those matters could not be brought against the Government of Canada or First Nations governments. The Canadian Human Rights Commission called for the repeal of the section in two of its Special Reports, *A Matter of Rights* (2005) and *Still a Matter of Rights* (2008).

Section 67 was repealed on June 18, 2008, when Parliament passed Bill C–21.[1] The *Canadian Human Rights Act* was immediately applicable to *Indian Act* complaints against the Government of Canada. The Bill included a three-year transition period before complaints could be filed against First Nations governments and related institutions. June 2011 marks the end of the transition period.

The purpose of this special report is to update Members of Parliament, First Nations governments, Aboriginal people, and other Canadians on the steps the Commission has taken over the past thirty-six months to prepare for full repeal.[2]

The activities outlined in this special report illustrate the many challenges to ensuring full access to human rights protection for Aboriginal people. These challenges include:

- the requirement to balance the rights of the community with the rights of individuals;
- the need to provide human rights redress in a manner that respects self-government;
- the importance of ensuring that First Nations human rights systems are open and accessible to all; and

[1] *An Act to Amend the Canadian Human Rights Act*, Second Session, Thirty-ninth Parliament, 56-57 Elizabeth II, 2007-2008.

[2] The primary impact of Bill C-21 is on the Government of Canada and Firts Nations operating under the *Indian Act*. For this reason, the Report focuses on First Nations. This is not meant to diminish the status of other Aboriginal peoples and communities, including those of the Métis and Inuit peoples, and others that operate outside the *Indian Act*, but who may be affected by Bill C-21 in some circumstances.

- First Nations governments' need for adequate resources to ensure their communities and organizations comply with the *Canadian Human Rights Act.*

The Report also sets out what the Commission has heard and learned over the past three years and how its ongoing work has been influenced as a result.

The repeal of section 67 is an important milestone on the road to equality for all Aboriginal people. However, the repeal will not resolve the multitude of social, economic, lands rights and political issues confronting First Nations and other Aboriginal peoples. Many of these issues, though clearly human rights matters, fall outside the scope of the *Canadian Human Rights Act*.

The Attorney General of Canada is also challenging the *Canadian Human Rights Act's* definition of a "service." If this challenge is successful it could seriously undermine First Nations people's ability to file discrimination complaints in relation to the funding of services to First Nations communities.

In the long run, it will be up to First Nations governments, Aboriginal peoples, legislatures, the courts and civil society to make the kind of fundamental changes necessary to ensure Aboriginal peoples achieve the full equality they have long been denied.

The Readiness Review

Bill C-21 provided that the Government of Canada undertake "a study to identify the extent of the preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the *Canadian Human Rights Act.*"[3] This study is to be carried out in cooperation with the appropriate Aboriginal organizations and reported to Parliament no later than June 18, 2011.

[3] *An Act to Amend the Canadian Human Rights Act*, Second Session, Thirty-ninth Parliament, 56-57 Elizabeth II, 2007-2008.

Bill C-21 did not require that the Commission be involved in the statutory readiness review. The Commission is tabling this report under its own authority pursuant to section 61(2) of the *Canadian Human Rights Act*, which states:

> (2) The Commission may, at any time, prepare and submit to Parliament a special report referring to and commenting on any matter within the scope of its powers, duties and functions if, in its opinion, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for submission of its next annual report under subsection (1).

The Commission hopes that this report, along with the Government of Canada's report, facilitates greater understanding about the repeal and its implementation over the past three years.

National Aboriginal Initiative

The Canadian Human Rights Commission's National Aboriginal Initiative is responsible for leading the Commission's activities relating to implementing the repeal of section 67. The purpose of the National Aboriginal Initiative is to ensure that the Commission, First Nations governments, Aboriginal peoples and other key stakeholders understand and are prepared to deal with the changes that come with the repeal of section 67. The Commission has been:

- meeting with First Nations governments and other stakeholders;
- developing policy and conducting research;
- training First Nations governments and raising awareness; and
- developing relevant guidance on investigative and community-based dispute resolution processes.

The Government of Canada allocated $5.7 million over the period 2009/10 to 2013/14 to fund the Commission's engagement and implementation activities. With this funding the Commission has been able to carry out a number of projects and build its organizational infrastructure to be ready to respond to new demands after June 2011.

Listening and Learning

A key objective of the National Aboriginal Initiative is engagement with First Nations governments, their citizens and other key stakeholders. The Commission is committed to working with First Nations governments to incorporate the unique context of First Nations communities into the human rights redress system in a way that respects self-government.

In developing the two previous special reports to Parliament, the Commission spoke with the Assembly of First Nations, the Native Women's Association of Canada, and the Congress of Aboriginal Peoples. The Chief Commissioner and the Deputy Chief Commissioner held a number of meetings with the leadership of these organizations.

Since the repeal, the Commission has been involved in a number of meetings with representatives of these national Aboriginal organizations and the Department of Indian Affairs and Northern Development Canada. These meetings provided the opportunity to identify potential areas of partnership and exchange information on implementing the repeal.

Since January 2009, senior Commission staff have participated in over 75 meetings, conferences and other events in First Nations communities and with First Nations and other Aboriginal representatives. At these events, Commission staff either:

- provided an overview of the *Canadian Human Rights Act* and the changes resulting from Bill C-21;
- discussed the Commission's understanding of how the *Canadian Human Rights Act* will be applied in First Nations communities; or
- trained stakeholders on human rights principles, such as the duty to accommodate.

These events were a two-way learning experience. The Commission has gained new knowledge that has been critical to the work of the National Aboriginal Initiative. The Commission is most grateful to all those who took time to share their knowledge. There is still much more to learn and the Commission's engagement efforts will continue.

It is difficult to summarize everything that was heard and learned over the past three years. However, these are some issues that were raised:

- **Support for human rights:** First Nations governments strongly support human rights protection. The concerns they have are focused primarily on how best to apply human rights in the unique circumstances of their communities and differing views on what human rights should include.

- **Disparities in knowledge and capacity:** A number of First Nations governments already have established dispute resolution processes that could be adapted to also resolve human rights disputes. Many First Nations governments are anxious to improve their redress processes or to establish new ones. This will require adequate funding and training.

- **Self-government and sovereignty:** All First Nations representatives that spoke with the Commission emphasized their inherent right to self-government. Some First Nations governments do not recognize the Commission's jurisdiction and argue that as sovereign peoples, human rights should be an internal matter. Other First Nations governments are willing to work in partnership with the Commission to ensure that appropriate human rights protection is put in place.

- **Legal traditions and customary laws:** The Commission met with many people, including Elders, who talked about the fundamental role legal traditions and customary laws play in the resolution of disputes in First Nations communities. The Commission heard about the need to be respectful in dealings with traditional knowledge keepers. The Commission also learned that there is a reluctance to share knowledge for fear that it may be misinterpreted or misused.

- **Prevention:** First Nations governments acknowledged that prevention should be a critical part of a human rights redress process. Many would prefer to identify and address potential causes of discrimination, rather than deal with these issues through a complaint process.

- **Confusion about what was covered by section 67:** First Nations governments have always been subject to human rights complaints for employment issues and for discrimination in services that were not related to the *Indian Act.* The Commission learned that many First Nations people mistakenly believed that they were not protected by the *Canadian Human Rights Act* at all.

- **Access for persons with disabilities:** The repeal has increased First Nations' awareness of their rights and responsibilities. Many First Nations leaders have expressed concern about the challenges associated with making their facilities and services accessible to persons with disabilities.

- **Colonialism:** Many Aboriginal people spoke about the impacts of the *Indian Act*. Its effects have been pervasive and largely negative on the lives of Aboriginal people for more than a hundred years. 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.[4]

- **People who do not live in their First Nation:** The Commission heard that although many Aboriginal people do not reside on their traditional territory, they continue to be connected to their people. This connection includes being involved in the affairs of the community and being eligible to receive benefits related to being a member of the community.

- **Amending the *Canadian Human Rights Act:*** Some Aboriginal people spoke of the need for further amendments to the *Canadian Human Rights Act* with regard to how it applies to Aboriginal people. A repeated suggestion was that "Aboriginal identity" and "Aboriginal residence" be added as prohibited grounds under the *Canadian Human Rights Act*.

[4] The Community Well-Being Index created by the Department of Indian Affairs and Northern Development Canada indicates that the average Community Well-Being score for non-Aboriginal communities is 77. For First Nations communities it is 57. The Community Well-Being Index was derived by combining a number of key indicators relating to matters such as health, education and housing. For more information see: *First Nation and Inuit Community Well-Being: Describing Historical Trends (1981-2006).*

In its two previous reports, and in the course of the work carried out since, the Commission has articulated basic principles essential to the successful implementation of repeal. These principles are:

- **Respect for self-government:** All Aboriginal peoples, including First Nations peoples, have an inherent right to self-government. The repeal of section 67 must be carried out in a manner that respects the ability of First Nations peoples to govern themselves.

- **Respect for Aboriginal and treaty rights:** By virtue of their Aboriginal ancestry and as protected by the Canadian Constitution[5] and recognized by the Supreme Court of Canada, the Aboriginal peoples of Canada have existing Aboriginal and treaty rights. In the implementation of repeal, these rights must be respected.

- **Discrimination Prevention:** Human rights legislation aims to promote and protect human rights. It is intended to be corrective. Effective human rights processes include programs and measures to educate people about their rights and prevent discrimination.

- **Freedom from Discrimination:** Section 2 of the *Canadian Human Rights Act* states that the purpose of the Act is to give effect:

  > . . .to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices.

  Aboriginal peoples have the right to be free from discrimination based on grounds such as sex, age, family status and disability. Aboriginal peoples continue to experience discrimination. This is especially true for Aboriginal women and children.

- **Adequate Resources:** First Nations governments require adequate resources in order to fulfill their obligations under the amended *Canadian Human Rights Act.*

[5] *Constitution Act*, 1982, sections 25 and 35.

The Commission supports Aboriginal peoples' inherent right to self-government. First Nations governments can, and should be encouraged to, develop their own human rights redress processes. Such systems might operate in conjunction with the *Canadian Human Rights Act* or under a self-government agreement, unique legislation, or other arrangements made between First Nations governments and the Crown.[6]

First Nations' human rights redress processes that operate under self-government will develop over time. Bill C-21 was not intended to replace this process. But there are immediate needs. First Nations and other Aboriginal people have been denied access to human rights redress on decisions flowing from the *Indian Act* for over 30 years. Repealing section 67 was the first step to ensuring that this denial of rights will end.

This legislation is now Canadian law and the Commission has a duty to Parliament, and to First Nations governments and Aboriginal people to implement this legislation. The Assembly of First Nations acknowledged this in a resolution passed in 2010:

> . . . that this legislation *[Canadian Human Rights Act]* 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.[7]

[6] In the longer term, consideration could be given to a separate First Nations Human Rights Act. This would be similar to the evolution in human rights structures that occurred in the Northwest Territories and the Yukon. Initially, the Commission had human rights jurisdiction over the territories. When the territories developed their own human rights laws, jurisdiction for human rights was then transferred to the territories.

[7] Paragraph 7, Resolution 19/2010, Annual General Assembly, Assembly of First Nations, July 2010, Winnipeg, Manitoba.

Alternatives to the Commission's Dispute Resolution Process

Under the *Canadian Human Rights Act*, alternative dispute resolution processes can be used to resolve human rights disputes without having to go through the Commission's formal complaint process. Encouraging community-based dispute resolution is consistent with universal practices in human rights. If a complaint received by the Commission can be addressed by a community-based process, the Commission has the discretion to refer the complaint to that process.

There is no fixed model for First Nations community-based dispute resolution processes. First Nations peoples will develop systems that are suited to their particular needs and circumstances. This could include processes based on:

- traditions and customs passed down from generation to generation;
- a contemporary approach using tools such as mediation and arbitration; or
- a hybrid approach that blends both traditional and contemporary approaches.

Guiding Principles for Developing Community-based Dispute Resolution Processes

Some First Nations governments asked the Commission for advice on the principles that should be at the foundation of a community-based dispute resolution process. In response, the Commission developed a set of guiding principles that take into account international human rights standards, such as those in the United Nations Declaration on the Rights of Indigenous Peoples, and Canadian law and jurisprudence. These principles will be refined as necessary.[8]

[8] In developing their community-based dispute resolution processes First Nations should also consider other matters. These include: a clear system for the approval of a system of conflict resolution; provision of an appeal mechanism; drafting of all documents in clear language; and proper procedures for giving notice of proceedings.

These guiding principles are:

1. Make the process accessible.
2. Obtain community input about the process.
3. Make sure the decision-maker knows about human rights.
4. Ensure impartiality and independence.
5. Allow people to bring a representative.
6. Give people the opportunity to be heard.
7. Encourage people involved to share information.
8. Keep information confidential.
9. Give reasons for decisions.
10. Ensure the process is acceptable to everyone involved in the dispute.
11. No retaliation.

Representatives of Aboriginal women have expressed concern that negative attitudes toward women (and their children) may limit their ability to bring forward discrimination complaints. Concern has been expressed that in some communities intimidation and retaliation are a possibility. Similar concerns may apply to other vulnerable groups. Incorporating these guiding principles into community-based dispute resolution processes will help First Nations governments ensure that the process is accessible and fair for everyone.

The Commission is working with the Southern First Nations Secretariat in a pilot project to develop community-based dispute resolution processes. The results of the project will be developed into an educational guide to share with other First Nations wanting to follow the same path.

The Non-derogation Clause

The *Canadian Human Rights Act* now includes a non-derogation clause[9] that the Commission, the Canadian Human Rights Tribunal, and the courts are legally required to respect in all decisions. The non-derogation clause says that the *Canadian Human Rights Act* cannot change the "existing Aboriginal and treaty rights" recognized and affirmed by section 35 of the *Constitution Act, 1982.*

The Interpretive Provision

Bill C-21 also added an interpretive provision to the *Canadian Human Rights Act* that states:

> 1.2. 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.

The interpretive provision has been an important focal point for the Commission in preparing for full repeal. It commissioned two research pieces to help inform how the provision should be applied:

- *Balancing Individual and Collective Rights: Implementation of section 1.2 of the Canadian Human Rights Act* (March 2010)[10] provides a comprehensive overview of the historical, constitutional and legal considerations regarding the interpretive provision.

[9] Clause 1.1: 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*.

[10] By Bradford W. Morse, Robert Groves & D'Arcy Vermette.

- *Section 1.2 of the Canadian Human Rights Act: Balancing Individual and Collective Rights and the Principle of Gender Equality* (July 2010)[11] analyzes the important interplay between giving due regard to First Nations legal traditions and customary laws, and respecting the principle of gender equality.

The Commission also sought out the experience of First Nations and other Aboriginal people to help understand their perspective on the interpretive provision. This included:

- meetings with a council of Elders;
- discussions with national Aboriginal organizations;
- a workshop at the Indigenous Bar Association's annual general meeting; and
- a special forum held at the Commission's 2010 discrimination Prevention Forum.

The knowledge shared, often through storytelling, gave the Commission an appreciation for the central role of customary laws and legal traditions in the daily lives of Aboriginal people. It also provided the Commission with a better understanding of some of the challenges that lie ahead.

First Nations Legal Traditions and Customary Laws

The Assembly of First Nations described the interpretive provision as a "slender thread linking the *Canadian Human Rights Act* to Aboriginal legal traditions."[12] Applying the *Canadian Human Rights Act* in a way that considers and incorporates First Nations legal traditions and customary laws will provide an opportunity for dialogue and greater understanding between Aboriginal peoples, the Commission, and other bodies interpreting the *Canadian Human Rights Act*.

[11] By Karen Green, Céleste McKay, Wendy Cornet and Kate Rexe.
[12] *Assessing the Readiness of First Nations Communities for the Repeal of Section 67 of the Canadian Human Rights Act*, Draft report to Indian and Northern Affairs Canada by the Assembly of First Nations. March 31, 2010, pg 30.

Identifying and understanding First Nations legal traditions and customary laws may be a challenge for decision-makers interpreting the *Canadian Human Rights Act*. First Nations traditions and customs are not frozen in time and they vary between nations. They can evolve just like traditions in any society, and can change in response to circumstances and the will of the community. They may be oral or recorded in writing, depending on the choice and practice of each nation.

The Commission recognizes the need to develop useful and respectful approaches to gathering information on the existence and nature of First Nations legal traditions and customary laws.

Balancing Collective and Individual Rights

Collective rights are those that belong to a group as a whole. They are often important to preserving the group's identity and culture. Individual rights are those that apply to an individual.

In the Commission's view, there is no fundamental conflict between collective rights and individual rights. However, at times there may be tension between the two. In such cases, it is important to find an appropriate balance that will respect both the rights of the individual and the collective.

Gender Equality

The interpretive provision states that due regard is to be given to First Nations legal traditions and customary laws to the extent that they are consistent with the principle of gender equality. Parliament's intention was to ensure that any historical discrimination against women would not continue.[13]

This overriding respect for the principle of gender equality is found in both international and Canadian law. For example, the United Nations Declaration on the Rights of Indigenous Peoples states:

> … all the rights and freedoms recognized herein are equally guaranteed to male and female Indigenous individuals.[14]

[13] Canada. Parliament. House of Commons. Debates, 39th Parl., 2nd sess., vol. 142 no. 097, (2008): 5982-598.
[14] Article 44, United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007.

Similarly, section 35(4) of the *Constitution Act, 1982*, says that Aboriginal and treaty rights are guaranteed equally to men and women.

The Commission has been told by Aboriginal representatives that some cultures may have different concepts of gender equality. There are circumstances where men and women can be treated differently to obtain an equal result. The Commission will consider all relevant information when dealing with discrimination complaints.

Operational Guidelines

Informed by discussions with First Nations governments and other stakeholders, the Commission has established some guidelines to ensure that the interpretive provision is applied consistently throughout its dispute resolution process. The Commission recognizes that these guidelines may evolve as the provision is applied and interpreted.

- **The interpretive provision is not a defence:**[15] It is clear from the legislative record that the interpretive provision was not intended to excuse actions that would otherwise be discriminatory under the *Canadian Human Rights Act*. Rather, it requires that the existing provisions of the *Canadian Human Rights Act* be interpreted in light of it.

- **Giving due regard is an obligation:** The interpretive provision creates a positive obligation on decision-makers to consider First Nations legal traditions and customary laws. As such, the Commission will ask both parties to a discrimination complaint if a legal tradition or customary law is engaged in the complaint and, if so, for supporting information. Commissioners will consider this information as part of the decision-making process.

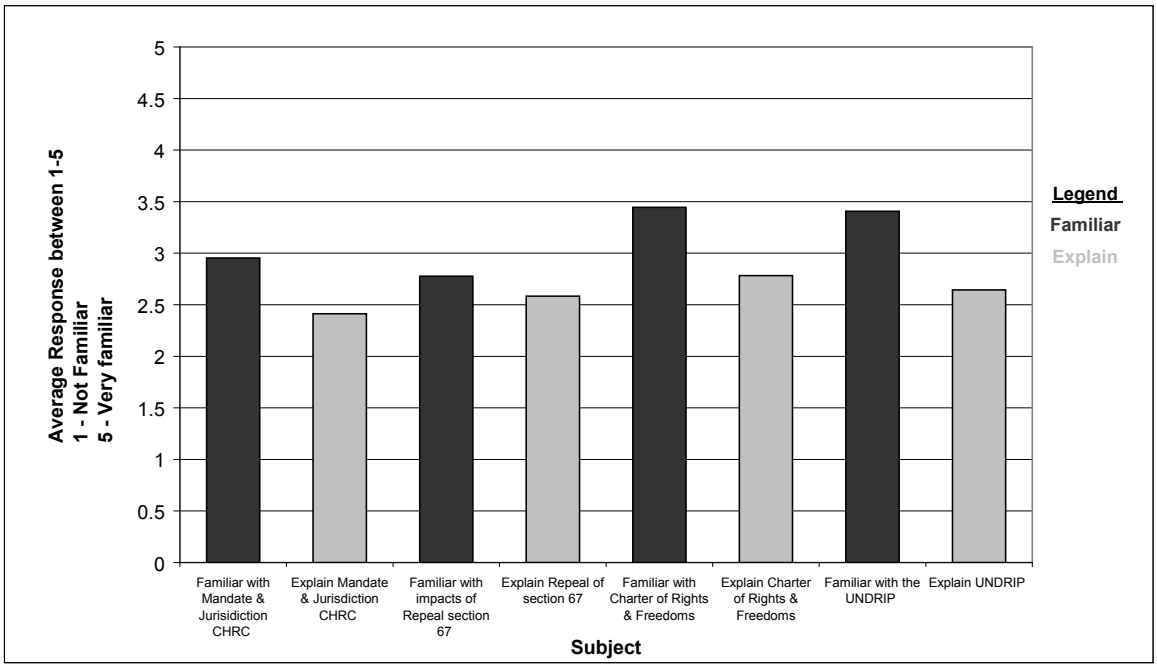
[15] In human rights law a party that is alleged to have discriminated may argue that they have a legitimate reason for doing so. This is called a defence. For example, an airline can discriminate against someone who applies to be pilot, but who cannot see well enough to do the job successfully.

- **Gender equality must be respected in all cases:** Relevant First Nations legal traditions or customary laws will be considered by the Commission in all cases, however the principle of gender equality may limit their application.

- **First Nations governments:** The interpretive provision will be applied to all First Nations governments, regardless of whether they are an *Indian Act* band or a self-governing First Nation. The legal tradition or customary law must be relevant to the alleged facts of the discrimination complaint to be considered.

The Awareness Survey

In 2009, the Commission undertook an awareness survey of First Nations communities, and First Nations regional and national representatives. Fifty-four (54) organizations were surveyed. The purpose of the survey was to determine how familiar these organizations were with Bill C-21, the work of the Commission, the *Charter of Rights and Freedoms* and the United Nations Declaration on the Rights of Indigenous Peoples.



Ratings were on a scale of 1 to 5, with 5 indicating the highest level of self-reported knowledge. Awareness ratings for Bill C-21 and the *Canadian Human Rights Act* were around 2.5. Awareness ratings for the *Charter of Rights and Freedoms* and the United Nations Declaration on the Rights of Indigenous Peoples were somewhat higher. Highlights of the findings include:

- Most respondents indicated that they had little or no contact with the Commission prior to the survey. Almost all expressed interest in receiving more information and training on human rights.

- Survey respondents' familiarity with the mandate and jurisdiction of the Commission was moderate and scored around 2.85 out of 5. This is understandable given the Commission's limited previous involvement with First Nations communities. Confidence in explaining Bill C-21 and the *Canadian Human Rights Act* was somewhat lower.

- 80% of survey respondents indicated they had never participated in a Commission information workshop or training session. This is also understandable given that the survey was conducted less than a year after Bill C-21 was passed.

- 69% of those who indicated they had never participated in a Commission information workshop or training session stated they would be interested in participating in a future session.

- 70% of the survey respondents reported that they did not provide human rights related information sessions to members or constituents.

- First Nations organizations indicated that their ability to fulfill the requirements of the *Canadian Human Rights Act* is limited by a number of factors, including:

    - the legacy of the *Indian Act* system;

    - lack of funding and human resources;

    - the geographical isolation of many communities; and

    - the need for human rights information to be written in clear language.

In the future, the results of the Awareness Survey will serve as a baseline for measuring the Commission's progress in increasing First Nations' knowledge and understanding of the human rights system.

Making Human Rights Accessible for Aboriginal People

The Awareness Survey made it clear that there was critical need for information written in language understandable to non-experts. In response to this need the Commission published *Your Guide to Understanding the Canadian Human Rights Act*.[16] The Guide, developed in collaboration with the Native Women's Association of Canada, is designed to be an introduction to human rights and the process for filing a discrimination complaint with the Commission. The Guide is available on the Commission's website in English, French and a number of Aboriginal languages. It is also available in print by request.

A second clear language guide was designed for First Nations leaders and administrators. The *Human Rights Handbook for First Nations* offers relevant human rights related information, with the goal of increasing First Nations capacity to address human rights issues.

The Handbook discusses:

- human rights law;
- how to prevent discrimination;
- the Commission's dispute resolution process;
- how to respond to a discrimination complaint; and
- how to develop community-based dispute resolution processes.

Making the Commission's Dispute Resolution Process More Accessible

Clear language is important. So too is a clear and understandable process for filing and resolving discrimination complaints. Over the years, the Commission has worked to make its dispute resolution process easier to understand and more accessible.

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[16] Minister of Public Works and Government Services 2010, Cat. No. HR21-18/2010E ISBN 978-1-100-16788-6. Copies are available from the Commission. See inside front cover for contact information.

This does not diminish the fact that a process that requires a person to file a complaint against their government, employer or fellow employee can be intimidating. This can be further complicated by factors such as the small size of many First Nations communities, and the strong family, employment and friendship ties that exist within these communities.

The Commission has reviewed all of its procedures to ensure they are able to address the specific needs and circumstances of Aboriginal people.

Human Rights Training

The Commission has already been involved in some human rights training with First Nations governments and other Aboriginal organizations. Through dialogue, presentations, and publications such as the clear language guides, the Commission has been working with First Nations governments to familiarize them with the requirements of the *Canadian Human Rights Act* and how it will apply.

It is also important to have formalized training for those who will be directly involved in a First Nations community-based dispute resolution process. Initiatives such as human rights training for trainers and investigation training for First Nations administrators would be beneficial. However, many First Nations governments have told the Commission that funding constraints limit their ability to get the training they need.

Discrimination Complaints

A major challenge, for both the Commission and First Nations communities, is identifying how many discrimination complaints will come forward after June 2011.

As mentioned earlier, despite the fact that only discrimination complaints stemming from the *Indian Act* were barred by section 67; many First Nations people believed that they were excluded from the *Canadian Human Rights Act* entirely. As a result, it is possible that the Commission will also see a rise in complaints against First Nations governments related to issues that were not part of the repeal. The Commission has some experience dealing with First Nations related complaints. For example, discrimination in employment matters has always been open to redress through the *Canadian Human Rights Act.*

Over the last five years, the Commission accepted an average of 29 complaints each year involving First Nations governments. Many of these (about 35%) were settled at an early stage, while 28% were dismissed, and 17% were referred to the Canadian Human Rights Tribunal for further inquiry. The breakdown of complaints is as follows:

Number of complaints involving First Nations	
2006	39
2007	22
2008	26
2009	20
2010	37
Total	144

The volume of inquires received by the Commission may provide some indication of the number of future complaints. The Commission receives many thousands of inquires each year. Phone calls asking about issues that could not be dealt with are treated as inquiries by Commission staff. In many cases, Commission officers are able to help callers resolve the issue without filing a discrimination complaint or by referring them to other agencies that can help. A relatively small proportion of inquires result in formal discrimination complaints to the Commission.

The following table shows the number of inquiries that the Commission handled in 2009 and 2010 that dealt specifically with Aboriginal issues, followed by the number of those inquiries that the Commission accepted as complaints.

Number of inquiries involving Aboriginal issues			
	2008 *	**2009**	**2010**
Total inquiries	54	100	95
Accepted as complaints	20	13	40

* From June 18, 2008.

The above numbers include inquiries and complaints against the Government of Canada, which were previously barred because of section 67. The Commission has also continued to deal with complaints involving First Nations governments that were not shielded by section 67.

Our preliminary analysis indicates that after June 2011, the Commission's caseload may rise by between 150 and 170 complaints per year.

The actual number of complaints that the Commission receives will depend on a number of factors including:

- the extent to which people are aware of their rights under the *Canadian Human Rights Act*;
- early efforts taken by First Nations governments to prevent discrimination and integrate respect for human rights principles into every day practice; and
- the number of First Nations governments that already have suitable processes for resolving human rights disputes within their communities.

Systemic Discrimination

The volume of discrimination complaints does not tell the whole story. Not all complaints are the same. Through the use of community-based dispute resolution processes and the Commission's dispute resolution processes, it is likely that many complaints will be resolved quickly. Some complaints will be more complex and difficult to resolve.

This is particularly true with regard to systemic discrimination complaints. Systemic discrimination occurs when policies or practices that are part of the structure of an organization create or perpetuate disadvantage for individuals or groups based on one of the 11 prohibited grounds of discrimination.[17]

Systemic discrimination complaints can establish important precedents for the future. As they deal with systemic problems rather than individual issues, these complaints often take time to resolve and sometimes require determination by the courts. For example, a decision ruling that a particular government policy or program is discriminatory would likely lead to a remedial order that ensures the discrimination does not re-occur. The following cases were recently considered by the Canadian Human Rights Tribunal and are illustrative.

Louie and Beattie v Indian and Northern Affairs Canada

The first decision of the Canadian Human Rights Tribunal following the repeal of section 67 was the case of *Louie and Beattie v Indian and Northern Affairs Canada.*[18] 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 section 58(3) of 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.

[17] The 11 grounds of discrimination listed in the *Canadian Human Rights Act* are: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and a pardoned conviction.

[18] James Louie and Joyce Beattie v. Indian and Northern Affairs Canada, T1441/6709, January 26, 2011.

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 they must 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 people who have rights to 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 Canada. Indian and Northern Affairs Canada also argued that because it had a responsibility to protect the interests of First Nations people, 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 Commission, to redress these practices; and
- amend its land management manual and related policies.

While The Department of Indian Affairs and Northern Development Canada is challenging part of the Canadian Human Rights Tribunal's decision in the Federal Court of Canada, it is working with the Commission to redraft its land management policies and programs. This is the type of collaboration that the Commission encourages with parties at every stage of the dispute resolution process.

First Nations Child and Family Caring Society et al. v Attorney General of Canada

The Commission received a discrimination complaint from the the First Nations Child and Family Caring Society of Canada and others. They allege that the formula for funding First Nations family service organizations is discriminatory on the basis of race, because First Nations child welfare organizations are underfunded compared to agencies serving non-First Nations children. As a result, First Nations child welfare agencies cannot provide the programs needed to assist First Nations families in crisis.

The Commission referred the complaint to the Canadian Human Rights Tribunal and represented the public interest in the hearings.

The Attorney General challenged the jurisdiction of the Canadian Human Rights Tribunal to hear the case arguing that the provision of funding to First Nations child welfare organizations is not a "service" as defined in the *Canadian Human Rights Act*. It also argued that it is not appropriate to compare Aboriginal children receiving child welfare services on reserve with children receiving such services off reserve.

On March 14, 2011, the Canadian Human Rights Tribunal ruled[19] that it had insufficient evidence to determine that First Nations child welfare programs were not a "service" within the meaning of the *Canadian Human Rights Act*. The Canadian Human Rights Tribunal's ruling went on to say that the government was correct in arguing that there was no valid comparator group and dismissed the complaint.

[19] Ruling, First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development) and Chiefs of Ontario and Amnesty International, T1340/7008, March 14, 2011.

If followed, the ruling that there is no comparator group would make future discrimination complaints against the Government of Canada by Aboriginal peoples difficult to prove. That is because of the unique obligations of the Government of Canada under section 91(24) of the *Constitution Act, 1867*, which makes it responsible for "Indians and Lands reserved for Indians."

The Government of Canada is often involved in the design, funding and delivery of services on reserve that are normally provincial services for other Canadians. Given the exceptional circumstances surrounding Aboriginal peoples and services delivered to them, there is no exact comparator group available in most circumstances.

The Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, and the Commission have requested that the Federal Court of Canada review this decision. A hearing is expected to take place in late 2011.

Discrimination Embedded in the *Indian Act*

The *Indian Act* is perhaps the only legislation in the world that rules and manages a people based on their race, and has remained relatively unchanged for 135 years. It is outdated and continues to be criticized for being discriminatory and paternalistic. A more modern approach to governance that recognizes First Nations inherent right to self-government is long overdue. Creating this approach will take time and can only be accomplished in consultation and collaboration with First Nations peoples.

In the meantime, the Commission plans to review the *Indian Act* from a human rights perspective. International human rights principles, such as those in the United Nations Declaration on the Rights of Indigenous Peoples, and the *Canadian Human Rights Act* will be used to identify discriminatory elements of the *Indian Act*.

Building First Nations Capacity

Implementing a human rights redress process for First Nations peoples is a complex matter that will involve the ongoing commitment of First Nations governments, the Commission, the Government of Canada and other stakeholders.

Building capacity to protect and promote human rights in First Nations communities is critical to ensuring that these processes work effectively. As outlined in the preceding sections of this report, the Commission, in partnership with First Nations governments, has already taken significant steps in this direction. The Commission will continue to offer its expertise to First Nations governments as there is much more that still needs to be done.

The challenges that continue to be faced by First Nations governments because of the repeal of section 67 are many and daunting. They include:

- **Raising awareness:** First Nations and other Aboriginal peoples still need accurate information about the repeal and its implications so they are equipped to participate in human rights redress processes.

- **Capacity building:** First Nations governments already have heavy workloads. Many lack people trained in the investigation and resolution of human rights disputes.

- **Policy development:** Few First Nations governments have human rights protection policies or procedures to prevent or deal with the human rights disputes. Many also lack the resources to review existing operational policies, practices and by-laws to ensure they respect human rights.

- **Accessibility for people with disabilities:** First Nations communities have critical needs such as clean water and adequate housing, and as a result, many have not been able to make accessibility for people with disabilities a high priority. While the Department of Indian Affairs and Northern Development Canada does provide some funding for accessibility it is not clear that the amount is sufficient. As mentioned earlier in this report, many First Nations people are only becoming aware of their human rights now, because of the repeal. This means that discrimination complaints based on disability could rise, although this was not an issue previously shielded by section 67.

The Commission understands the scale of challenges faced by First Nations governments and other Aboriginal organizations in implementing repeal. However, it is not in a position, nor would it be appropriate, to comment on the specific amount of financial and human resources required to do the job effectively. The Commission commends the Government of Canada and the Aboriginal organizations they have worked with for the report to Parliament that they have prepared together, in accordance with Bill C-21.