First Nations Legal Traditions and Customary Laws and the Human Rights Complaint Process

Interim Report of the Aboriginal Human Rights Project

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A. Introduction

> "*Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the case where they exist, juridical systems or customs, in accordance with international human rights standards.*"
>
> Article 34 of the UN Declaration of the Rights of Indigenous Peoples
> (endorsed by Government of Canada on November 12, 2010)

In 2008, the Parliament of Canada passed legislation repealing section 67 of the *Canadian Human Rights Act*, a provision that exempted from review under the Act any decisions made by the federal government or First Nations governments under the authority of the *Indian Act.* At the same time it enacted a mandatory requirement that in relation to complaints against a First Nations government the Act be "… **interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws**…."[1] (the "due regard provision"). The application of the *Canadian Human Rights Act* to decisions taken under the *Indian Act* was delayed until June 18, 2011 to allow time for First Nations governments to plan for the repeal of section 67[2].

This is an interim report of the **Aboriginal Human Rights Project** that is exploring how the statutory mandate to give due regard to First Nations legal traditions and customary laws can be fulfilled. It is an attempt to articulate the emerging ideas from two ongoing initiatives: a community-based process of the Tsleil-Waututh Nation in British Columbia designed to develop a community dispute resolution process that reflects that nation's legal traditions and customary laws; and an Advisory Group dialogue identifying and reflecting on the principles and wisdom arising from the community-based process.

An underlying assumption of this report is that implementing the "due regard provision" is not about how First Nations communities in Canada can fit into the existing *Canadian Human Rights Act* processes, but about how the processes under the Act can be built on a recognition of, and made consistent with, internationally adopted Indigenous people's individual and collective rights.

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[1] Statutes of Canada 2008, Chapter 30, An Act to Amend the *Canadian Human Rights Act*, assented to 18th June, 2008 (Bill C-21)
http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=3598216&file=4

[2] Parliament of Canada, Bill C-21: An Act to Amend the *Canadian Human Rights Act,* Prepared by Mary C. Hurley, Law and Government Division, Revised 30 June 2008.,
http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C21&Mode=1&Parl=39&Ses=2&source=library_prb

The key message of this report is that the statutory requirement to give due regard to First Nations legal traditions and customary laws holds promise for Canada to advance the rights asserted in Article 34 of the *United Nations Declaration of the Rights of Indigenous Peoples*[3], and transform its relationship with First Nations peoples. A concurrent risk exists, however, that instead of fulfilling this promise the repeal of the exemption could be experienced, in the words of a member of the Advisory Group to the project, as yet another imposition of "western law" on First Nations peoples and communities. To the end of realizing the promise and managing the risk, this report sets out some observations and proposals for action.

It is important to emphasize the "interim" nature of this report because the reality is, confirmed by the experiences and reflections gained from the project to date, that fully implementing the due regard provision will take many years. An interim report is being written at this time to share what has been learned to date from the project because the *Canadian Human Rights Act* becomes applicable to First Nations acting under the *Indian Act* on June 18, 2011. If the promise of the statutory requirement is to be realized, a long-term time frame for implementation needs to be adopted during which First Nations' communities must be fully engaged.

The report is also "interim" in terms of the work of the project. The project is supporting the community-based process with the Tsleil-Waututh Nation, but it is still in its early stages. A parallel process with the Wikwemikong Unceded Indian Reserve First Nation on Manitoulin Island in Ontario is also being considered, subject to additional funding. Future meetings of the Advisory Group are planned. Given the enormous scope of the changes signaled by this legislative amendment, the reality that implementation of the changes is still at a very preliminary stage, and the limited resources available under this unique project, this report summarizes the work to date and identifies the work still to be done to meet the goal of the due regard provision, all within the context of Article 34.

[3] United Nations Declaration of the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/en/drip.html

B. The Project

Background

Under former section 67 of the *Canadian Human Rights Act*, the federal government, a First Nation's government or a related agency were exempt from scrutiny under the Act if the issue involved an *Indian Act* provision. With the repeal of section 67, for the first time, remedies under the *Canadian Human Rights Act* complaint process may be available for such matters as registration or non-registration of someone as a First Nation member; use and occupation of reserve lands; employment, wills and estates; education; and housing.

The repealing legislation provides that due regard must be given to First Nations legal traditions and customary laws in the interpretation and application of the Act, arguably creating a statutory mandate for a fundamentally different approach (both substantively and procedurally) to the handling of human rights complaints in the First Nations context.

> *An Act to Amend the Canadian Human Rights Act*, section 1.2
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> *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 "due regard provision")

The due regard provision raises an important threshold question:

How can First Nations complaints processes under the Canadian Human Rights Act be designed to give "due regard" to First Nations legal traditions and customary laws?

Exploring the answer to this question is the goal of the **Aboriginal Human Rights Project.** First Nations peoples have used a variety of resolution mechanisms for hundreds of years. This project is intended to learn from those traditions, to support communities to use their traditions to create processes to resolve human rights disputes and to provide guidance to the Canadian Human Rights Commission on a culturally resonant approach to resolving human rights disputes involving First Nations peoples and communities.

Project Overview

The project arose from a number of discussions with interested parties about the implications of the due regard provision. These discussions led to the development of the concept for this project using Mediate BC Society as a vehicle to provide the

infrastructure and support and through funding provided by the Law Foundation of British Columbia. Working directly with a First Nation community in BC (and possibly Ontario, if additional funding can be secured), one goal of the project is to explore a First Nation's community-based approach to human rights dispute resolution.

This aspect of the project is not intended or designed to be an empirical analysis or an academic study of customary laws and legal traditions. Rather, it is intended to gain knowledge through a community-based participatory research process[4] about what a particular community's customary laws and legal traditions might reveal about the dispute resolution process itself. The project is intended to directly benefit the participating BC First Nation, the Tsleil-Waututh Nation, by supporting the community to identify and recover its customary laws and legal traditions and to develop a community-based dispute resolution process for resolving human rights complaints, which can be flexible enough to be used for other types of disputes as well. It is hoped that the process followed by the Tsleil-Waututh Nation can assist other First Nations communities in developing their own dispute resolution models.

The community-based process is also intended to generate some general wisdom or insight as to what it means to give due regard to First Nations legal traditions and customary laws in terms of process. Although there is a wide diversity of customary laws and traditions across the many First Nations in Canada, the intent is to identify and extract through the community-based process overarching principles and protocols that can inform the Canadian Human Rights Commission about how it can approach the handling of complaints under the *Canadian Human Rights Act* that involve First Nations in a way that meets the "due regard" provision of the legislation.

The community-based process is augmented by a dialogue with a group of leaders or members of First Nations communities and organizations and individuals with expertise in human rights and dispute resolution (from both BC and Ontario). The "Advisory Group" has contributed significantly to the project by reflecting on the emerging wisdom from the community-based process and providing an additional

[4] Community-based, participatory research is a collaborative approach to research that involves all parties equally in the research design and process and concerns a topic of importance to the community with the goal of combining knowledge and action for social change (Flicker). Community based research is "community situated" in that it addresses a research area that is of practical relevance to the community and is carried out in a community setting; is "collaborative" with community members and researchers having shared control of the research and active participation from both parties in designing, carrying out and reporting on the research; and "action oriented" in that the process and the results are useful to the members of the community bringing about positive social community change." (Centre for Community Based Research).

perspective on the application and interpretation of the *Canadian Human Rights Act* in a way that has due regard for First Nations' customary laws and legal traditions.

[Attachment #1 is a list of Project Team members and Advisory Group members.]

C. Context

The "Due Regard Provision" in the Scheme of the *Canadian Human Rights Act*

The *Canadian Human Rights Act* is intended to "prohibit discriminatory practices on the basis of an exhaustive list of grounds in the areas of employment, accommodation and the provision of goods, services or facilities that are customarily available to the public".[5] The Canadian human rights system is complaint-based with the Canadian Human Rights Commission responsible for administering the Act including evaluating complaints to determine whether they fall under the jurisdiction of the Act, investigating complaints, settling valid complaints, and/or, where warranted, referring a case to adjudication by the Human Rights Tribunal.

Under the scheme of the *Canadian Human Rights Act,* there is also provision for the Commission to recognize internal dispute resolution processes. The Commission can decide not to deal with a complaint if another grievance or review procedure is reasonably available (section 41(1)(a)).

The Commission has made it clear that it is strongly supportive of the development by First Nations of community-based alternatives to human rights complaints, framing them as "internal dispute resolution processes", which could potentially deal with complaints more quickly and effectively close to the source.[6] The Commission notes that Article 34 of the *United Nations Declaration on the Rights of Indigenous Peoples* supports the development of internal dispute resolution processes by First Nations.[7]

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[5] Parliament of Canada, Bill C-21: An Act to Amend the *Canadian Human Rights Act,* Prepared by Mary C. Hurley, Law and Government Division, Revised 30 June 2008., http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C21&Mode=1&Parl=39&Ses=2&source=library_prb

[6] Canadian Human Rights Commission, *CHRC Framework for Community Based Processes and CHRC Procedural Issues arising from the "Interpretive Provision".* Presentation to Aboriginal Human Rights Project, March 16, 2011.

[7] Ibid.

The "Due Regard Provision" Framed Within the Context of the United Nations Declaration on the Right of Indigenous Peoples

While the Canadian Human Rights Commision's support of the development of internal dispute resolution processes by First Nations communities is encouraging, it is also potentially unduly limiting. The concept emerging from the Advisory Group is that the statutory obligation to interpret and apply the Act giving "due regard to First Nations legal traditions and customary laws" is significantly broader than simply framing First Nations community-based dispute resolution processes as "internal dispute processes" within the currently established scheme for handling complaints under the *Canadian Human Rights Act*.

Canada has officially endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (the federal government issued a Statement of Support on November 12, 2011). The Advisory Group suggests that the *Canadian Human Rights Act* and the Commission's complaint processes must be viewed through the lens of the Declaration. In the words of one of the Advisory Group members, starting with the Declaration "flips the question". The question is not "how do First Nations fit into the current practices in the handling of *Canadian Human Rights Act* complaints", but "how can recognizing the rights set out in the Declaration transform current Canadian Human Rights practices?" The Declaration, and in particular, Article 34, should provide the framework for the implementation plan for the statutory mandate to give due regard to First Nations legal traditions and customary laws in the application of the amending Act.

First Nations organizations go further and promote a First Nations human rights model.

A report prepared following a broad consultation process undertaken by the Assembly of First Nations with First Nations communities and individuals reported that a major criticism of the change in bringing First Nations under the *Canadian Human Rights Act* umbrella was the lack of recognition and opportunities for the principles of self-government and development of First Nation specific human rights mechanisms[8]. The report also noted that the *United Nations Declaration on the Rights of Indigenous Peoples* is more reflective of Indigenous law and First Nations peoples thoughts and aspirations for First Nations human rights.[9] "True legitimacy in human rights legislation can only arise from a meaningful inclusion of First Nations people in developing a process that respects [First Nations] traditional and

[8] Assembly of First Nations, Assessing the Readiness of FN Communities for the Repeal of Section 67 of the CHRA (March 21, 2010), page 3.
[9] Ibid, page 19.

customary practices and which is directly related to [First Nation] self-determination."[10]

Consultations held by the Native Women's Association about the changes to the *Human Rights Act* arrived at similar conclusions, including that "Aboriginal designed approaches to dispute resolution/mediation [and] Aboriginal /First Nations charters of human rights" should be developed[11].

United Nations Declaration on the Rights of Indigenous Peoples

Article 1 - Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2 - Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 - Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5 - Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 34 - Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards

[10] Assembly of First Nations, Policy Areas – Canadian Human Rights Act, http://www.afn.ca/index.php/en/policy-areas/nation-building-and-re-building-supporting-first-nation-governments

[11] NWAC, Presentation to NWAC AGA, *The Canadian Human Rights Act: NWAC Projects 2009-10*, September 2010.

Respecting and accepting First Nations legal traditions and customary laws in this area presents a significant opportunity for reconciliation and true recognition of multi-juridicalism in Canada. In the words of Professor John Borrows, through recognition of indigenous law, "[r]elationships can be strengthened as we affirm the overlapping, interacting, and negotiated nature of our traditions over time. One dimension of effective constitutionalism involves cultivating and refining laws that implement Indigenous people's own aspirations and perspectives, alongside the common law and civil law, and in harmony with international human rights standards. Affirming Indigenous legal traditions in this way would expand and improve Canada's legal system and benefit Aboriginal peoples along with our society as a whole."[12]

[12] Borrows, John, *Canada's Indigenous Constitution,* University of Toronto Press, 2010, page 21 and 22.

D. Our Story

Wisdom Gleaned to Date from Consultations with Tsleil Waututh Nation

The community-based process underway with the Tsleil Waututh Nation is collaborative in nature with a team from the community and a member of the Project Team (who is also acting as facilitator to the community-based consultations) working together to scope out the design and process. The goals of the Tsleil Waututh Nation and the project are complementary and supportive. The community is focused on developing a community-based dispute resolution process based on customary laws and legal traditions adapted and applied in a modern context and is supportive of the project's efforts to extract broader principles and protocols defining how due regard for customary laws and legal traditions can be taken into account in addressing First Nation human rights complaints.

A day-long session with a group of Tsleil Waututh Nation elders was held in March 2011. Significant knowledge was gained from working with this group of elders to identify and recover customary laws and legal traditions of the Tsleil Waututh Nation. A discussion about collective and individual human rights identified a number of important values including:

- fairness – an understanding of how a decision is made;
- voice - a sense that people have been heard;
- equal treatment; and
- prevention, including ways to prevent conflict from escalating and using dispute resolution processes to build or maintain unity and restore balance in the community.

The discussion also identified the following key principles:

- trust,
- respect (for each other and property),
- accountability,
- honour, and
- equality.

Respect was revealed as a traditional driving force behind people's behaviours, but the elders expressed concern that its influence has been eroded and that fear has become the primary motivator as a result of past traumatic events experienced by First Nations including the residential school experience. A common goal in the community is to rebuild trust and respect.

Further consultations with elders in this community are being undertaken to extract additional knowledge of customary laws and legal traditions. Following this, meetings will be held with other community groups to apply the community's customary laws and legal traditions to develop a broad dispute resolution process for the community.

Insight from the Advisory Group

The Advisory Group met by conference call in December 2010 and held a day-long in-person meeting in March 2011[13], to consider and extrapolate on the findings of the community-based process and other relevant initiatives and to provide initial advice to the Canadian Human Rights Commission on approaches to consider in ensuring that "due regard" is given to First Nations legal traditions and customary laws. In addition to specific insights mentioned in other parts of this report, broad comments and cautions from the Advisory Group include that:

- the statutory mandate to give due regard to First Nations customary laws and legal traditions in a human rights context represents both a significant opportunity or step forward, and a significant challenge:
    - it represents a significant opportunity to respect and recognize First Nations legal traditions and customary laws; and
    - it represents a significant challenge because the diversity of communities and the range of their customary laws and legal traditions is a hurdle to the Commission's appropriate and effective implementation of the due regard provision in a manner consistent with the spirit and intent of the provision;
- both the opportunity and challenges presented by the change are exacerbated by the fact that for a number of reasons most First Nations communities appear to remain unaware of, or ill-prepared for, the imminent change;
- imposing a system and process in the shorter term based on established human rights principles that may not be consistent with First Nations customs and

[13] The Canadian Human Rights Commission provided contract funding to Mediate BC Society to host the March 16, 2011 meeting of the Advisory Group to the Aboriginal Human Rights Project in Vancouver.

traditions could result in early and deleterious precedents that prevent true adherence to the due regard provision;

- "due regard" is an open concept (without any legal definitions or constraints in the legislation) allowing the Commission great flexibility to apply the concept and to work with First Nations to achieve its spirit and intent. At the same time, the openness of the concept and lack of definition or guidance as to what constitutes due regard presents a challenge for the Commission. Application could include requiring that a complainant must first work with their First Nation community to address the issue, unless there is some compelling reason not to do so;

- the work of this project, combined with the knowledge gained from other initiatives in which the Commission is engaged, could contribute to the development of a set of broad guidelines and criteria ("toolkits") to assist First Nations to develop processes for considering and resolving human rights complaints based on their own customary laws and legal traditions;

- consideration be given to the development of a roster of experts who can work with communities to assist them to recover their customary laws and legal traditions and to develop community-based processes; and

- based on the lessons of restorative justice initiatives, it takes time to involve the community in building effective processes and that such processes must be developed from the bottom up (not imposed from the top down).

Further conference calls/meetings are planned with the Advisory Group as work proceeds with the Tsleil Waututh Nation and as further wisdom is generated from the community-based process.

E. Giving Due Regard to First Nations Legal Traditions and Customary Laws

Nature of First Nations Legal Traditions and Customary Laws

Changes to the *Canadian Human Rights Act* require that due regard must be given in the interpretation and application of the Act to "First Nations legal traditions and customary laws".

But, how are a First Nation's legal traditions and customary laws to be determined?

Legal traditions and customary laws form a fundamental part of a First Nation's culture and identity. They are both "traditional" (based in history and tradition) and "contemporary" (part of current practice). Many customary laws are based in oral tradition and language, illustrating values and dissonance from those values rather than specific rules to be followed. First Nation traditions and customs are not stagnant, but are subject to continual enhancement and continuous evolution to adapt to contemporary realities and ways of being.

Respect was identified by the Tsleil Waututh elders as a cultural value critical to their customary dispute resolution practices; a value whose importance has been diminished in their community and which must be regained. The Advisory Group observed that this was likely true of other First Nations communities. First Nations dispute resolution processes are often based on holistic and restorative approaches intended to restore the relationship of the individual to the community. They do not pit the individual against the community; or one gender against another. In many cases the roles of men and women in First Nations communities are based on custom and tradition, and it is important that these roles be respected moving forward. Issues must be considered on a case-by-case basis, in the context of the participating First Nation's customs and traditions, and those issues raising concerns of possible discrimination must be addressed in a fair and respectful way.

Principles and values underlying the resolution of First Nations human rights matters need to emanate from within the community. To be effective and achieve support within the community, principles cannot be imposed from the top down or from outside agencies. Legal traditions and customary laws and their contemporary application within dispute resolution processes need to be discerned by the community and all groups or members of the community equally, including elders and youth.

For many decades, however, First Nations legal traditions and customary laws have been suppressed, subverted or not recognized as part of the Canadian multi-juridicial system. Time and effort is required to allow First Nations to recover and

identify their laws and apply them in a contemporary setting, including making them understood and accessible. In its report assessing the readiness of First Nations communities, the Assembly of First Nations cautioned that First Nations legal traditions and customary laws "should be documented with great thought, and not be a quick reactionary response to an event such as the *Canadian Human Rights Act* amendment".[14]

For the Canadian Human Rights Commission and the requirement that it give due regard for legal traditions and customary laws, all of the challenges above are compounded by the large number of First Nations in Canada and the corresponding diversity in legal traditions and customary laws across First Nations[15].

A Values Based Approach

The Canadian Human Rights Commission has indicated that it recognizes the challenges in developing a system where due regard for First Nations legal traditions and customary laws informs all the processes of the Commission. The degree of consideration to be given by the Commission to the due regard provision, "will likely depend on the nature of alleged discrimination, how relevant the legal traditions and customary laws are to the facts of the complaint and the extent to which they will be impacted by the complaint".[16] The Commission recognizes that "identifying and understanding legal traditions may be challenging when conducting an investigation" and that there is the possibility "that there may be disagreement within a community about a legal tradition or customary law ([as] debate about laws and norms occurs naturally)."[17] The Commission has indicated that in determining what is a customary law or legal tradition the Commission will be looking to outside expertise[18].

The ability of the Commission to identify and understand First Nations legal traditions and customary laws is a concern for First Nations. In its consultations about the changes to the *Canadian Human Rights Act*, the Native Women's Association of Canada found that those consulted had "serious concerns about the

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[14] AFN Report, page 22.

[15] As of December 31, 2006, there were 612 "Indian bands" or First Nations in Canada, and a total registered First Nation population of 763,555; 198 Indian bands in BC and a population of 122,089. In 2010, it is estimated that there about 800,000 registered First Nations people and 615 Indian bands (source: Indian and Northern Affairs Canada).

[16] Canadian Human Rights Commission, *CHRC Framework for Community Based Processes and CHRC Procedural Issues arising from the "Interpretive Provision".* Presentation to Aboriginal Human Rights Project, March 16, 2011.

[17] Ibid.

[18] Ibid. [The Canadian Human Rights Commission has undertaken research on the scope and meaning of legal traditions and customary laws, http://www.chrc.gc/research_program_recherche/bicr_edidic].

ability of outsiders to properly understand First Nations legal traditions and customary law when these are grounded in cultural values, a worldview and languages that are quite different than those used in the Canadian legal system."[19]

The problem in interpreting and applying the due regard provision on the basis of existing Canadian jurisprudence is highlighted by the approach that the Commission plans to take in considering the acceptability of First Nations community-based processes. The Commission developed "Principles" to provide guidance on what elements would need to be included in a community dispute resolution process in order to meet human rights standards. These principles include: community input, accessibility, impartiality and independence, confidentiality, opportunity to be heard, disclosure of evidence, reasons for decision, acceptable resolution, right to representation and no retaliation. As noted by the Assembly of First Nations, the "proposed principles are expressed in terms used by western human rights systems" and "[w]estern descriptors of mediators as 'neutral', 'impartial', and 'objective', may be at odds with Indigenous characteristics of 'personal involvement', 'first hand knowledge', and 'tied to community and culture'".[20] . The Commission has indicated that it will be seeking advice from First Nations on "the development of these principles to make them free of a western bias or value system. Still it will be challenging for the Commission to step back from the established "western" understanding of "natural justice" principles.

The Advisory Group suggested an approach for the development of the criteria for an appropriate community-based process that avoids "western bias" and respects the different values inherent in First Nations legal traditions and customary law. This approach would focus first on the *values* underlying the principles. Principles can be seen as conclusions or rules attempting to protect or promote underlying values. Consideration of the underlying rationale (or values) allows a more objective analysis and inclusion of First Nations values. For example, an important value may be a need to protect the safety of community members who wish to make a complaint in order to encourage them to come forward with issues. One way to promote this value might be to create a principle (or rule) outlawing retaliation against a complainant. However, there may be other ways of achieving this goal that might be equally effective and more consistent with First Nations traditions and customs.

Rather than immediately adopting the principles reflected in the current "natural justice" jurisprudence, the approach should be to start afresh. First Nations should be invited to identify key values and related principles of fair process that are rooted in their legal traditions and customary laws. Once that has been done, the question to be asked is whether there are any important differences between those

[19] NWAC presentation, slide 22.
[20] AFN Report, page 37.

values and principles and common law natural justice principles, and if so, how might those differences be reconciled? As an increasing number of First Nations communities are engaged in exploring the underlying values of fair process emanating from their respective legal traditions and customary laws, it may be possible to extract some shared values for general application. The values identified through this project could be taken as a start in identifying some principles for fair process rooted in community.

G. The Challenges

There are many challenges to the effective implementation of the due regard provision in the *Canadian Human Rights Act* repealing legislation.

A fundamental challenge in working with First Nations communities to meet the statutory mandate is the lack of trust that many First Nations people have in the federal government and the Canadian legal system. The historic, unhealthy dependency of First Nations on the federal government significantly hinders the ability and capacity of First Nations people to respond to the opportunity to develop First Nations community-based dispute resolution processes that reflect each First Nation's unique set of legal traditions and customary laws. A second major challenge results from First Nations forgotten and misplaced cultures, damaged sense of community and weakened internal leadership as a result of past events and trauma, particularly the Indian Residential School experience.

A practical challenge is that, despite the three-year preparation period, it appears that many communities are still unaware of these legislative changes. Of those who are aware, the Advisory Group is concerned that most are likely to be unprepared in terms of having in place policies and practices for handling complaints, let alone a community-based dispute resolution process. There is a perception that the changes are being imposed too quickly and without proper foresight and preparation. Insufficient funding and a perceived lack of support from federal government agencies are cited as the chief reasons for this lack of awareness and preparation[21].

As well, the sheer number of First Nations and diversity of legal traditions and customary laws is daunting, particularly for the Commission in redesigning its own processes to correspond with the Declaration and the due regard provision. This diversity does not lend itself easily to the development of standard policies and practices or to the need to meet a "fairness" standard that assumes the same procedural treatment for all complainants.

[21] Assembly of First Nations and Native Women's Association of Canada consultations; input to project from interested parties.

H. Concluding Observations and Recommendations

Conclusions

As noted in the introduction section, a basic underlying assumption of this report is that implementing the statutory mandate is not about how existing *Canadian Human Rights Act* processes can be applied to First Nations, but how interpretation and application of the Act, including by the Canadian Human Rights Commission, will meet internationally adopted Indigenous people's individual and collective rights and the statutory mandate to give due regard to First Nations legal traditions and customary laws. To meet this goal, the Commission needs to recognize indigenous peoples' individual and collective rights and the inherent authority of the First Nations communities in addressing and resolving disputes. The Commission has challenges before it, but if it exercises its discretion and authority in a judicious way and in a way that recognizes and respects the rights of First Nation peoples it has the potential to achieve acceptance in this area, "increase awareness of First Nations legal traditions and customary laws", and ultimately, "influence the evolution of human rights concepts in Canada [making] them more culturally relevant to First Nations"[22] and consistent with the United Nations Declaration of Indigenous Rights.

Recommendations

Following are some preliminary recommendations for action.

Framing the Statutory Mandate within a Indigenous Human Rights Context

- Frame the response to the statutory mandate to give "due regard" to First Nations legal traditions and statutory laws in the context of the *United Nations Declaration on the Rights of Indigenous People*.

First Nations Legal Traditions and Customary Laws

- Use language that recognizes the current relevance of First Nations legal traditions and customary laws to the resolution of disputes within First Nations.

- Develop Commission processes that are flexible enough to respond to the pluralistic reality of diverse cultures.

- Develop a set of questions to be used by the Commission early in the complaints process to explore with the First Nation community that is party to the

[22] Canadian Human Rights Commission, *CHRC Framework for Community Based Processes and CHRC Procedural Issues arising from the "Interpretive Provision"*, slide 38.

complaint whether it has, or could develop, a dispute resolution process consistent with its customary laws or legal traditions.

- Develop a set of broad guidelines and criteria for assisting First Nations to identify and document their own legal traditions and customary laws and to develop community-based dispute resolution processes.

- Develop a respectful protocol for involving community (elders, youth, others) in recovering, identifying, defining, and if appropriate, adapting First Nation legal traditions and customary laws.

- Develop "process fairness" values rooted in First Nations legal traditions and customary laws to assess community-based processes.

- Recognize "respect" as a core value against which to judge community-based processes.

Addressing the Challenges

- Recognize that a longer term time frame is needed for full implementation of the mandate to give due regard to First Nations legal traditions and customary laws in dealing with First Nations human rights disputes.

- Work with the federal government to address the current capacity issue by providing funding, resources and support to assist First Nations in recovering and articulating legal traditions and customary laws and developing *community-based* dispute resolution processes.

- Develop, support and offer to communities, on an interim basis, access to respected leaders to provide dispute resolution support while communities work through their own process.

- Acknowledge and embrace the diversity of First Nations across the country.

Need for Action – Not Just Words

While the Advisory Group recognized the long-term time frame for creating an indigenous human rights system, it urged action now. With a process for ongoing reflection built in to ensure that due regard for First Nations legal traditions and customary laws is emerging, concrete steps need to put in motion for achieving the statutory mandate. While there is not time to put an ideal framework in place from the outset, there is the need to move forward and let things evolve, monitor what is working and what is not, and build a framework with time and experience.

One caution in this regard is to be open and flexible and not let existing established human rights principles, processes and practices impede, through early and

precedent setting decisions, the ability of the system to evolve and form with full recognition and respect for First Nation values.

Moving Forward

Next Steps

Over the coming months the project will undertake the following activities:

- Continue to work with, support and learn from the community-based process with the Tsleil Waututh Nation.
- Continue to seek additional funding to support expanding the project to include a community-based consultation process with the Wikwemikong in Ontario.
- Develop a set of guidelines and outline a process (a "toolkit") for communities that want to develop dispute resolution processes based on and consistent with their traditional legal traditions and customary laws.

Sources

Assembly of First Nations, *Assessing the Readiness of FN Communities for the Repeal of Section 67 of the CHRA* (March 21, 2010).

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Attachment #1

Project Management and Governance

Project Team:

- Bob Watts, Project Lead, dispute resolution consultant, former CEO Assembly of First Nations, Interim Executive Director of the Truth and Reconciliation Commission, and member of the Six Nations;
- Jane Morley, Q.C., Lawyer, mediator, leadership consultant and dispute resolution consultant;
- Michael Coyle, Professor, Faculty of Law, University of Western Ontario, primary research interests related to aboriginal rights and dispute resolution theory; and
- Kari Boyle - Executive Director, Mediate BC Society (Project Sponsor);
- Kim Thorau -Project Coordinator, Principal with Perrin, Thorau and Associates Ltd.

Advisory Group[23]:

- Stephen Augustine, Canadian Museum of Civilization's Curator of Ethnology for the Eastern Maritimes (15 years), Hereditary Chief of Mi'kmaq Grand Council, member of Elsipogtog (Big Cove) First Nation in New Brunswick and on advisory council to federal court with respect to the use of oral history evidence in the court
- Robert P. Birt, Ridgewood Foundation; founding Chair of the Canadian Institute for Conflict Resolution
- Teresa Edwards, Director of Human Rights and International Affairs, Native Women's Association of Canada and member of Mi'kmaq First Nation
- Leah George-Wilson, Tsleil-Waututh First Nation
- Sherri Helgason, Director, National Aboriginal Initiative, Canadian Human Rights Commission
- Grand Chief Edward John, elected executive member of First Nations Summit and North American Representative to the United Nations Permanent Forum on Indigenous Issues
- Kathleen Lickers, Six Nations of the Grand River Territory, Lawyer

[23] Listed alphabetically.

- Maureen Maloney, Q.C., currently a Professor in the School of Public Policy at Simon Fraser University, formerly Chair in Law and Public Policy and Director of Institute for Dispute Resolution at University of Victoria
- David Merner, Executive Director, Dispute Resolution Office, Ministry of Attorney General, British Columbia
- Sharon Sutherland – Assistant Professor, Faculty of Law, University of British Columbia, Mediator
- Vicki Trerise – Mediator, Law Foundation of BC Consultant and L.L.M candidate