



CANADIAN
HUMAN RIGHTS
COMMISSION

COMMISSION
CANADIENNE DES
DROITS DE LA PERSONNE

**Submission from the Canadian Human Rights Commission (CHRC)
to the United Nations Human Rights Council
as part of the second Universal Periodic Review (UPR)
of Canada's Human Rights Obligations
October 9, 2012**

**Canadian Human Rights Commission
344 Slater Street
Ottawa, Ontario K1A 1E1
www.chrc-ccdp.gc.ca
policy-politiques@chrc-ccdp.gc.ca**

Created by an Act of the Parliament of Canada in 1977, the Canadian Human Rights Commission was accredited as Canada's National Human Rights Institution with A status in 1999, 2006 and 2011.

A. DESCRIPTION OF THE METHODOLOGY AND GENERAL CONSULTATION PROCESS

1. As Canada's National Human Rights Institution (NHRI), the Canadian Human Rights Commission (the Commission) sought input and comments from provincial/territorial human rights institutions, non-governmental organizations, Canadian human rights experts, Aboriginal organizations and federal government officials on its proposed submission to the UN Human Rights Council (HRC).

B. BACKGROUND ON CANADA AND ON ITS NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

2. The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The Commission has jurisdiction pursuant to the *Canadian Human Rights Act* (CHRA) over federally regulated service providers and employers. Provincial and territorial governments have their own human rights codes and are responsible for provincially/territorially regulated sectors. In order for conventions to have full legal effect in domestic law, Canada must, as a "dualist" state, directly incorporate conventions into its laws by introducing enabling legislation. While Canada has not incorporated UN conventions directly into its laws, many similar norms exist in Canadian law. Moreover, human rights commissions, tribunals and courts in Canada are increasingly considering and applying international human rights law in their policies and decisions to aid in the interpretation of domestic human rights law.

C. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

Mechanisms to Implement International Human Rights Commitments

Progress in Treaty Ratification

The United Nations Convention on the Rights of Persons with Disabilities

3. In 2010, the Commission welcomed Canada's ratification of the *Convention on the Rights of Persons with Disabilities* (CRPD).

4. Article 33(2) of the Convention requires that State parties designate:

a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

5. When Canada ratified the Convention in 2010, it declared that:

Canada interprets Article 33 (2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.¹

6. The Commission acknowledges that a variety of organisations have a role to play in the “framework” required by article 33(2). However, it also has concerns:

- It is not clear which organisations are specifically tasked with fulfilling the role provided for by Article 33(2), especially with regard to independent monitoring of the Convention.
- It is also not clear that these organisations have the independence, legal mandate, and resources essential to be effective as is required by “the principles relating to the status and functioning of national institutions for protection and promotion of human rights” (the Paris principles).

1. **Recommendation: That Canada consult its provinces and its territories and make explicit to the Committee on the Rights of Persons with Disabilities the means by which Canada, its provinces and its territories intend to operationalise Article 33(2) of the CRPD, and how it will take into account the Paris Principles.**

7. The CRPD requires Canada to “closely consult with and actively involve persons with disabilities” regarding implementation. Canada was a leader in promoting the principle that people with disabilities should have a strong voice in developing the Convention. However, since Canada’s ratification of the Convention in 2010, there has been only limited consultation with disabled persons’ organizations and other elements of civil society, including in preparation of Canada’s Initial Report to the Committee on the CRPD.

2. **Recommendation: That Canada, its provinces and its territories develop a process for regular consultations on implementation of the CRPD with people with disabilities, Aboriginal organisations, other elements of civil society, as well as with the Commission and its provincial and territorial counterparts.**

¹ <http://www.un.org/disabilities/default.asp?id=475>

Consultations (Follow-Up to 2009 Recommendations #14, 55, 62 and 63)

8. During Canada's first UPR, the HRC recommended that Canada "create or reinforce a transparent, effective and accountable system that includes all levels of the government and representatives of the civil society, including indigenous people, to monitor and publicly report on the implementation of Canada's human rights obligations."
9. Canada accepted this recommendation in part.
10. Canadian Parliamentary committees undertook studies of the UPR process and accepted submissions and presentations from civil society.
11. In one of these studies, the message from several elements of civil society was that Canada's responses to the recommendations of the HRC have not met expectations for domestic implementation of the 2009 UPR commitments. In particular, several NGOs expressed considerable disappointment in the lack of follow-up and consultation in Canada, other than through Parliamentary Committees.
12. The Commission notes that there has not been a federal-provincial-territorial conference of Ministers responsible for Human Rights in Canada since 1988.
13. More recently, however, Canada has undertaken a regular dialogue with national NGOs on the HRC sessions, has established contacts between the Continuing Committee of Official on Human Rights and NGOs (but not with human rights commissions), and has conducted some consultations on Canada's UPR. This has had positive results in enhancing information sharing, and the Commission is encouraged by this approach.
14. Despite this progress, as Canada's NHRI, the Commission echoes NGOs' and Parliamentarians' concerns on the need for improvements in consultation and dialogue on the promotion and protection of universal human rights in Canada.

3. Recommendation: That all federal, provincial and territorial departments implicated in the recommendations that are accepted fully, in part and in principle by Canada demonstrate leadership in actively seeking further opportunities for improving established processes, including with respect to follow-up to treaty body and UPR recommendations, and engaging civil society, Aboriginal organisations and human rights commissions.

D. IDENTIFICATION OF ACHIEVEMENTS, BEST PRACTICES, CHALLENGES AND CONSTRAINTS

Achievements and Best Practices

National Security (follow up on 2009 recommendations #26 and 61)

15. The Supreme Court of Canada has confirmed that Canadian security organizations have two equally important responsibilities. The first is to ensure the safety of people in Canada. The second is to ensure that security measures do not discriminate against the people they are designed to protect.
16. In a 2011 Special Report to Parliament entitled *Human Rights Accountability in National Security Practices*, the Commission proposed that governance and accountability frameworks are necessary to ensure that national security institutions consider human rights in every day operations: these frameworks are currently lacking. Without an accountability structure, national security institutions have no credible way to show that they are consistently adhering to Canadian human rights standards.
17. The Commission collaborated with federal government organizations responsible for national security to develop a guide entitled *The Human Rights Impact Assessment for Security Measures* (2011). The Assessment Guide is intended to enhance security standards, policies, and practices so they are effective and respect human rights. However, the Commission also recommends:

4. Recommendation: That federal, provincial and territorial Parliaments introduce legislation that requires national security organizations and law enforcement agencies to have accountability structures to track their human rights-related performance and account publicly for that performance.

Business and Human Rights (BHR)

18. In June 2011, the HRC endorsed the *Guiding Principles on Business and Human Rights* for implementing the three pillar UN “Protect, Respect, Remedy” Framework.² The principles recognize the role of NHRIs across all three pillars. Through Resolution 17/4, the HRC encouraged the development of NHRI capacity in relation to BHR.³
19. The Commission has developed a Human Rights Maturity Model which assists Canadian businesses to meet their human rights obligations and to build self-sustaining human rights cultures.

² See A/HRC/RES/17/17/4. *Human rights and transnational corporations and other business enterprises*, 6 July, 2011. The three pillars are: the state duty to protect human rights, the corporate duty to respect human rights, and the need for access to effective remedy mechanisms when abuses occur.

³ See A/HRC/RES/17/4 p. 10.

- 5. Recommendation: That Canada, its provinces and its territories be encouraged to continue to work actively with business, employers, Aboriginal organisations as well as human rights commissions to facilitate awareness, capacity and implementation of the *UN Guiding Principles* and of tools and resources that may assist implementation.**

Challenges and Constraints

Full Equality of Protected Groups

Full Equality of Aboriginal Peoples before the Law (Follow-Up on Recommendations #19-20, 24, 27-28, 33-38, 45-46, 52 and 54)

20. In 2010, Canada gave its qualified support to the *Declaration on the Rights of Indigenous Peoples*.⁴ Despite Canada's reservations, its endorsement provides additional clarity for the way Canada's legal system might address Aboriginal human rights issues. Nevertheless, much remains to be done before the principles in the Declaration are comprehensively applied in the lives of Aboriginal peoples in Canada.
21. Aboriginal peoples continue to be significantly disadvantaged in terms of education, employment and access to basic needs such as water, food and housing. Many Aboriginal children and persons with disabilities live in conditions described as "unacceptable" in a country as rich as Canada, and Aboriginal women, girls, two-spirited and LGBT persons continue to experience multiple and aggravated forms of discrimination including high rates and severe forms of sexualized and racialized violence.
- 6. Recommendation: That Canada strengthen its leadership role on the issue of violence against Aboriginal women, girls, two-spirited and LGBT persons by ensuring national coordination and enhancing programs through support and collaboration with organizations serving Aboriginal peoples.**
22. Many of the problems in Aboriginal communities in Canada have been linked to the *Indian Act*. The *Indian Act* regulates and affects many aspects of the daily lives of Aboriginal peoples, including their core identity. The Act sets out criteria for Indian status and band membership as well as criteria for entitlements that flow from having Indian status and band membership, such as access to housing on reserves. Challenges to these and other *Indian Act* provisions continue to be filed at the national and international levels.

⁴ In 2007, Canada placed on record its concerns with various provisions of the Declaration. In Canada's Statement of Support on the Declaration, delivered November 12, 2010, a key message was that "Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."

23. For more than 30 years, section 67 of the CHRA prevented people from filing complaints of discrimination resulting from the application of the *Indian Act*. Section 67 was repealed in part in 2008, allowing human rights complaints to be filed against the Government of Canada, and was repealed in full in 2011. Since 2008, the Commission has worked actively with Aboriginal communities to enhance their knowledge and understanding of how to access their rights under the CHRA.
24. However, in response to complaints of discrimination recently filed with the Commission, the Government of Canada is arguing to narrow the application of the CHRA, maintaining that the provision of funding for on-reserve child welfare services is not a “service” within the meaning of section 5 of the CHRA.⁵
25. The positive effects of the repeal of section 67 of the CHRA could be nullified if the Government of Canada is successful in narrowing the application of the Act. In particular, the Commission is concerned that Aboriginal children would once again be denied full human rights protection from discriminatory practices.

7. Recommendation: That Canada endeavour to ensure that the repeal of section 67 is a catalyst for positive change for Aboriginal children on reserves, and that Canada support the application of the CHRA with respect to the provision of funding and other on-reserve services.

26. In June 2011, the repeal of section 67 came into force for First Nations governments and other relevant governing authorities: they must now also comply fully with the CHRA.
27. Their responsibilities include raising awareness of rights and responsibilities, enhancing capacity to investigate and resolve human rights complaints internally, and modifying policies and physical infrastructure, for example, for persons with disabilities. The human and financial resources needed to fulfill these responsibilities and obligations are and will be substantial.
28. Since these communities remain, in most cases, largely dependent upon funding provided by the federal government, their ability to respond to these new requirements will be limited if there is no infusion of resources on the part of the Government of Canada. The Commission considers it imperative that Aboriginal communities have adequate resources to protect human rights in their communities.

⁵ The First Nations Child and Family Caring Society of Canada (FNCFCS), the Assembly of First Nations (AFN), and others filed a complaint under the CHRA against the Government. They maintain that child welfare service organizations on-reserve are underfunded as compared to organizations serving non-First Nations children, and that such underfunding constitutes discriminatory treatment in the provision of a service on the basis of race. In much the same way as education in Canada, child welfare services are generally funded by the provinces; however, on-reserve, these programs are funded by the federal government. As a result, First Nations child welfare organizations cannot provide the programs needed to assist First Nations families in crisis. This often translates into higher rates of foster care and lower prospects of surviving a troubled childhood.

- 8. Recommendation: That Canada provide adequate human and financial resources to First Nations governments or governing authorities operating or administering programs and services under the *Indian Act*, to ensure their obligations under the *Canadian Human Rights Act* can be met and to ensure they have the financial means and the resources to develop community-based dispute resolution systems. This should also take into account obligations towards off-reserve and non-status Indians, where applicable.**

Full Equality of Members of Visible Minorities

29. Following her visit to Canada in 2009, the United Nations' independent expert on minority issues raised concerns about young Canadians who belong to a visible minority. In 2010, she reported to the Human Rights Council that:

African-descendant Canadians and some Asian Canadian communities are concerned that their children are having negative experiences in public schools.... In the field of policing, serious concerns include the use of racial profiling as a systemic practice, biased and heavy-handed policing of some minority communities and allegations of excessive use of force leading to deaths, particularly of young Black males.

In addition, African Canadians are disproportionately represented in prisons.

Full Equality of Persons with Disabilities before the Law

Accommodation of Mental Disabilities in Prison

30. The Commission believes that the treatment of people with mental disabilities in Canada's prisons is a pressing human rights issue that requires immediate attention.⁶ In 2009, the Office of the Correctional Investigator (Ombudsman for offenders serving their sentences in federal prisons) reported to a Parliamentary Committee that "the prevalence of offenders with significant mental health issues upon admission has doubled in the past five years. Federal prisons are now housing the largest psychiatric populations in the country."⁷

⁶ http://www.chrc-ccdp.ca/pdf/publications/cat_cct-eng.pdf

⁷ The Standing Senate Committee on Legal and Constitutional Affairs, November 25, 2009.

31. Recent figures indicate that more than 10 per cent of federal male prisoners and as many as 20 per cent of female ones have a serious mental disorder.⁸ Each year the numbers grow. The Commission notes with serious concern the closure of 140 beds for prisoners with mental disabilities at a treatment facility within the grounds of a federal penitentiary⁹ as well as a pattern of managing prisoners with mental disabilities through the use of “administrative segregation” (also known as solitary confinement).¹⁰
32. International human rights standards recognize that solitary confinement should only be used in very exceptional cases and that prolonged solidarity confinement (more than 15 days) for managing prisoners can rarely be justified.¹¹

9. Recommendation: That Canada abolish the use of disciplinary and administrative segregation (solitary confinement) for persons with serious or acute mental disabilities, including significant intellectual deficits.

10. Recommendation: That Canada endeavour to increase the capacity and effectiveness of intermediate and acute mental health treatment centres for prisoners, and to take into account the particular needs of Aboriginal peoples, who are vastly over-represented in Canadian prisons.

⁸ Toronto Star, *Where is the plan to replace disappearing treatment for mentally ill prisoners?* April 27, 2012.

⁹ Ibid.

¹⁰ John Service, *Under Warrant: A Review of the Implementation of the Correctional Service of Canada's Mental Health Strategy*, 2010.

¹¹ The Special Rapporteur on Torture to the UN General Assembly Third Committee (Social, Humanitarian and Cultural) October 18, 2011.