CANADIAN HUMAN RIGHTS ACT AND SPECIAL PROGRAMS: EXAMINING JURISDICTION, SPECIAL PROGRAMS AND PREFERENTIAL HIRING FOR FIRST NATIONS

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HUMAN RIGHTS LEGISLATION AND FIRST NATIONS

Special programs under the *Canadian Human Rights Act* are applicable to federal employers. In this paper we will outline the definition of special programs and its criteria as set out in the federal legislation.

The first question to ask before making a human rights complaint is whether the complaint falls under provincial or federal jurisdiction. With respect to First Nations employers, the issue of jurisdiction has always been a thorny one. There have been conflicting decisions regarding jurisdiction of First Nation employers in the past.

In this paper, we will discuss a recent Supreme Court of Canada decision that may have rectified the conflicts for First Nation employers regarding jurisdiction of complaints.

THE CANADIAN CONSTITUTION

n 1982, the Canadian Constitution was repatriated to Canada from Great Britain. The *British North America Act*, as it had been known, became the *Constitution Act*, 1867 and later, a new *Constitution Act,* 1982 was enacted. The *Constitution Act*, 1982 took over where the old Constitution left off.

Sections 91 and 92 of the original *Constitution Act 1867* set out the division of powers between the federal and provincial governments. This division of powers is consistent with the principles of federalism which contemplate the division of government by areas of authority, which in turn, serve to keep the balance of power in check.

While section 91 provides the federal government with a residuary plenary power, section 92 allows the provinces to retain jurisdiction over property and civil rights, and local and private matters.

Canada has exclusive jurisdiction over “Indians, and Lands reserved for the Indians” under section 91(24) of the Constitution Act 1867, while the provinces have exclusive jurisdiction over education under section 93. Pursuant to section 91(24) of the *Constitution Act 1867*, Parliament has the power to make laws in relation to ‘Indians, and lands reserved for the Indians’. Under the division of powers, “Indians” are subject to federal jurisdiction.

This new *Constitution Act*, 1982 included the Canadian *Charter of Rights and Freedoms* and, most importantly from First Nations’ perspectives, a provision – section 35 – which recognized and affirmed Aboriginal and treaty rights.

Section 25 is also salient as it shields aboriginal and treaty rights and freedoms, from the provisions of the *Charter* so as not to abrogate or derogate those rights.

THE CANADIAN HUMAN RIGHTS ACT

In 1977, the *Canadian Human Rights Act* (CHRA) was passed, together with the exemption that was described at the time as an “interim” measure". That measure, section 67, effectively exempted the

Indian Act from scrutiny under the CHRA. Section 67 was the only “sheltering” clause of the Act, and said,

> "Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.”

This “interim” status was key as the *Indian Act* was perceived as being discriminatory, particularly in terms of gender. It was anticipated that the sexual discrimination present in the *Indian Act* (and other forms of discrimination) would lead to parts of the *Indian Act* being found contrary to the principle objectives of the CHRA. Subsequent interpretation deemed the CHRA as “quasi-constitutional” in nature and, therefore, influencing the *Indian Act* and other “ordinary” legislation.

Decisions rooted in the *Indian Act* were seen as unlikely to survive a challenge under the new CHRA. Sandra Lovelace’s challenge to *the Indian Act*’s denial of entitlement to formerly “out-marrying” women, helped illustrate how the *Indian Act* was discriminatory. Lovelace’s challenge resulted in a decision by the United Nations Human Rights Committee that declared s.12(1)(b) of the Indian Act contrary to the International Covenant on Civil and Political Rights[1].

Thus, thirty-one years later, *Bill C-21* was passed in 2008 and the federal government finally repealed Section 67 of the *CHRA*, allowing Aboriginal peoples full access to the complaint mechanism under the *CHRA* to address discrimination. However, a three-year transition period was introduced with the repeal suspending full application of the *CHRA* to *Indian Act* band councils until June 2011, when it became effective. There have been approximately 162 complaints filed against First Nation governments since implementation.

DETERMINING JURISDICTION AT THE HUMAN RIGHTS TRIBUNAL

Before NIL/TIU,O

Jurisdiction over employment and human rights matters in First Nations employers was historically a complicated determination and the jurisprudence was not conclusive. Until recently, Canadian courts seemed to take differing approaches to the issue of jurisdiction of First Nation entities. If a federal court was deciding the issue, a broad approach was typically taken. That is, a federal court would typically find that federal employment laws applied if an enterprise was important to a First Nation or its members, or its operations were influenced by First Nations culture.

In contrast, if a provincial court was deciding the issue, they tended to take a more restrictive approach. That is, limiting federal jurisdiction to cases where the ordinary and habitual activities of the operation affected core aspects of “Indian status”, or if the activities were conducted pursuant to federally delegated authority.

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[1] *Lovelace v. Canada*, [1983] Can. Human Rights Yearbook 305 (U.N.H.R.C.) Also see *McIivor v. Canada (Registrar of Indian and Northern Affairs),* CanLII B.C.C.A. (2009) 153.

At one time it was thought that the identity of the employer was crucial to determine federal or provincial jurisdiction. For example, if the employees were employed by the Band itself, the federal legislation would apply and if employed by a Band-controlled company, then provincial legislation would likely apply. However, the jurisprudence held that the identity of the employer was not determinative. Rather, the key was whether or not an operation controlled by the Band is primarily for purposes that benefit members of the Band.

This led to various decisions of the Canada Labour Board, Canada Human Rights Tribunal and provincial employment and human rights authorities to determine matters based upon these principles. For instance, a drug and alcohol treatment program, a company that builds Band housing or any other service such as education or healthcare for the Band, would have likely been governed by federal legislation. If, on the other hand, the operation predominantly served the general public and only incidentally served Band members, then provincial labour legislation would likely apply. For example, if there was a Band-owned corporation that provided contract logging services both on and off reserve, provincial legislations would probably apply. The situation which was most difficult to predict is where an operation was for the benefit of both members of the Band and for the general public.

After NIL/TIU,O

These contrasting approaches may now be resolved with the Supreme Court of Canada's (the "SCC") decision in *NIL/TU,O Child and Family Services Society and the B.C. Government and Service Employees' Union, et al*. ("*NIL/TIU,O* "), which sets out a functional analysis approach to the determination of jurisdiction over human rights and clarifies issues involving First Nations and jurisdiction in employment and human rights matters.

In the *NIL/TU,O* case, the employer was a child welfare organization that was established and administered by a collective of First Nations. Its authority over child welfare, which is constitutionally within provincial jurisdiction, was delegated to the First Nations' collective by the provincial government. However, the organization was funded by the federal government and it primarily employed First Nations people in providing services in a culturally sensitive way.

The Court found that provincial employment laws applied. It founded its decision on what the organization actually did - which was to provide child welfare services -as opposed to how it provided the services or for whom. This is arguably a change in the test applied by courts and tribunals to determine jurisdiction.

In reaching its decision, the Court also clarified the approach to be taken in determining this issue on a case by case basis. That is, to first look at *what* the organization is actually doing and whether or not it is something that falls within a federal undertaking. If it is clear from this first step that it falls within a federal undertaking, then federal employment law will apply. But if it is not clear, then a second step in the inquiry should be undertaken. That is, a determination of whether in applying provincial employment law, it would impair a core of the federal power. If it does not impair a core of the federal power, provincial employment law should still apply.

The SCC concluded that the essential nature of the Society's operation was to provide services within the provincial sphere and, therefore, its labour relations fell under provincial jurisdiction. The new test set

out by the he Court, is a two-part analysis to determine whether a service provided in a First Nations community is within federal or provincial jurisdiction as follows:

(1) The court must first examine the nature, operations and habitual activities of the entity to determine if it is a federal undertaking. If yes, the entity is federally regulated. If no or if inconclusive, proceed to step 2;

(2) The court must examine whether provincial regulation of the entity's activities would impair the core of the federal head of power at issue.

The *NIL/TU,O* decision has been applied as the appropriate legal test to determine jurisdiction by human rights tribunals and the Canada courts. While there still exists conflicting jurisprudence since *NIL/TU,O,* general principles have emerged and decisions that conflict are likely not good law.

The *NIL/TU,O* decision has also been judicially considered in various other contexts, with examples as follows:

1. In the recent employment case of *Nelson v. Lower Stl/Atl'mxTribal Council*, an adjudicator appointed pursuant to the *Canada Labour Code*, applied the SCC's approach in the context of an unjust dismissal case involving a tribal council employee. He found that the operations of a tribal council were clearly within federal constitutional jurisdiction, and held that federal employment law applied.

However, the adjudicator went further. He held that even if the operations of the tribal council were not a federal undertaking, the federal employment laws should still apply for a different reason. He held that the core "Indianness" as set out in section 91(24) of the *Constitution i*nvolves fiduciary duties to give First Nations' peoples the rights pursuant to the laws of Canada. The right to reinstatement following an unjust dismissal is only provided pursuant to the federal employment laws - the *Canada Labour Code*- not the British Columbia (or other provincial) employment laws. This finding may have broad application to any First Nations employee where it is not clear whether the activity in question falls within a federal undertaking.

2. In *Duke v. Dakota Oyate Lodge Inc.*[2] , the employer was Dakota Oyate Lodge (the "Lodge"), a provincially incorporated entity operating an elders care home on reserve. The Lodge is licensed by Manitoba Health. Professional staff must comply with provincial standards and maintain provincial licensure. All residents of the care home are First Nations. Professional staff are not employed by Health Canada. All funding comes from the federal government.

The complainant filed an unjust dismissal complaint under the *Canada Labour Code*. In response, the Lodge argued that it was provincially regulated. The adjudicator concluded that the labour relations of emergency and other health care services on reserve are within provincial jurisdiction. This is a marked difference from past jurisprudence.

3. In the *Norway House Cree Nation* (Re) decision,[3] the Norway House Cree Nation Nurses' Union (the "Union") applied to the Manitoba Labour Board to certify nurses in a community health clinic and in an elders care facility. The Board relied on the test in *NIL/TU,O* to find that labour relations at the

[2] [2012] C.L.A.D. No. 53
[3] 2011 M.L.B.D. No. 26

community health clinic and the elders care facility were provincial regulated. In each case, the fact that the employer was owned by a First Nation, located on reserve land, funded by the federal government and that the services were primarily for the benefit of and delivered by aboriginal persons did not affect the operational nature of the business. The Board concluded that the operation of health care facilities and the regulation of staff in those facilities is clearly a matter of provincial jurisdiction.

4. However, there have also been BC Human Rights Tribunal decisions that remain contrary to *NIL/TU'O* decision and which are likely not good law. In *Pierre v. Bertrand*[4], the complainant filed a complaint of discrimination against her employer, the Tl'azt'en Nation Health Center (the "Health Center") and a co-worker. The Health Center provides health services exclusively for First Nation members. It is located on reserve and the services are carried out on behalf of the Band Council and at their direction. The Tribunal relied on the functional test from the *NIL/TU'O* case and held that the Health Center is under federal jurisdiction for human rights purposes. Therefore, the Tribunal did not have jurisdiction to consider the complaint.

5. In *Prichard v. Tla'Amin Community Health Board Society* [5] Mr. Prichard filed a complaint against the Tla'Amin Community Health Board Society (the "Society") alleging discrimination in the areas of publication and employment. The Society's mandate is to provide health, child and family services to First Nations individuals. It operates under the authority of the Sliammon First Nation ("SFN"), but is a separate legal entity and operates independent of its Chief and Council. SFN received funding from Canada and has delegated its obligations to the Society. The Society is provincially incorporated and receives provincial funding. The Society is certified to a union under the BC *Labour Relations Code*.

In this decision, the BC Human Rights Tribunal found the Society's mandate, including its accountabilities, operational independence and funding sources to be entirely similar to the agency in *NIL/TU,O* and, therefore, subject to provincial jurisdiction. This decision reaches the opposite conclusion from *Pierre v. Bertrand.*

6. In *Tla'amin Community Heath Board Society v. Bassett*[6], the complainant alleged that she was unjustly dismissed from her employment by the *Tla'amin Community Heath Board Society* (the "Society"). The Canada Labour Board held that the Society's services, health care and health promotion, were normally provincial activities and, therefore, the Society fell under provincial jurisdiction with respect to the employment of the complainant.

7. *The Oneida of the Thames Emergency Medical Services (Re)*[7] case a land based ambulance service operated by the Oneida First Nation (the "Employer"). The Employer is located on the Oneida of the Thames settlement and provides emergency medical services to First Nation and non-First Nation individuals. It is a distinct operation, reporting to the Oneida Nation, that was established in January 2005 pursuant to an agreement between the Oneida Nation and the Ontario government. Its operations

[4] [2011] B.C.H.R.T.D. No. 284
[5] [2012] B.C.H.R.T.D. No. 152
[6] [2012] C.L.A.D. No. 142.
[7] [2011] C.I.R.B.D. No. 1

are regulated by the Ontario Ambulance Act, R.S.O. 1990, c. A.19. It is entirely funded by the Ontario Ministry of Health and its hours of operation are set by the Ministry of Health.

The issue before the Canada Industrial Relations Board (the "Board") was whether the Board had jurisdiction to award a federal bargaining certification to the C.A.W - Canada. The Employer argued that "its ordinary and habitual activity is the running of a land ambulance service and that this activity does not touch on issues of First Nations status or rights". The Board held that, on the facts regarding the Employer's operations as presented, "the nature, operations and habitual activities of this entity are subject to provincial jurisdiction over labour relations." It concluded that "the activities of the Oneida EMS do not fall within the protected "core of Indianness" under section 91(24) of the *Constitution Act, 1867*".

8. In *Rampanen-Fritzsche v. Okanagan Nation Alliance*[8], Tamara Rampanen-Fritzsche filed a complaint with the Tribunal alleging that Okanagan Nation Alliance (the "Alliance") and Pauline Terbasket (collectively, the "Respondents") discriminated against her with respect to her employment on the basis of ancestry and place of origin contrary to s. 13 of the BC *Human Rights Code.* In that case, the Tribunal followed the reasoning of *NIL/TU,O* to determine that this complaint was within federal jurisdiction. The Tribunal justified its decision as follows at paragraph 11-12:

> The functions of the Alliance are that of a First Nations government and may be properly characterized as forming an integral part of primary federal jurisdiction over "Indians and lands reserved for Indians", as defined in s. 91(24) of the *Constitution Act*, 1867, and therefore, fall under federal jurisdiction for human rights purposes: *Edwards v. Lake Babine Nation and others*, 2005 BCHRT 215 ("*Edwards*"); *Osborne v. Department of Fisheries and Oceans and Haida Nation*, 2008 BCHRT 75; *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. 3, paras. 50, 60-61.

SPECIAL PROGRAMS -- FEDERAL

Section 16 of the CHRA states:

> **16.** (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.
>
> ***Advice and assistance***
>
> (2) The Canadian Human Rights Commission, may
>
> (*a*) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and

[8] [2012] B.C.H.R.T.D. No. 138

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> (*b*) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve.
>
> ***Collection of information relating to prohibited grounds***
>
> (3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).
>
> R.S., 1985, c. H-6, s. 16;1998, c. 9, s. 16.

A special program under Section 16 is any plan, arrangement, rule, policy or legislative provision designed to prevent, eliminate or reduce disadvantage that is experienced, or likely to be experienced, by a disadvantaged group.

Various legislation and jurisprudence refer to this concept differently. The CHRA refers to "special programs"; the *Employment Equity Act* (EEA) to "special measures" and "positive policies and practices"; and the *Charter* to programs whose object is the "amelioration of disadvantage." For ease of reference the Canadian Human Rights Commission refers to these all generically as "special programs".[9]

The reason for the disadvantage must be related to a prohibited ground of discrimination as defined in the CHRA or be related to membership in any of the designated groups defined in the Federal Employment Equity Act (the "EEA").[10]

Section 2 of the EEA states:

> The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

Special programs are designed to ameliorate or prevent disadvantage by allowing for unique programs, policies or practices that apply to, and benefit, only those in one or more of the specified disadvantaged groups.

It is important to recognize that although this policy statement applies to special programs under both the CHRA and the EEA, there are differences between how the two statutes approach special programs.

The most critical difference is that section 16 of the CHRA is permissive: a special program may be implemented for the purposes of ameliorating disadvantages based on or related to any of the eleven prohibited grounds of discrimination. No organization subject to the CHRA is required to implement such a program. On the other hand, under the EEA, employers must implement special programs that can

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[9] Canadian Human Rights Commission, Resources, Policy on Special Programs
[10] *Employment Equity Act,* S.C. 1995, ch.44

ensure reasonable progress towards full representation of one or more of the four designated groups when there is evidence of under-representation in the workforce.[11]

Special programs may be initiated by any organization, of its own accord, coming under the jurisdiction of the Canadian Human Rights Commission.

CRITERIA FOR CHRA SPECIAL PROGRAMS

There are now general principles that have emerged for the specific criteria and principles to which special programs are to adhere in order to ensure that they are consistent with underlying human rights principles.
The basic rules[12] set out by the Commission, Tribunal and courts are as follows:

A special program must advance equality

Inherent in the notion of a special program is the idea that in the pursuit of equality it may be necessary to treat individuals or groups differently in order to establish "substantive equality." Special programs must be designed and administered to ensure that this objective is always paramount.

It has been clearly established by the courts that validly constituted special programs are not a limit or exception to equality. Rather, they are a means of advancing the achievement of equality.

A special program must address genuine disadvantage

The organization responsible for the program must establish that the target group experiences disadvantage and that the proposed special program will advance the achievement of equality for that group.

For example, a special program may be warranted within organizations where the equitable representation of disabled people is lacking and where people with disabilities do not have access to the same employment and advancement opportunities as non-disadvantaged workers.

A special program must be tailored to meet the actual needs of the disadvantaged group

A determining factor in establishing that the program will advance equality is whether the program meets the actual needs of the disadvantaged group for which it is intended. There must be a demonstrable connection between the program and its intended goals. For example, if a program is aimed at improving employment prospects for visible minority professionals, there must be clear evidence that the program in fact achieves this goal.
Special programs may have some impact on non-designated group members, and steps should be taken to ensure that such impacts interfere as little as possible with the opportunity of third parties, consistent with the overall need for and objectives of the special program.
Special programs must be proportional to the degree of under-representation or disadvantage. Greater and more entrenched disadvantage may necessitate more comprehensive and far-reaching special

[11] Canadian Human Rights Commission, Resources, Policy on Special Programs
[12] Canadian Human Rights Commission, Resources, Policy on Special Programs

programs. For example, within workforces where there is history of exclusion (e.g., women in the railways) it may be possible to justify special programs that are more restrictive.
Factors to be considered include the degree of disadvantage, the size of the organization, the scope of the measure, the type of industry, and alternatives available to third parties.

Special programs are temporary

By definition, special programs are designed and initiated in order to remedy or prevent disadvantages being suffered by groups for a reason related to one of the proscribed grounds of discrimination. A special program can therefore only be justified for as long as the disadvantage persists. Sponsors of special programs should reassess the need for the program periodically, and wind programs down as soon as they are no longer necessary.[13]

PREFERENTIAL TREATMENT OF ABORIGINAL PERSONS IN EMPLOYMENT

The term "preferential hiring" means, in effect, having the ability to choose an Aboriginal employee over a non-Aboriginal candidate in selection for hiring. Preferential treatment could also include posting a position, with the stipulation that if an Aboriginal candidate is eventually found, that a non-Aboriginal person may be displaced. It may mean training for Aboriginal employees and not for others.

Normally, such a bias would be deemed to be discriminatory under both the federal and provincial human rights schemes. This is due to the legislative requirements ---both federal and provincial -- not to discriminate against any person in the employment context, based upon *inter alia* race, national or ethnic origin, colour, religion, ancestry, place of origin.

The reason that Indian Bands can discriminate against non-Aboriginal persons, by preferring an Aboriginal candidate over any other candidate, stems from the disadvantages that Aboriginal peoples of Canada face. Aboriginal peoples are deemed to be a disadvantaged group for the purposes of human rights and other federal and provincial legislative schemes.

There are several federal legislative schemes which provide a basis for preferential hiring practices. Most important, Section 35 of the *Constitution Act*, 1982 recognizes and affirms *"the existing Aboriginal and treaty rights"* of the Aboriginal peoples of Canada. This unique constitutional status includes the right to self-government and economic autonomy. This status merits special consideration for measures aimed at enhancing the cultural, economic and political autonomy of the Aboriginal peoples.

Also, Section 15 (1) of the *Canadian Charter of Rights and Freedoms* provides that "Every individual is equal before and under the law..." However, section 15(2) provides an exception for "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ...". In other words, Canadian law recognizes that in some circumstances programs that give preference to historically disadvantaged groups, such as the Aboriginal peoples, are necessary in order to prevent, eliminate or reduce disadvantage.

[13] Canadian Human Rights Commission, Resources, Policy on Special Programs

These provisions of federal legislation set in motion the need for preferential treatment of Aboriginal persons in employment to improve conditions of Aboriginal peoples.

With the *Charter a*nd *Constitution Act* in mind, the federal government enacted the federal *Employment Equity Act* (the "EEA")and the *Canadian Human Rights Act* which outline the process to obtain the right to preferential treatment of Aboriginal persons in employment in the federal sphere.

In the provincial sphere, the BC *Human Rights Code* provides that employers can adopt a special program such as preferential treatment of Aboriginal Persons in employment.

The EEA application is broad. The EEAs legislation applies to private sector and public sector employers who have 100 or more employees as follows:

(*a*) private sector employers;
(*b*) the portions of the federal public administration set out in Schedule I or IV to the *Financial Administration Act*;
(*c*) the portions of the federal public administration set out in of Schedule V to the *Financial Administration Act* that employ one hundred or more employees; and
(*d*) such other portion of the public sector employing one hundred or more employees, including the Canadian Forces and the Royal Canadian Mounted Police, as may be specified by order of the Governor in Council on the recommendation of the Treasury Board, in consultation with the minister responsible for the specified portion.

Section 7 of this legislation states:

Employment of aboriginal peoples

7. Notwithstanding any other provision of this Act, where a private sector employer is engaged primarily in promoting or serving the interests of aboriginal peoples, the employer may give preference in employment to aboriginal peoples or employ only aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the *Canadian Human Rights Act*.

Section 7 of the EEA was included primarily to address the situation of Band Councils on Indian reserves acting as employers. Such Indian Band Councils, if they employ 100 or more employees in connection with federally-regulated activities, are subject to the EEA. If so, then that federal employer would still be responsible for its other obligations under the EEA, which may be met by the hiring of Aboriginal women or Aboriginal persons with a disability. I will not explain the employer obligations under the EEA as it is beyond the scope of this paper. However, most federally governed employers, whether private or public, have obligations to comply with the EEA in terms of its objective.

The objective of section 7 of the EEA is to ensure that employers and organizations whose main purpose is to advance the interests of Aboriginal peoples are not unduly restricted from doing so by certain requirements of the EEA. Such employers may give preference to Aboriginal peoples, or employ only Aboriginal peoples. Section 7 also ensures consistency with special programs to address disadvantage peoples by section 16 of the CHRA.

Section 7 allows employers under certain conditions to give preference to or to hire only Aboriginal employees. It does not exempt them from other requirements of the EEA, however, such as the

requirement to hire Aboriginal women and Aboriginal persons with disabilities. However it does give the right to Aboriginal Bands over 100 employees to implement preferential hiring. However, the section of the legislation does not allow for preference to be given to members of a particular First Nation, band or tribe.

In addition to the EEA (if it applies), is Section 16(1) of the CHRA which states that it is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Under section 16 of the CHRA exceptions are in place for the promotion of equality through preferential employment practices that would ordinarily be prohibited. For example, under section 16, employers can establish special programs to promote the hiring of women, persons with disabilities, visible minorities or Aboriginal people in preference to other candidates.

However, the Canada Human Rights Commission has recognized that Aboriginal Bands and employers need not undertake the same processes as for other groups under Section 16. In or about 1990, it adopted and implemented a policy entitled: The Aboriginal Employment Preferences Policy.

THE ABORIGINAL EMPLOYMENT PREFERENCE POLICY (the "AEPP")

The reason for the AEPP was the recognition of the disadvantaged status of Aboriginal peoples generally. For example, in order to advance autonomy, a First Nation Government may want to give preference to hiring Aboriginal people for government administrative positions. Likewise, school boards and health authorities have reason to promote the hiring of persons who are culturally attuned to the needs of their students and patients. In addition, the disadvantage of Aboriginal communities in general, where unemployment rates are usually very high, justifies special consideration to the employment of Aboriginal people.

The list of employers under the EEA may smaller than anticipated in light of the SCC decision in *NIL/TU,O.*

The AEPP applies to complaints received by the Commission alleging discrimination by an employer. Under this policy, an employer may give preferential treatment to Aboriginal persons in hiring, promotion or other aspects of employment, when the primary purpose of the employer is to serve the needs of Aboriginal people.

Pursuant to the AEPP, employers applying a preferential employment scheme will not be required to produce evidence of specific disadvantages suffered by Aboriginal people as is the case under Section 16 for other groups. The general disadvantaged condition of Aboriginal people is sufficient to warrant preferential treatment.

In addition, on application (although not necessary), the Commission will advise parties contemplating implementing an Aboriginal preference program, or those planning to establish a formal policy on preferential hiring, as to whether the proposed program or policy conforms with this policy in particular. However, the provision of such advice by the Commission does not preclude it from dealing with a complaint against a program or policy on its merits.

Commission experience since the original policy was issued in February 1990 indicates that in some instances the treatment of non-Aboriginal employees affected by the exercise of Aboriginal employment preferences appeared to be arbitrary, and not in keeping with the spirit and intent of the EAPP and the *CHRA*.

It is the Commission's view that in the application of an Aboriginal employment preferences policy adequate measures must be taken to ensure that non-Aboriginal employees or candidates for employment are treated fairly and reasonably.

Measures that can be implemented by employers to ensure fair treatment of non-Aboriginal employees or candidates for employment may include, but are not limited to, the following:

- Employers should, if possible, have clear written policies regarding their application of Aboriginal employment preferences;

- All job postings and advertisements should indicate whether Aboriginal people will be given preference;

- All employees, as part of their terms and conditions of employment should be made aware of, and required to acknowledge, that Aboriginal people will be given preference in accordance with this policy;

- Where non-Aboriginal employees have accepted, as a term of their employment, that they may be displaced in preference to an Aboriginal candidate, the employer must still treat the non-Aboriginal employee in a fair and reasonable manner, by for example, ensuring that adequate notice of termination is given. It is not acceptable to dismiss a permanent employee in favour of an Aboriginal employee if no preferential policy or practice was in place at the time of the permanent hiring.

- The Commission will not accept Aboriginal preference as a defense against an allegation of discrimination if it is convinced that the employer's defense is pretextual, in other words that there is reason to believe that at the time of the impugned employment action, the employer had no clear policy or intent to hire on a preferential basis, and that the defense is being used to avoid liability.

- Employers can require job applicants to have knowledge and/or experience with the language, culture, history and customs of a particular First Nation, band or tribe when such requirements are directly related to the job requirements. <u>However, the policy does not allow for preference to be given to members of a particular First Nation, band or tribe.</u>

RELEVANT LEGISLATION

***The Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c.3.**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, – …

24. Indians and Lands reserved for Indians.

***Canadian Charter of Rights and Freedoms*, Being Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c.11.**

25. The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

***Constitution Act, 1982*, Being Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c.11.**

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Important

***Indian Act*, R.S.C., 1985, c. I-5.**

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.