



Special Guideline: Application of Section 7

***This Guideline applies ONLY to employers
operating in federal jurisdiction which
exist primarily to promote the interest of
ABORIGINAL PEOPLES***



Human Resources
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INTRODUCTION

This Special Guideline is intended to provide information to employers in federal jurisdiction who are engaged primarily in promoting or serving the interests of Aboriginal peoples. Normally this will mean Band Councils operating on Indian reserves. It is intended to clarify the intent and meaning of section 7 of the *Employment Equity Act* regarding the employment of Aboriginal peoples by those employers. It does not apply to employers who are not engaged primarily in serving or promoting the interests of Aboriginal peoples.

Guidelines provide general direction and practical pointers which reflect best practices. They are not, however, a template: readers should consider the specific circumstances of their own organizations as they use the Guidelines. Other documents to consult include the *Act* and *Regulations*, as well as documents available from the Canadian Human Rights Commission (CHRC) relating to the audit criteria and audit framework, and the CHRC policy statement on Aboriginal Employment Preferences.

PART A: LEGAL FRAMEWORK

Section 7 of the *Act* applies to private sector employers engaged primarily in promoting or serving the interests of Aboriginal peoples.

This provision was intended primarily to address the situation of Band Councils on Indian reserves, acting as employers.

Such employers may give preference to Aboriginal peoples, or employ only Aboriginal peoples.

However, this must not constitute a discriminatory practice under the *Canadian Human Rights Act*.

PART B: PRACTICAL APPLICATION

Purpose Of Section 7

The objective of section 7 of the *Employment Equity Act* 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 *Employment Equity Act*.

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 *Employment Equity Act*, however, such as the requirement to hire Aboriginal women and Aboriginal persons with disabilities.

This provision reflects the special status of Aboriginal peoples as well as the reality that, by virtually every measure, Aboriginal peoples are among the most disadvantaged of Canadians.

Section 7 also ensures consistency with special programs to address disadvantage permitted by section 16 of the *Canadian Human Rights Act*

Section 7 of the *Employment Equity Act* 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 *Employment Equity Act*.

Other federally-regulated organizations which meet the eligibility criteria discussed on page 4 of this Special Guideline may also benefit from this exemption.

The provision is consistent with the Government's commitment to give greater autonomy to Aboriginal communities, and to allow Aboriginal peoples to assume greater control over decision-making that affects their communities.

Why Only Aboriginal Organizations?

Section 7 focuses only on organizations which exist to promote the interests of Aboriginal peoples. There is no corresponding provision relating to the other three designated groups. It should be noted that organizations

which exist to serve the interests of women, persons with disabilities and members of visible minorities by and large fall under provincial jurisdiction. Many provincial human rights codes have provisions which allow for employment preferences in such situations.

Even among those organizations which exist to further the interests of Aboriginal peoples, many also fall under provincial jurisdiction.

Which Employers Are Covered By Section 7?

Section 7 applies to any private sector employer which operates in federal jurisdiction, employs 100 or more employees in connection with a federally-regulated activity, and whose primary purpose is to serve the interests of Aboriginal communities and peoples or to promote their interests in the larger society.

Band Councils on Indian Reserves

For the most part, this section is intended to apply to certain Band Councils operating on Indian reserves. However, the *Act* does not restrict the application to Band Councils alone.

See pages 4-5 for a discussion of the criteria which apply to employers besides Band Councils.

As noted above, not all organizations which exist to promote or serve the interests of Aboriginal peoples are in federal jurisdiction. For example, certain on-reserve manufacturing operations controlled by Aboriginal people have been found by the courts to be in provincial jurisdiction.¹ As well, off-reserve social service organizations to promote the economic betterment of non-status Indians and Metis have been found to operate in provincial jurisdiction.²

It should be noted that a Band Council is only subject to the *Employment Equity Act* if it has 100 or more employees who are employed in connection with a federally-regulated activity. In other words, it may have 100 or more employees, but it would only be subject to the *Act* if at least 100 of those employees

¹ *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

² *Ontario Public Service Employees Union v. Ontario Métis and Non-Status Indian Association et al.*, [1980] 3 Can.L.R.B.R. 328 (Ontario Labour Relations Board).

were engaged in federally-regulated activities.

How can one determine whether the activities in question are federally- or provincially-regulated? Jurisdictional issues with respect to Aboriginal organizations are quite complex. They must be dealt with on a case-by-case basis. A few general principles will usually apply, however.

Activities on a reserve operated by a Band Council will normally fall under federal jurisdiction where those activities involve the functions associated with **governance**. This would include the operation, management or administration of a local government, or the provision of services to local residents or performance of other governance functions by that Band Council. Such activities might include the administration of education, housing, or public works, or the maintenance of schools, roads, sanitation and garbage collection.

Other Employers

As has already been mentioned, the application of section 7 is not restricted to Band Councils alone.

Federally-regulated activities for the private sector in general, for the purposes of the *Employment Equity Act*, are those set out in section 2 of the *Canada Labour Code*. These activities include *any work, undertaking or business that is within the legislative authority of Parliament*. Section 2 of the *Canada Labour Code* provides a non-exhaustive list of particular activities that are within the legislative authority of Parliament, including banks, telecommunications, inter-provincial and international rail, air, road and water transport.

A private sector employer engaged in any of these federally-regulated activities may also benefit from the exemption granted by section 7 provided all the criteria set out below are met:

- the organization is engaged in promoting or serving the interests of Aboriginal peoples;
- the organization employs 100 or more employees

in connection with a federally-regulated activity;

- the interests of Aboriginal peoples being served relate to the well-being of the larger Aboriginal society, not merely the financial interests of certain individuals;
- promoting or serving the interests of Aboriginal peoples is the primary goal of the employer, not simply an incidental consideration; and
- employment practices engaged in, further to section 7, do not constitute discriminatory practices under the *Canadian Human Rights Act*

Any commercial business seeking to benefit from the exemption provided in section 7 would normally be owned and operated by Aboriginal peoples. In this regard, control by a Band Council, rather than by individuals, would tend to indicate that it exists for the benefit of the larger Aboriginal society.

What Are Employers Covered By Section 7 Permitted To Do?

Employers covered by section 7 of the *Act* do not receive a blanket exemption from the Act. They are, however, allowed to give employment preference to Aboriginal peoples or to employ only Aboriginal peoples, subject to the limits discussed below in this guideline.

What does this mean in practice?

Employers to whom section 7 applies should survey their workforces and file reports annually with the Minister of Labour reporting on all four designated groups, like any other employer.

However, aside from this requirement, such employers would be relieved of any further activities relating to non-Aboriginal persons.

This means that such an employer's workforce analysis, employment systems review and employment equity plan are only required to address two designated groups, women and persons with

disabilities. In both cases, the requirements of the legislation could be met through the hiring of Aboriginal women and Aboriginal persons with disabilities only. However, there would be no requirement to address members of visible minorities.

In addition, the employer would not be obliged to undertake any special activities regarding Aboriginal persons in general as a separate designated group. The employer would not need to improve representation of Aboriginal peoples overall, since representation of Aboriginal peoples in the employer's workforce would in all likelihood be well above what is required for other private sector employers under the *Act*. An employment systems review is not required where there is no under-representation in any given occupational group, nor is the setting of numerical goals required to improve representation.

It is important to note, however, that all obligations under the *Act* relating to women and persons with disabilities would continue to apply to employers covered under section 7 of the *Act*. In practice, employers could fulfill these obligations through activities relating only to Aboriginal women and Aboriginal persons with disabilities.

Workforce Analysis

In terms of workforce analysis requirements and goal-setting, however, it should be noted that the external representation estimates for women and persons with disabilities will not be based on their numbers in the Canadian workforce, but rather on their representation within the relevant Aboriginal population.

In other words, for the purposes of the workforce analysis (which leads to all subsequent steps, since it shows where under-representation exists), the employer will use tailor-made estimates of the external representation of Aboriginal women and Aboriginal persons with disabilities, taking into account the usual factors of qualifications, eligibility, and geography.

If the employer is a Band Council operating on a reserve and if it is reasonable to recruit from that reserve alone, the employer can construct tailor-made

*For further information about the workforce analysis in general, please refer to **Guideline 5: Workforce Analysis**.*

*Employers are referred to sections 6(1)(b) and 6(2) of the *Employment Equity Regulations* for further information regarding tailor-made estimates of the external representation of Aboriginal women and Aboriginal persons with disabilities..*

estimates of external representation based on the labour pool of women and persons with disabilities on that particular reserve. These estimates would then be used as the benchmark to compare the representation of women and persons with disabilities in the employer's workforce to the external workforce.

Example

As an illustration, we can consider a Band Council, with more than 100 employees, that operates schools and a hospital on a reserve. As these activities form part of a "governance" function – providing services to residents of the reserve -- these activities would normally fall under federal jurisdiction. Existing primarily to promote the interests of Aboriginal people, such an employer would be covered by section 7, and would therefore be permitted to employ only Aboriginal employees for the requirements of the *Employment Equity Act*. Moreover, it would not be required to take any other step related to members of visible minorities, beyond the workforce survey and reporting requirements.

Because the workforce is comprised nearly exclusively of Aboriginal persons, there would be no practical need to undertake a detailed workforce analysis for Aboriginal peoples overall, in order to reveal areas of under-representation. With no under-representation of Aboriginal peoples, there would be no need to undertake an employment systems review or to set numerical goals with a view to increasing Aboriginal representation.

However, the employer would have to comply with all obligations under the legislation related to persons with disabilities and women. It would be expected to look at its internal representation of Aboriginal women and Aboriginal persons with disabilities, to compare these figures with expected representation – based on appropriate estimates of external representation – and to identify barriers and design an employment equity plan wherever under-representation is found. In other words, it would be expected to carry out the same analyses and implement the same type of employment equity measures as any other employer covered by the *Act* – the only difference (though it is a critical

one) being that the employment equity program is designed only for Aboriginal women and Aboriginal persons with disabilities.