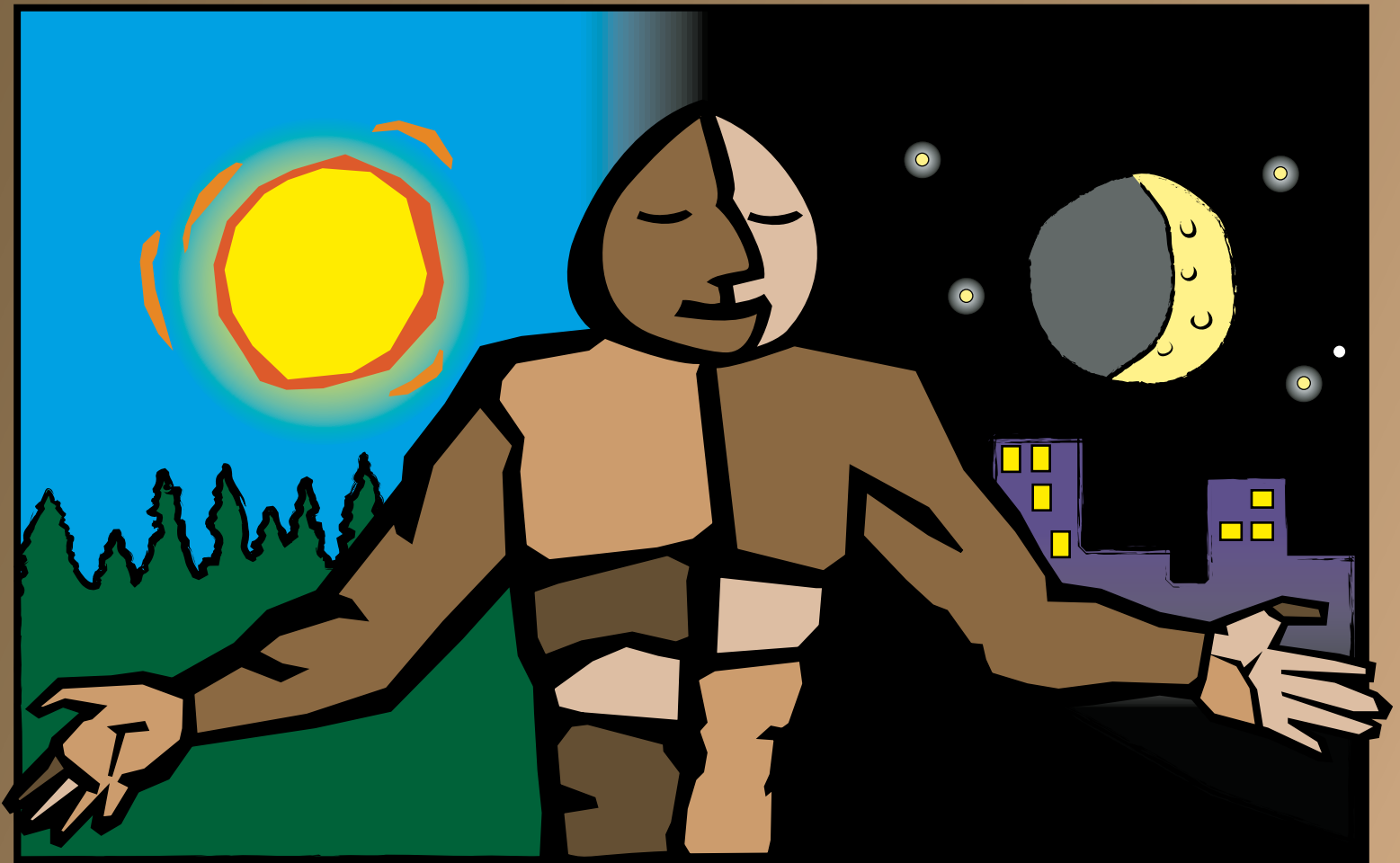


Executive Summary





September 19, 2007

A Framework and Action Plan for the Investigation and Resolution of Human Rights Complaints from Mi'kmaq and other Aboriginal People in Nova Scotia

Executive Summary

Background

In a survey conducted on reserve in Nova Scotia in 2002–03, Mi'kmaq adults 18 years and over were asked if, in the previous 12 months, they had experienced any instances of racism. Some 39 per cent answered “yes” to this question. A significant proportion of this group (29 per cent) said that it had at least some impact, and sometimes a strong impact, on their level of self-esteem. Yet, at any given time, the Nova Scotia Human Rights Commission (NSHRC) has only a handful of formal complaints lodged by members of the Mi'kmaq or other Aboriginal communities.

While recognizing that not every perception of discrimination is well founded, and that not everyone will want to pursue a complaint even if there are good grounds for doing so, still there is a major gap between the experience of discrimination and the search for a remedy. It also appears that efforts to prevent discrimination from occurring in the first instance are not effective. These issues are at the core of the mandate we have been given by the NSHRC, which asked us:

“In cooperation with Mi'kmaq and other Aboriginal communities, develop an ... action plan to improve the services the NSHRC offers to these communities, particularly through effective models of dispute resolution.”

In pursuing this assignment over the spring and summer of 2006, we

- conducted interviews with other provincial/territorial human rights commissions in Canada, as well as the Canadian Human Rights Commission
- attended and made a presentation at the annual conference of the Canadian Association of Statutory Human Rights Agencies in Fredericton in June 2006
- met with the staff and commissioners of the NSHRC
- undertook an extensive series of meetings and interviews with leaders and members of the Mi'kmaq community, both on and off reserve (see Appendix A)
- met with representatives of the Nova Scotia Chamber of Commerce and the Nova Scotia Barristers' Society



- **met with two committees of the Canada–Nova Scotia–Mi’kmaq Forum, a tripartite process unique to Nova Scotia intended to resolve matters of concern to the three parties**

Our Conclusions

Our conclusions can be summarized in five points.

(1) The experience of Mi’kmaq and other Aboriginal people with discrimination is in some respects similar to the experience of other victimized groups such as African Nova Scotians, e.g., being refused accommodation, being subjected to derogatory remarks at hockey games, being subjected to harassment and unequal treatment in service establishments, being under-represented in the labour force (e.g., policing).

(2) In other respects, though, the experience of Mi’kmaq and other Aboriginal people with discrimination is different because it often arises in the context of, and as a response to, their exercising their collective rights. The best known example is the racism that Mi’kmaq fishers experienced in the aftermath of the Donald Marshall, Jr., Supreme Court decision, when Mi’kmaq fishers attempted to regain their rightful place in the fishing industry and were met with racism and violence at the wharf. A less well-known example occurs when Mi’kmaq people attempt to exercise their right to have goods delivered on reserve free from the goods and services tax. They may have to go to the back of the store to complete the necessary forms, endure the hostile remarks of other customers or sales staff, or have the tax exemption refused altogether. We also heard about harassment at border crossings, for example, when traditional medicines are seized.

(3) Instances of discrimination arise both on and off reserve. If on reserve, the grounds of discrimination are not typically based on race, but may involve other grounds such as gender, sexual orientation, or family status. We heard repeatedly about discrimination against persons with disabilities. Frequently, community members feel aggrieved but the grounds of their complaint may not be covered by human rights legislation, as when decisions are made by Chief and Council on the allocation of scarce resources (housing, jobs, social assistance) in a context of divisions in the community on family and political lines.

(4) An added complication, especially for cases arising on reserve, is lack of clarity on whether the Canadian Human Rights Commission (CHRC) or the NSHRC has jurisdiction. Our legal research has determined that, for most cases arising on reserve, the CHRC would have jurisdiction because most cases concern a federal body, a Band Council, or an entity that is substantially controlled by a Band Council. This mandates federal jurisdiction because section 91 (24) of the Constitution Act of 1867 gives the federal government exclusive legislative authority over “Indians, and lands reserved for Indians.” We note two exceptions, however:

- (a) when discrimination is alleged to have been committed by an individual or organization that is not substantially a federal entity, nor controlled by a federal



entity such as a Band Council, and does not deal with either “Indianness” or lands reserved for Indians. This might be the case with a privately owned business located on reserve, for example, or an organization such as a Gaming Commission that is provincially incorporated.

(b) when section 67 of the Canadian Human Rights Act applies. Under section 67, the CHRC is prohibited from taking on any cases that arise from the *Indian Act*. There are some matters, such as decisions concerning who is entitled to Band membership or decisions taken by the Minister of Indian Affairs, where neither federal or provincial human rights legislation applies, and individuals who are affected have no recourse under the law.

While this analysis helps to clarify the jurisdiction situation, in fact there continue to be many grey areas where jurisdiction remains unclear. In the long run, the Mi’kmaq Rights Initiative (the “Made in Nova Scotia Process”) may result in a situation where the Mi’kmaq re-assume responsibility themselves for dealing with human rights abuses. In the short and medium term, however, some interim solutions to this aggravation need to be found.

(5) When asked about the NSHRC—and often the same comments are volunteered about the CHRC—we conclude from what we heard that Mi’kmaq and other Aboriginal people have almost given up looking to the NSHRC as an agency that can provide effective and timely interventions when it comes to instances of discrimination. According to our respondents, complaints of racism and other forms of discrimination are not pursued because of

- lack of information about the Commission and how to proceed with a complaint
- the length of the Commission’s complaint resolution procedure, which can take several years; this includes long delays in some cases in staff getting back to complainants and failure to return calls
- distrust of outside institutions that are not well known in the community
- people being uncomfortable with the process: its adversarial nature, its formality and emphasis on written documentation, the feeling that their integrity is being questioned, being interviewed by lawyers and police, being highlighted by the media, the lack of support for the complainant, the inequalities in power and resources compared to the respondent, and not being able to express yourself in the Mi’kmaq language
- fear that you will lose your job or be blacklisted if you complain
- lack of satisfactory outcomes in the few cases that have proceeded



- cost factors, such as for travel and legal representation

(6) Members of the Mi'kmaq community with whom we spoke are strongly in favour of putting in place a procedure for resolving disputes that draws on Aboriginal traditions of restoring balance and harmony. They recommend that a healing circle approach be added to mediation as another form of settlement initiative, to be used when both parties to a complaint of discrimination agree. This is consistent with the trend in other areas, such as the use of sentencing circles in criminal justice and family group conferencing in child welfare. It is also consistent with the work of the Saskatchewan Human Rights Commission, which now uses a talking circle format under the direction of a respected elder to handle some human rights complaints in that province.

A Proposed Framework and Action Plan

In our report, we lay out the main elements of a framework and action plan that would assist the NSHRC in investigating and resolving human rights complaints from Mi'kmaq and other Aboriginal people in Nova Scotia. The key elements are as follows:

A. Staffing, Access, and Visibility

- Hiring two Mi'kmaq (preferably) or other Aboriginal staff as human rights officers, with the added provision that at least one of the persons should be fluent in the Mi'kmaq language
- Locating the offices of the designated positions either on reserve or within easy reach of concentrations of Mi'kmaq and other Aboriginal people in the province, both on and off reserve. One office should be in Cape Breton and the other on the Nova Scotia mainland.
- Taking steps to increase the visibility of the Commission in Mi'kmaq communities through the preparation of culturally appropriate literature and videos, and the organization of workshops
- Making arrangements so that fully qualified Mi'kmaq or other Aboriginal persons are in place and available to conduct investigations in human rights cases. This may include making contractual arrangements with an appropriate Mi'kmaq organization.
- Strengthening the process by which chairs of Boards of Inquiry are selected and prepared. The process should include in-person interviews and training, with a view to appointing persons who understand socio-economic disadvantage, cultural difference, and community perspectives.



B. Preventing Discrimination

- Ensuring that at least half the time of the designated staff be spent in educational and other effective activities directed to employers and others to prevent discrimination from occurring, including within Mi'kmaq communities
- In view of the link between instances of racism and the exercise by the Mi'kmaq of their collective Aboriginal and treaty rights, having the NSHRC collaborate with the province's Office of Aboriginal Affairs and with relevant Mi'kmaq organizations in carrying out an educational campaign to educate Nova Scotians about these collective rights
- Encouraging Mi'kmaq communities to provide support to community members who pursue valid human rights complaints

C. Clarifying Jurisdictional Issues and Providing Integrated Services

- Collaborating with the Canadian Human Rights Commission in the development of an easy-to-understand manual that clarifies, insofar as possible, the current state of knowledge and practice regarding jurisdictional issues
- Asking the Canada–Nova Scotia–Mi'kmaq Tripartite Forum, particularly its Committee on Justice, to develop clear and workable guidelines on jurisdiction
- Taking appropriate measures to ensure that, when jurisdictional issues arise in specific cases, the jurisdictional element is thoroughly investigated and resolved (insofar as possible) at the outset
- Collaborating with the Canadian Human Rights Commission in undertaking preventive/educational programming and making available an Aboriginal approach to restoring balance and harmony in complaints proceeding either under the federal or the provincial process

D. Restoring Balance and Harmony

- Adding a healing circle approach as a discrete and explicit option for resolving human rights disputes under the Commission's settlement initiatives category, and contracting with an appropriate Mi'kmaq organization, such as the Mi'kmaw Legal Support Network, to conduct healing circles on behalf of the Commission









Human Rights Commission

