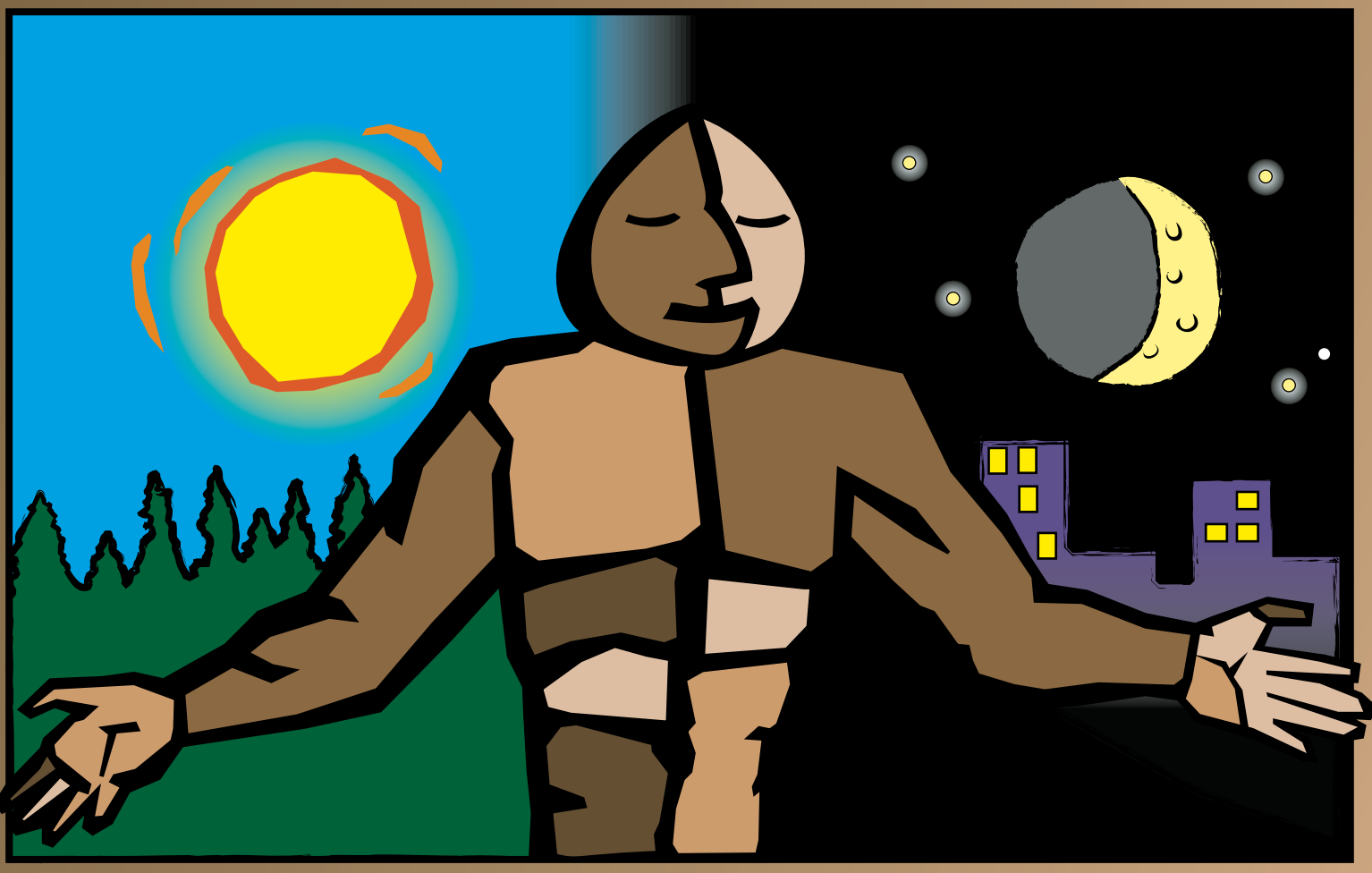
Plan for Investigation and Resolution of Aboriginal Complaints



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

A Report Prepared for the Nova Scotia Human Rights Commission
by Carla Moore, Tuma Young, and Fred Wien

A FRAMEWORK AND ACTION PLAN FOR THE INVESTIGATION AND RESOLUTION OF HUMAN RIGHTS COMPLAINTS FROM MI'KMAQ AND OTHER ABORIGINAL PEOPLE IN NOVA SCOTIA

TABLE OF CONTENTS

Preface

In undertaking an assignment to develop a framework and action plan for the investigation and resolution of human rights complaints arising from Mi'kmaq and other Aboriginal people, the most important activities are the meetings and interviews that provide us with the information we need. In this respect, we have been very fortunate to have received the co-operation and kindness of so many people within and outside the Mi'kmaq community.

Our discussions with the organizations and individuals listed in Appendix A have been very informative and insightful. In exchange for a meagre cookie and a cup of tea, many persons shared their experiences and perspectives about the Nova Scotia Human Rights Commission, and gave us their best advice about how the situation could be improved. There are few components of the framework and action plan summarized in the conclusion of this report that do not stem from these very productive conversations. It was also very helpful to speak with staff from other human rights commissions across the country, including Ottawa, and we thank them for their contribution.

We are also grateful to Mayann Francis, Michael Noonan, and the staff of the Commission for providing us with background information as well as ideas and support for this initiative.

With respect to our own division of labour, our objective was to have at least two of us, in some combination, attend each of the meetings and interviews described in Appendix A. Carla Moore is Mi'kmaq, from Membertou, and the Director of the Atlantic Aboriginal Health Research Program based at Dalhousie University. She undertook the administrative coordination of the work, especially the difficult task of making sense of everyone's schedules. Tuma Young is the first Mi'kmaq-speaking lawyer called to the Bar in Nova Scotia, and the CEO of the Eskasoni First Nation. He contributed the legal analysis on which the section in this report concerning jurisdiction is based. Fred Wien is a faculty member at the School of Social Work at Dalhousie University. He undertook the telephone interviews with other human rights commissions in Canada, and wrote the rest of this report.

Executive Summary

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

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

A FRAMEWORK AND ACTION PLAN FOR THE INVESTIGATION AND RESOLUTION OF HUMAN RIGHTS COMPLAINTS FROM MI'KMAQ AND OTHER ABORIGINAL PEOPLE IN NOVA SCOTIA

I. INTRODUCTION

The issue of racism directed against the Mi'kmaq population of Nova Scotia, and particularly in the justice system, received an extensive hearing in the 1990's through the *Commission of Inquiry into the Donald Marshall Junior Prosecution*.[1] Recent data suggest that large numbers of Mi'kmaq people continue to experience racism in their daily lives, and for many it has damaging consequences. Yet the Nova Scotia Human Rights Commission deals with only a handful of cases involving Mi'kmaq complainants at any one time. What explains this discrepancy and what steps should be taken to address it?

These questions are at the core of an investigation that we have undertaken on behalf of the Commission. This report provides both our findings and our recommendations. Our assignment arose out of an earlier, more broadly focused examination of how well the Commission was serving the Nova Scotia population and what organizational changes needed to be made.[2] That report, completed in 2001, reflected discussions with Nova Scotians from all walks of life, but included information gleaned from meetings held with Mi'kmaq people at Eskasoni, Indian Brook, Truro, and elsewhere, where a number of unresolved issues came to light. These included

- a generally low profile for the NSHRC in Mi'kmaq communities and lack of knowledge about its policies, practices, and procedures
- the need for a more visible presence, possibly through the hiring of a Mi'kmaq staff person
- confusion about the jurisdiction of the NSHRC and the Canadian Human Rights Commission
- uncertainty about the role of the NSHRC for Aboriginal people living outside Mi'kmaq communities
- a reluctance to look to an outside agency to resolve concerns within Mi'kmaq communities

As a result, as part of its Business Plan for 2005–06, the Commission resolved to establish a framework that would guide the Commission in providing services to the

1 Nova Scotia, *The Report of the Royal Commission on the Donald Marshall, Jr., Prosecution. Vol. 1 Commissioner's Report - Findings and recommendations* (Halifax: The Province of Nova Scotia, 1989).
2 Wanda Thomas Bernard, Viola Robinson, and Fred Wien, *Final Report on the Public Consultations: Organizational Review of the Nova Scotia Human Rights Commission* (Halifax: Praxis Research, 2001).

Mi'kmaq and broader Aboriginal population in Nova Scotia.[3] The Commission asked Carla Moore and Fred Wien (from Dalhousie University) and Tuma Young (a Mi'kmaq lawyer from Eskasoni) to prepare a report that would provide the outline of a framework for the investigation and resolution of complaints from Mi'kmaq and other Aboriginal people. In the words of the business plan, we were asked to undertake the following:

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

Beginning in the spring but mostly over the summer of 2006, we undertook a number of steps to achieve this objective. They included the following:

- 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
- 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

A complete list of those with whom we met is found in Appendix A.

It is not surprising that we would find a range of opinions within the Mi'kmaq community about their experience with discrimination in this province and how to deal with it. In some of our interviews, we heard about the need for fundamental changes that would need to be made before the situation could be set right—for example, the full recognition of Aboriginal and treaty rights, profound changes in the curriculum of the province's schools, and the possible development (in the context of self-determination) of Mi'kmaq legislation in the field of human rights. These are important considerations and,

3 The term "Aboriginal" is an inclusive term that includes persons of First nation, Métis, and Inuit origin. However, the Indigenous population of Nova Scotia is overwhelmingly Mi'kmaq or First Nation, and hence it is the focus of this report.

fortunately, some structures are in place that have the promise of building a new relationship between the Mi'kmaq, Nova Scotian, and Canadian populations and their respective governments.[4]

We were also advised by some Mi'kmaq leaders, however, not to raise expectations about changes that could not be realized in the short and medium term, and to keep our recommendations practical and achievable. This is what we have chosen to do.

II. THE FACE AND EXPERIENCE OF DISCRIMINATION

In some respects, Mi'kmaq people in Nova Scotia experience discrimination in a manner similar to other groups, such as African Nova Scotians, who are visibly different from the majority population. That is, they may be refused accommodation, treated differently in retail establishments, insulted at hockey games, denied employment or promotion, or confronted with any of the other indignities that some groups have found to inflict upon others.

There are also aspects of the situation that are unique to Aboriginal people in general and the Mi'kmaq in particular. One aspect, especially for those living on reserve, is the lack of clarity around who has jurisdiction in the event that a complaint is filed. Is it the Nova Scotia or the Canadian Human Rights Commission? We will explore this issue more fully in a subsequent section of this report.

Another unique feature is that Mi'kmaq people will often encounter racist reactions from the majority population in those situations where the Mi'kmaq are exercising their special, collective rights. We will give examples below. A third difference arises from the fact that the Mi'kmaq and other Aboriginal people have a culture and outlook that are markedly different from the predominantly Western cultures of the mainstream population. As a result, the procedures for investigating and resolving disputes, which have been put in place based on the culture and traditions of the majority population, may be quite foreign and unsuitable when it comes to the Mi'kmaq population.

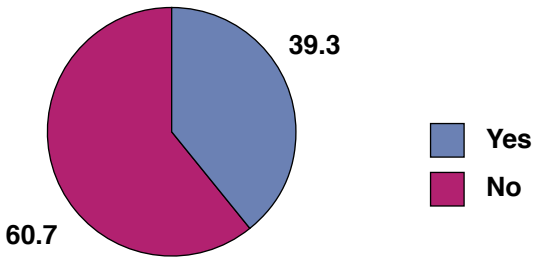
Perhaps a fourth difference, harder to pin down precisely due to the lack of comparative data, is the sheer volume or frequency of discrimination that Mi'kmaq people face in the province. Certainly at an anecdotal level, there was hardly a meeting we attended where participants did not raise personal examples of discrimination, or situations involving their friends or family members. Related to this is the pervasive sense that Mi'kmaq people do not have access to a process that will work for them. As one person noted, "All of us have been victims of discrimination but we don't pursue it because of the [human rights commission] process." A corollary to this is the suggestion that if a satisfactory process were put in place, the number of cases that would come forward from the Mi'kmaq population would be sure to increase.

4 Of particular note is the *Kwilmuk-Maw-klusuaqn* or Mi'kmaq Rights Initiative)also known as the "Made in Nova Scotia" process), which brings the three parties together to resolve Aboriginal and treaty rights issues, including issues concerning lands, resources, and governance.

Measuring the level of discrimination faced by a given population is a challenging exercise at the best of times, so it is hard to obtain good data on the subject. One approach is to take a particular area, such as accommodation, and have a team of persons on hand to respond to advertisements of vacancies. If a landlord tells a "racially visible" applicant that the apartment is rented, yet makes it available when a "white skinned" applicant comes along a few minutes later, this is deemed to be an example of racial discrimination. While this provides convincing data, it is an expensive and timeconsuming process to carry out, and typically provides information in only one area of inquiry at a time (e.g., accommodation).

Another approach is to ask persons themselves whether they have experienced discrimination in their daily lives. We are fortunate in having this type of information available for Mi'kmaq adults living on reserve during 2002–03.[5] A large representative sample was asked in a personal interview whether they had personally experienced instances of racism in the 12 months prior to the interview. The result, shown in Chart 1, was that 39 per cent of those responding said this had been the case. This is an extraordinarily high number, and reflects only incidents involving race. Other types of discrimination, based on grounds such as gender or sexual orientation would be additional. The data also does not reflect the experience of the off-reserve population.

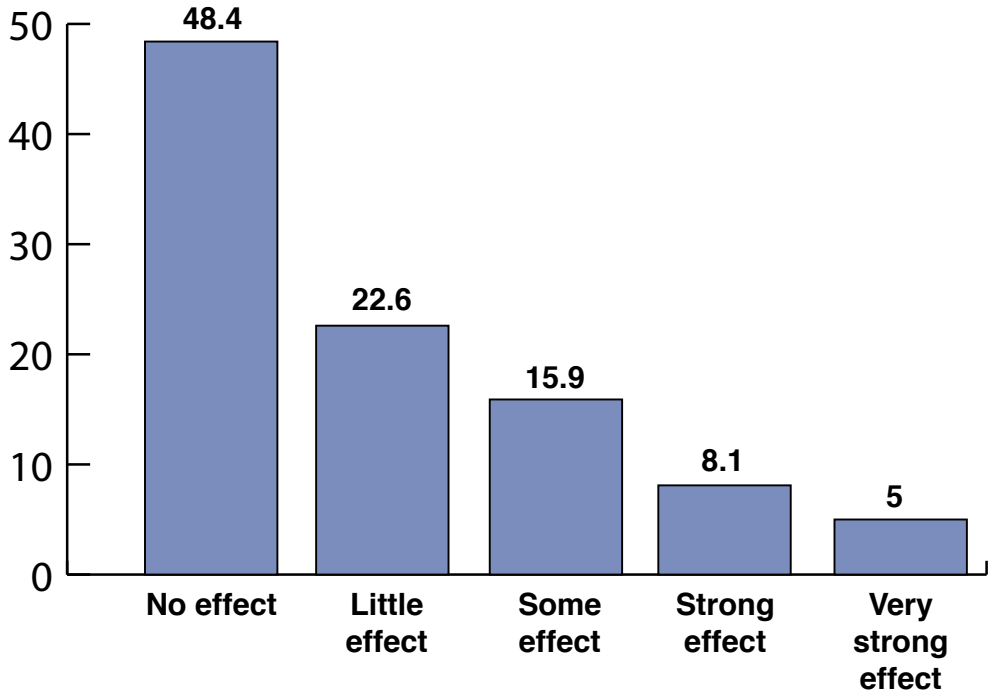
Chart 1
Personally Experienced Racism



Experiencing racism is not without consequence. A follow-up question asked those who had experienced racism whether this had any impact on their level of self-esteem. Thirteen per cent said that it had either a strong or very strong effect on their self-esteem and an additional 16 per cent said it had at least some effect (Chart 2).

5 Charlotte Loppie and Fred Wien on behalf of the Mi'kmaq Research Group, *The Health of the Nova Scotia Mi'kmaq Population: Data from 2002-03* (Sydney: The Union of Nova Scotia Indians, 2007).

Chart 2
The Impact of Racism on Self-esteem



In our meetings and interviews, we heard of many instances of perceived discrimination, of different types.

- Persons have been refused accommodation for no apparent reason other than the fact they were Mi'kmaq.

- There were occasions when derogatory remarks and insults were expressed. This occurs most frequently at sporting events such as hockey games, but other situations arise as well. For example, we were told about a Mi'kmaq person who went to a dental office to have her teeth cleaned but was subjected to repeated, strongly negative, comments about life on reserve. In another case that was well publicized in the media, a Mi'kmaq employee was repeatedly greeted by her employer in a derogatory manner. In cases where Mi'kmaq communities have had some success in economic development and have established businesses that may compete with existing businesses in surrounding communities, tensions arising from competition may be reflected in hostile and insulting terms being used.

- There was harassment and unequal treatment by retail establishments. Under this heading, we were told about security guards in stores or shopping malls following Mi'kmaq people around, or being singled out (based on appearance or speaking Mi'kmaq) to have their bags searched. We also heard about not being served in a timely fashion and, in one instance, a disabled Mi'kmaq person not being successful in having an attendant come out to fill his car at a self-serve gas station

even though assurances had been made that attendants would pump gas for physically disabled patrons.

As noted above, there are also situations where Mi'kmaq people seek to exercise collective rights that arise from treaty or Aboriginal rights, or that may be enshrined in legislation or government policy. This may lead to situations of tension and hostility, as the following examples illustrate:

- The most dramatic examples occurred in the wake of the Supreme Court decision in the case of fishing rights (the Donald Marshall, Jr., case). Here, the Department of Fisheries and Oceans implemented policies designed to help Mi'kmaq communities regain access to the fishery. In this context, confrontations occurred with established fishers at some but not all wharves in the province, and the racial tension spread in some instances to the surrounding communities and schools.

- Mi'kmaq people who have Indian status, who live on reserve, and who have goods or services delivered there are able to take advantage of an exemption from the HST. However, when they try to exercise this right, problems occur. For example, at one store an employee became visibly angry at the prospect of a Mi'kmaq person being exempt from a portion of the sales tax. In the case of one large retail chain, Mi'kmaq people who wish to claim tax exemption are required to go to the back of the store to fill in the required form, rather than having the matter dealt with routinely at the cash register. In another instance, we heard of retail establishments that refuse to deliver on reserve, or that charge an exorbitant amount for the courier service. We also were told about car dealerships that raise the price of automobiles for Mi'kmaq customers, thereby negating the benefit of the exemption.

- Another unique situation arises because, by and large, the federal government is responsible for providing health and social services on reserve even if, for other Canadians, those services are provided by provincial governments. This sometimes leads to situations where some services are not provided at all to reserve residents, or at a level inferior to that provided by the province. A human rights case settled recently before coming to a hearing involved a Mi'kmaq organization that took Indian and Northern Affairs Canada to the Canadian Human Rights Commission because of the failure of the department to provide residential services on reserve for Mi'kmaq persons with intellectual disabilities.

These kinds of cases underline the need for the development of an Aboriginal framework not only because of cultural difference but also because the historical and legal situation of Aboriginal peoples is quite different from that of other Canadians. One specific implication is that human rights commission staff members from top to bottom need to thoroughly understand this different context. A second implication is that the NSHRC has an important role to play in educating Nova Scotians about Mi'kmaq rights, and in so doing, to help prevent the occurrence of racism when those rights are affirmed and implemented. A third implication is that Mi'kmaq organizations may wish to pursue

cases where collective rights are involved, on behalf of their membership, rather than leaving it up to individuals to deal with the situation on their own.

A final observation is that instances of discrimination are also found within Mi'kmaq communities. Indeed, when we visited the communities, we were often approached by individuals who wanted more information about how to proceed with a complaint typically directed against Chief and Council. This is not surprising given the power of First Nation governments to determine much of individual and family well being in such areas as housing, employment, or income support. In these circumstances, the grounds of complaint are not typically based on race (although sometimes non-Aboriginal reserve residents or employees feel they are the subject of discrimination) but rather on other grounds such as gender, sexual orientation, family status, or disability. Some cases involve alleged discrimination on grounds that are not covered by the Nova Scotia or Canadian Human Rights acts, especially when there are strong family and political divisions.

III. PERCEPTIONS OF THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

We noted in the previous section the high proportion of Mi'kmaq adults who indicated that they had experienced instances of racism in the 12 months prior to the survey. Yet at any given time, the Commission has only five or six cases before it involving Mi'kmaq or other Aboriginal complainants. What explains the small number of cases that are actually brought to the Commission?

We explored this issue at some length in our meetings and interviews. Only rarely did anyone say that the current system is fine and does not act as a deterrent to Mi'kmaq and other Aboriginal people. At least seven types of reasons were given, and there was considerable repetition of the main points from one meeting to the next. Collectively, these factors attest to the disaffection of the Aboriginal population from the main mechanism (federal or provincial) designed to protect the Nova Scotia population from acts of discrimination. As one interviewee put it, "It is just not acceptable to be discriminated against and not have a satisfactory process to deal with it."

(1) *Lack of information about the Commission and how to proceed with a complaint*. Both the federal and provincial commissions have low visibility, especially on reserve. While this is not the case for everyone, many do not know they can make complaints, nor do they have the resources required. They are not familiar with the law (for example, what grounds are covered) nor whom to go to and how to proceed with lodging a complaint.

(2) *The length of the Commission's complaint resolution procedure*. For those who have some information about the Commission, there is a strong perception (as there is among Nova Scotians generally) that the complaint procedure is a long, drawn-out affair—similar to the time required to settle a land claim, as one person joked. Another said:

"This is one time when people don't want to be on Indian time." Part of the problem is administrative, for example, staff not returning phone calls or lengthy delays in getting back to complainants. Another part of the problem is inherent in the process itself. Given the various phases of the formal process—complaint, investigation, recommendation, and inquiry—and the opportunity for appeals, cases can take years to come to a conclusion and it is perceived that sometimes they go nowhere. Some think this is deliberate—"they hope you forget about it." A Band Council member stated that, "It becomes a long drawn-out process that makes you feel victimized in the end—more of a victim than when you went in."

Some were of the opinion that the time delay factor was especially damaging for Aboriginal people since they have experienced colonialism and have been repeatedly denied and ignored. Under these circumstances, it was suggested, people are inclined to let it slide, to give up easily, and to be reluctant to invest the time and energy required in the midst of all the other things that require their time.

(3) *Distrust of outside institutions that are not well known in the community.* There was the suggestion in our hearings that the Commission is external to the community, an outside force that is controlled by non-Aboriginal interests ("white people," "the provincial government," "large corporations"). Thus it is unlikely to listen to or rule in favour of a Mi'kmaq person who brings a discrimination case before it. It is an intimidating prospect to proceed before such an institution, reflecting a sense of hopelessness. "People aren't geared up to going to outside authorities. Bigger systems have failed us in the past."

(4) *People are uncomfortable with the human rights process as it is implemented in Nova Scotia and in other jurisdictions*. There are a number of different pieces to this concern.

- The process is seen to be adversarial in nature, and does not result in outcomes that permit people to move on. One way of putting it is to say that it does not restore good relationships and balance. Thus there is concern that if you pursue a case, there will be unresolved tensions in the workplace or community, yet you still need to live and work there. Even if the mediation alternative is used, we were told in one instance the mediator never brought the two parties together so that the victim could explain the hurt that had been caused, hear an apology, and restore a harmonious relationship.

- People are apprehensive about a police officer or lawyer interviewing them in the investigation phase.

- They feel that their integrity is being questioned by a process that requires them to prove that discrimination occurred. In one case that was described to us, the complainant felt that her whole life history came into play and that efforts were made to discredit her. Her anger at the process has still not been resolved.

- They are embarrassed by the process and the attention that is brought to them, especially when the media gets involved.

- They are discouraged by the formality of the process and feel intimidated by it. So much paperwork defeats people, and a different process is required that is geared more toward oral submissions.

- While the parties to a dispute are treated as equals in a formal sense, in practice there are usually sharp inequalities in power, financial and legal resources, education, and even in dress (suits versus jeans). Even when a settlement is reached, we were told, people walk away with bad feelings.

- There are few, if any supports for persons who pursue a discrimination case. They feel alone and vulnerable, subject to repercussions in the workplace and in the community.

- For those for whom Mi'kmaq is their first and most commonly used language, they are not able to express themselves satisfactorily in a process that assumes use of the English language. Discrimination cases are by their nature emotional, but it is difficult to communicate emotions in a foreign language. One of our respondents who has worked closely with the Mi'kmaq-speaking elders of his community informed us that if they are required to speak English, the nature of their responses changes substantially and is much more likely to involve simple "yes/no" answers.

(5) *Fear of losing their jobs or being blacklisted if they complain*. People don't believe that the protections in the *Human Rights Act*, designed to discourage retribution against a person who files a complaint, will protect them in their specific instance. They are extremely vulnerable because they typically have no alternative protective mechanisms such as a collective agreement or protections provided by a large employer to its workers. In the reserve context where getting along with Chief and Council counts for a lot since the latter control access to scarce resources such as housing, jobs, and social assistance, people are understandably nervous about pursuing a complaint against the Band.

(6) *Lack of satisfactory outcomes*. We spoke both with persons who have been involved in pursuing complaints through the **NSHRC**, and those who have observed the process. Some say they tried to lay a complaint but did not hear back from the Commission. Others have given up because of the time factor, or have run into difficulty because of the lack of clarity around jurisdiction (federal or provincial).

Even if a case comes to a conclusion, it does not necessarily have an outcome that is satisfactory to the complainant—for example, if the case for discrimination having occurred does not meet the (high) legal standard required by law. In one recent case involving the Canadian Human Rights Commission, there was a settlement between the parties before the complaint reached its final phase. While this may have been satisfactory to the complainant, the "out of court" settlement was perceived to mean that

the defendant, a federal government department, was able to escape with a much narrower settlement than might have been the case if the process had been pursued to its conclusion.

(7) *Cost factors*. Finally, those who would pursue a complaint have to take into consideration their own financial and other resources to do so. We met with one person, for example, who wished to pursue a complaint but his home base was in a rural area some distance away from Commission offices. He had no transportation and no telephone in his home, let alone the resources that would enable him to obtain legal advice. Typically those who initiate a complaint have far fewer financial and other resources than those who are the respondents.

IV. LESSONS FROM OTHER JURSIDICTIONS

As part of our background research, we wrote to each of the provincial/territorial human rights commissions as well as the Canadian Human Rights Commission. We were able to review all of their websites and arrange interviews with six of them, in addition to the discussion that occurred in the course of our presentation to the annual conference of the Canadian Association of Statutory Human Rights Agencies (Fredericton, June 2006).

Our general impression is that the issues that gave rise to our inquiry in Nova Scotia are of concern in other parts of the country as well. Secondly, the issues are broadly similar: the jurisdiction question, the low number of complaints from Aboriginal people (especially those living on reserve and in the North), the inadequacy and inappropriateness of the mainstream human rights process, the frustration with the time required to process a case, and so on.

In addition, most of the commissions have taken at least a few steps to address the special concerns and situations of Aboriginal populations in their area. It is instructive to summarize these measures.

- Commissions that have a high proportion of Aboriginal people in their population have taken steps to hire human rights officers, and sometimes investigators, who are of Aboriginal origin. They may also have senior staff and commissioners who are Aboriginal, as is the case in the Northwest Territories, for example.

- Sometimes there is a deliberate effort to make the Commission more accessible by locating one or more offices outside the urban capital. In Manitoba, for example, the Commission there has an office not only in Winnipeg but also in The Pas. In the latter case, the office is in an urban mall that is on reserve land. Staff member from that office keep to a regular travel schedule that takes them to all of the Aboriginal communities in northern Manitoba.

- Some commissions make a point of developing a user-friendly intake process, and take the time to meet with complainants several times, especially if the latter is more accustomed to an oral rather than a written process.

- In most other provinces, the Aboriginal population is less homogeneous than is the case in Nova Scotia, where almost everyone is Mi'kmaq. Thus, some commissions have taken steps to make their literature available in different Aboriginal languages, as has been the case in Ontario. In the Northwest Territories, information from the recently established Commission there is available in 11 different languages.

- Several commissions report that they try to build in an educational, preventive element in their work on the grounds that it is much better to try to prevent discrimination from occurring than to deal with it after the fact. In Manitoba, for example, 5 of 21 staff positions are filled by Aboriginal people and the preventive element is a half-time responsibility in at least one of the positions. Along these lines, the Commission has stepped outside the normal process of dealing with complaints to undertaking meetings with Aboriginal youth living in the core area of Winnipeg. One of the outcomes from this initiative is a research project dealing with racial profiling by police. It is difficult to find the resources, however. As one executive director put it, "You can't address the broader issues with a complaint process that is geared to making a few individuals happy."

- Several commissions have expressed an interest in putting in place an alternative dispute resolution process that is more in keeping with Aboriginal traditions and cultures, but few have successfully done so. The notable exception is Saskatchewan, where the Commission has the option of inviting a respected Aboriginal elder to convene a talking circle that brings the two parties together. According to a recent paper, five cases have proceeded using a talking circle, with positive results especially in resolving psychological issues pertaining to discrimination. They have been less successful in addressing issues of compensation or other policy considerations. These have on occasion been left to subsequent negotiation outside the circle.[6]

This concludes the segment of our report that provides descriptive and contextual information relevant to the subject matter of this report. We turn now to a consideration of the elements that should comprise the NSHRC's framework for investigating and resolving human rights complaints from Mi'kmaq and other Aboriginal people.

V. VISIBILITY AND STAFFING

For some time, the NSHRC has had a position designated to be filled by an Aboriginal person, and at times has been successful in doing so. However, it is vacant at the present

6 Bill Rafoss, "Incorporating Aboriginal Traditions Into Dispute Resolution," paper submitted for publication (Saskatoon: Saskatchewan Human Rights Commision, 2006).

time and the Commission has had difficulty in finding applicants who have the necessary qualifications. In our meetings and discussions, we heard quite a bit about the staffing of the Commission, and received much helpful advice on the larger framework that would, if it were put in place, make it easier to recruit Mi'kmaq or other Aboriginal staff.

We heard the argument put forward in one meeting that there should not be a designated position at all and that, instead, all human rights staff should receive appropriate training to deal with complaints from the Mi'kmaq or other Aboriginal people. But this was not what we heard from the community, among whom there appears to be a consensus that it would be helpful to have Mi'kmaq or other Aboriginal staff both as human rights officers and as investigators. In fact, the case was forcefully made that there should be at least two human rights officers, one located in Cape Breton and a second on the Nova Scotia mainland, with at least the Cape Breton person being able to speak Mi'kmaq. This was seen to be a step in the right direction, but not a sufficient response to the situation. In other words, it should be part of a larger package of changes. Otherwise, as one person put it, "You would just have a couple of Mi'kmaq people in place who would take forever" to process complaints.

The idea of having Mi'kmaq (preferably) or other Aboriginal staff rests on the grounds that members of the community would feel much more comfortable in approaching someone who is from the same cultural community who would fully understand where they are coming from, about what is, after all, an intensely personal situation. It is important, too, to have someone in place who speaks the Mi'kmaq language. We know from the Regional Health Survey that a very high proportion of Mi'kmaq adults speak Mi'kmaq—especially in Cape Breton and especially among the older population.[7] We believe that Mi'kmaq human rights officers and investigators would better understand the people and the issues, would better be able to attract the support of the community, and would know how to reach out to community members.

Why are at least two positions needed? We expect first of all, based on what we heard, that the Commission will experience an increase in the number of cases that will come forward from the Mi'kmaq and wider Aboriginal community. This follows if the barriers that presently stand in the way are removed (see Section III above), but it also would be consistent with the experience in other fields. For example, when Mi'kmaq Family and Children's Services was established in the mid-1980s, taking over responsibility for family and child welfare from provincial agencies, there was an increase in the caseload because members of the community felt more comfortable in going to their own organization. Under our proposal, Mi'kmaq staff will be more visible and accessible, and they will be given a role that includes a substantial element of preventive education, of organizing community-based workshops, and having meetings with employers including Chief and Council. However, we would not maintain that Mi'kmaq staff should only deal

7 In the First Nation Regional Longitudinal Health Survey, 44 per cent of Mi'kmaq adults claimed that Mi'kmaq was the language they used most often in everyday life, a figure that rises to 65 per cent in Cape Breton. Close to half of the adult population 35 years and over use Mi'kmaq daily. Charlotte Loppie and Fred Wien on behalf of the Mi'kmaq Research Group, *The Health of the Nova Scotia Mi'kmaq Population: Data from 2002-03* (Sydney: The Union of Nova Scotia Indians, 2007).

with Mi'kmaq or other Aboriginal complaints, nor would we maintain that all such complaints should necessarily be given only to the designated staff.

We heard repeatedly that the designated staff should have their offices located either in or within easy reach of concentrations of Mi'kmaq people, and they should develop a schedule of visits to the communities (both on and off reserve) such that residents would know when they are available. Having one or both staff located on reserve will aid considerably in the recruitment process, not only because it may make it possible for the successful applicants to work close to home but also because they would be able to take advantage of the more favourable income tax situation if they are working from a reserve base.

Within the NSHRC, the question was raised whether the advertisement to recruit designated staff should specify qualifications different from those that are normally sought. Based on what we heard, our response is that the Mi'kmaq community wants "its" human rights officers to be fully qualified with no compromise on the educational and other qualifications that are desired. However, there are some additional requirements, as noted above: being Mi'kmaq (preferably) or Aboriginal, and the ability to speak Mi'kmaq for at least one of the positions. Other considerations include being experienced—that is, knowing community and government structures and how they work; being respected, trustworthy, self-confident, and non-judgmental (accepting people as equals); and able to keep information confidential. It was noted that there should be clear conflict of interest guidelines in place to guide staff in situations where cases arise "close to home," and in fact this is an additional reason why it makes sense to appoint two persons.

As noted above, we believe it will also be beneficial for the NSHRC to have access to Mi'kmaq (preferably) or other Aboriginal persons to whom it can turn to conduct investigations of human rights complaints. These persons might be contracted as individuals, but the Commission should also explore the possibility of contracting this service from an appropriate Mi'kmaq organization such as the Mi'kmaw Legal Support Network. More information about this organization is provided in Section VII below. However it is arranged, investigators need to be fully qualified to undertake this function. Indeed, we heard criticism about the level of training provided to the Commission's investigators, and the quality of investigative reports. If this is accurate, the Commission should raise the bar in this respect.

A similar comment was raised about strengthening the qualifications of persons chosen to chair Boards of Inquiry. While many are very well qualified, it was noted that some have insufficient understanding of the barriers faced by those who come from disadvantaged socio-economic backgrounds, and have insufficient sensitivity to cultural difference and to obtaining community perspectives. It was suggested that, in the process of selecting persons to comprise the panel from which chairs are chosen, in-person interviews should be required and training provided.

Finally, we learned how vulnerable and isolated complainants feel when they decide to pursue a complaint, whether that is directed to a respondent within or outside the Mi'kmaq community. Those who advance a complaint may need an advocate or someone to support them through the process. While it will help to have Mi'kmaq or other Aboriginal staff who serve as human rights officers and investigators, this is not likely to be sufficient. Given that the NSHRC needs to stay above the fray when complaints are pursued, it does not appear that the NSHRC is itself well positioned to provide or pay for the support and advocacy that is required. This is something that individual Mi'kmaq communities should undertake to provide when one of their members pursues a valid complaint. It was suggested, for example, that a member of the Band Council could be designated as the point of contact for persons pursuing a complaint, and could mobilize support for them. Another suggestion was that the court workers program could perform this support function if staff were given appropriate training.

We conclude this section with some observations on how the visibility of the Commission and its programs can be increased within the Mi'kmaq community. In a sense, most of our recommendations, and especially the idea of engaging Mi'kmaq staff who are based in and have a regular schedule of visits to the communities, will do much to achieve the visibility objective. Additionally, it was suggested to us that the Commission should

- develop posters and pamphlets to which Mi'kmaq and other Aboriginal people can relate (as examples, we note the booklets on The Rights Path, produced by the Canadian Human Rights Commission and other organizations in Winnipeg and Saskatoon)

- produce educational videos showing examples of discrimination and how people can take action in the event of discrimination

- use Mi'kmaq and other Aboriginal role models in educational workshops at schools and in other settings

- place notices and news items in such media as community cablevision, Mi'kmaq-Maliseet Nations News, and the Aboriginal Peoples Television Network

- conduct community-based workshops to educate employers and community members

VI. THE JURISDICTION ISSUE

The "jurisdiction issue" refers to the uncertainty that exists in many instances about whether the federal or provincial human rights commission has jurisdiction in particular cases. Failure to resolve the issue is not only time consuming for both commissions, but it has also resulted in hardship for Mi'kmaq persons who have pursued a complaint and been advised that one level had jurisdiction only to be told several months later that this

was mistaken. We were also told, but were unable to confirm, that some lawyers refuse to take on human rights cases involving Aboriginal parties because of the uncertainty over jurisdiction.

At first glance, it might appear straightforward. If the respondent (employer, landlord, etc.) is located on reserve, then normally the Canadian Human Rights Commission would have jurisdiction. If off reserve and not involving businesses or agencies that are federally regulated—for example, banks or railroads—then the provincial commission would have jurisdiction. But life is not so simple.

Jurisdiction on Reserve

Can the Nova Scotia Human Rights Commission hear complaints by the L'nu (the Mi'kmaq) on reserve? To answer this question requires an examination of the *Nova Scotia Human Rights Act*, the Nova Scotia Human Rights Commission, the *Canadian Human Rights Act* and Commission, several constitutional documents of Canada, and, of course, the *Indian Act*. The short answer is that, for the most part, the Nova Scotia Human Rights Commission does not have jurisdiction to receive or hear complaints by L'nu people who live on reserve. Any complaints by L'nu, on reserve, must be lodged with the Canadian Human Rights Commission. The only time when the Nova Scotia Human Rights Commission may have jurisdiction is when the complaint is against an entity that is under provincial jurisdiction, a situation that we will describe further below.

When a complaint is received by the NSHRC, the first step it needs to undertake is to determine whether it has the necessary jurisdiction to begin the process of investigation. The quick process is to figure out whether the organization or company complained against is either a federal body, a Band Council, or a body that is substantially controlled by the Band Council. If it is not, then further inquiry needs to be done to see if the complaint matter is related to reserve lands.

To determine how this came about, it is necessary to go back to the constitutional documents of Canada, specifically, the *Constitution Act* of 1867 and the *Constitution Act* of 1982.

The *Constitution Act* of 1867 established the concept of the division of powers for the new country of Canada. Section 91 lists the subject areas in which the federal government can legislate and section 92 lists the subject areas where the provincial governments have the authority to enact legislation.

Section 91(24) of the *Constitution Act* of 1867 gives the federal government exclusive legislative authority over "Indians, and Lands reserved for the Indians." Section 91(24) is an exclusive federal authority that cannot be touched by provincial legislation. Provincial laws that were ruled invalid under this section were found to have "impaired the status and capacities of Indians," affected "Indianness," regulated Indians qua Indians, and regulated a matter that forms an integral part of the primary federal jurisdiction. The

scope of federal authority under section 91(24) is very wide and includes many areas that normally would be under provincial legislative authority.

Provincial laws that attempt to legislate over federal authority will be deemed invalid but provincial laws that do not invade the area of federal legislation may apply to Indians, unless those laws are inconsistent with federal laws. If there is an inconsistency, then the federal laws are paramount. Thus, provincial laws of general application that do not invade the area of exclusive federal jurisdiction may be incorporated into federal law through section 88 of the *Indian Act* as long as such laws are not inconsistent with the latter.

The other consideration is the theory of "Necessarily Incidental and Double Aspect" of interpreting constitutional legislative authority. Post-WW II, judicial interpretation of the constitutional division of powers has moved away from the classical divisions and has allowed for overlap or duplication of legislation between the two authorities. The current approach is to look at the "pith and substance" of the legislation to see whether it is valid or encroaches on the subject matter of the other level of government. Where provincial and federal laws overlap, the doctrine of federal paramountcy is invoked to ensure that the federal law is supreme.

In this case, the *Nova Scotia Human Rights Act*, R.S., c. 214, s.1 is a provincial statute and thus, on its surface, would seem to have general applicability over all of Nova Scotia. Yet, many aspects of the Act, if it were to apply on reserves, would intrude or invade the federal legislative authority, especially if it relates to "Indians, and Lands reserved for Indians." Thus, the *Nova Scotia Human Rights Act* would not have jurisdiction over many potential complaints that may arise from L'nu who live on reserve. One example would be raising a complaint of discrimination by Band Councils.

Band Councils are the creatures of a federal statute, the *Indian Act*. The Indian Act was enacted under section 91(24) and is considered an exclusive legislative authority for the federal government. It flows that any complaint that arises out of a relationship between the complainant and the Band Council is one that falls under the jurisdiction of the Canadian Human Rights Commission, a federal body. The same applies for corporations, bodies or entities that are substantially controlled or owned by the Band Council.

For example, if a native fisher were to complain to the NSHRC about discrimination against a fishing company, the NSHRC needs to determine first if the fishing company is one that is substantially controlled or owned by the Band Council and not a private or personal enterprise. This approach is further complicated by the fact that most fishing companies are incorporated and thus are not "Indians" as defined by the *Indian Act*, but the majority or only shareholder is the Band Council. In this example, the complainant would have to go to the CHRC rather than to the NSHRC.

What about in the case of a tenant and private landlord dispute? Here, the normal analysis would seem to suggest that the NSHRC would apply. After all, it is not the Band Council that is the landlord. However, it has been determined by the courts in Nova Scotia that the

landlord/tenant relationship is based on land and this would kick it into the realm of section 91(24), which pertains to lands reserved for Indians. Again, the complainant would have to go to the CHRC.

But the CHRC Does Not Always Apply On Reserve

There are cases where one would expect the CHRC to be responsible, but there are whole classes of cases that prevent the CHRC from taking action because of section 67 of the *Canadian Human Rights Act*. Section 67 says that, "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." Its effect is that "some actions carried out by the Government of Canada or a First Nation government (or a related agency, such as a school board) can be exempt from human rights scrutiny. Given the broad scope of the *Indian Act*, which affects many aspects of the daily lives of First Nation people, the impact of section 67 is significant. In effect, it creates a zone of law and decision making within which First Nation people have a restricted right to pursue claims of discrimination."[8] The Canadian Human Rights Commission is lobbying vigorously to have section 67 dropped.

There are also situations when the NSHRC has jurisdiction to hear complaints of discrimination on reserve. This occurs when the complaint is alleged to have been committed by an individual or organization that is not substantially a federal entity, not controlled by a federal entity such as a Band Council, and does not deal with either "Indianness" or lands reserved for Indians. A shoe-making business located on reserve might fit this definition, for example, or a corner grocery store. Entities on reserve that are provincially incorporated would fall under the jurisdiction of the provincial commission. In Saskatchewan, for example, the Court of Queen's Bench ruled that a Board of Inquiry appointed under the Saskatchewan Human Rights Code had jurisdiction to hear a complaint against the Saskatchewan Indian Gaming Authority. The latter is a non-profit association established by the Federation of Saskatchewan Indian Nations located on reserve but incorporated under provincial law to carry on Indian gaming in the province.

Sometimes, the situation is not at all clear. A case arose in Nova Scotia a few years ago involving some adult members of a reserve community who were taking a federally funded training course delivered by a (provincial) community college, where the alleged discrimination took place. Initially, the NSHRC thought it had jurisdiction and proceeded with the case, but some months later it was found that this was mistaken. By this time, several months had passed, and the complainants were forced to begin the case again under the procedures of the CHRC.

8 Canadian Human Rights Comission, *A matter of Rights:A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the* Canadian Human Rights Act (Ottawa: Canadian Human Rights Commission, October 2005).

It is also not clear how to proceed in instances where an on-reserve organization provides provincially mandated services but is substantially controlled by Indians, as when the Chiefs form the Board of the organization.

Jurisdictional issues are not unique to the human rights field, but come up in many areas affecting the health and well being of First Nation populations, especially those living on reserve. It is unlikely that they will be resolved in any definitive way until the negotiations concerning treaties and Aboriginal rights, lands, and governance are concluded. In the interim, we were made aware that it is unacceptable for the kinds of delays that have occurred in the human rights field because of confusion over jurisdiction to continue. Not only are human rights staff uncertain, but people in the communities are at a loss as well. They deserve better.

Longer term, it is possible that the Kwilmuk Maw-klusuaqn negotiation process will address and clarify this jurisdictional issue, among many others—perhaps by the Mi'kmaq developing their own human rights act—but this is unlikely to occur in the near future.

The interim steps that have been suggested to us in our meetings are the following:

- It is suggested that the Nova Scotia and Canadian commissions collaborate to develop a manual that spells out the current state of knowledge and precedents regarding jurisdiction. This would no doubt involve a legal analysis of relevant constitutional provisions, case law, and tribunal decisions. In addition, and as a second step, a manual written in easily understood language should be developed and widely distributed. We suggest that the content of the manual be reviewed by the Justice Committee of the Canada–Nova Scotia–Mi'kmaq Tripartite Forum. This work would be of benefit not only within Nova Scotia but nationally as well. As far as we are aware, this has not been undertaken anywhere in Canada.

- It has been suggested that the Canada–Nova Scotia–Mi'kmaq Tripartite Forum work with the two commissions to develop clear and workable guidelines that would, at least in Nova Scotia, result in greater clarity around the jurisdictional issue. This work would be informed by the manual in the first instance but would go beyond it and would ultimately lead to revisions to incorporate the new guidelines. This is the kind of subject that the Tripartite process was established to address—that is, to find interim solutions to issues of concern to the three parties—and we believe that the Tripartite Committee on Justice is the appropriate location for this task. [9]

9 It was agreed among the three parties several years ago that certain issues, such as lands, resources, treaty rights, and jurisdiction, would not be dealt with at the Tripartite Forum but rather would be the subject of discussion at the consultation and negotiating tables. This has not been interpreted to mean, however that practical arrangements touching on jurisdiction with respect to specific issues such as the licensing of childcare centres cannot be dealt with by the appropriate Tripartite committee. If larger issues concerning jurisdiction or collective rights arise, they can always be referred to other tables for resolution.

- It is also necessary for the NSHRC to ensure that, when jurisdictional issues arise in specific cases, the jurisdictional element is thoroughly investigated and resolved (insofar as possible) at the outset. One suggestion that we heard is that respondents be required to raise any jurisdictional considerations early in the proceedings.

Apart from working together to clarify the jurisdiction issue, there is also room for increased collaboration between the provincial and federal commissions in other areas. For example, the Mi'kmaq staff we have recommended could be mandated to undertake preventive, educational measures both on and off reserve. And the full range of dispute resolution mechanisms, including an Aboriginal approach to restoring balance and harmony (the subject of the next section), would be available to parties proceeding with a complaint either with the federal or provincial commission. This would require an unprecedented degree of collaboration but it would be a very worthwhile pilot project to undertake in Nova Scotia.

VII. AN ABORIGINAL APPROACH TO RESTORING BALANCE AND HARMONY

At present, the NSHRC offers two routes to achieving a settlement of a human rights complaint. One is the regular, formal process, which involves a number of stages beginning with the initial complaint and continuing through to an investigation and, ultimately, a hearing by a formal board of inquiry. The complaint can get derailed at several points along the line—for example, if it deals with an issue that is not covered by the *Human Rights Act,* or if it is judged not to have merit.

A second option comes under the heading of "Settlement Initiatives" and usually involves mediation, although the door is open to other ways of settling disputes as well. In its brochure, the Commission says: "If both sides agree to try a settlement initiative such as mediation, we [that is, the NSHRC] coordinate the process. We invite both parties to participate, and we provide an impartial mediator." [10]

What are the advantages to a settlement initiative? The Commission lists them as follows:

- Settlement meetings can resolve complaints more quickly than a formal investigation.

- All parties talk about the actions that led to the complaint and the issues surrounding them.

- The meeting can bring about a better understanding between the parties, even if they do not agree exactly on what happened. The process promotes respect and compromise.

10 *Introduction to Settlement Initiatives*, a brochure published by the Nova Scotia Human Rights Commission (Halifax: Nova Scotia Human Rights Commission, n.d.).

- The parties find their own solution that is fair to all sides, rather than having someone else decide it for them.

- While information from a Human Rights Board of Inquiry is made public, information exchanged during settlement initiatives is kept confidential. This allows participants of settlement initiatives to discuss their situation openly and candidly without fear of repercussions. [11]

These advantages of using a settlement initiatives approach are attractive, and address at least some of the barriers to the resolution of complaints that we described in Section III above. However, a mediation approach is not the way to go because, despite its appeal as an alternative process, it is still strongly rooted in Western cultural traditions. Indeed, the cases that we heard about involving Aboriginal complainants using the mediation route did not result in satisfactory outcomes. The Mi'kmaq participants were still alienated by the mediation process, which, in at least one case, did not even involve the parties getting together around the same table.

Mediation and conciliation are normally used as part of a last-ditch attempt to resolve disputes between labour and management, in an effort to avert a strike. Mediation is also used in other contexts, such as in the justice field (for example, in personal injury cases) and in the attempted resolution of family disputes. It continues to carry with it the idea of contending parties brought together with the objective of negotiating a settlement of the dispute through the creative involvement of the mediator. Lawyers, labour relations specialists, and sometimes social workers are the key players in the mediation process. As such, it is some distance from Aboriginal cultural traditions of restoring balance and harmony in a relationship that has been disrupted. Indeed, mediation has been described to us as a process that tends to bury the problem rather than resolving it.

When one looks to Aboriginal traditions, one does not have to go very far to find examples being applied in other fields. Approaches such as sentencing circles in the criminal justice area, family group conferencing in family and child welfare, and sharing or healing circles as part of the process of recovering from the effects of residential schools are pervasive. In Nova Scotia, for example, the Mi'kmaw Legal Support Network uses a talking circle format to assist parties to negotiate Alternative Measures Agreements. "The young person, his or her parents, the victim and his or her supports, the police and others affected by the offence meet together with a facilitator in a talking circle which resolves issues using a holistic approach." [12]

For some years now, Mi'kmaq Family and Children's Services has been experimenting with an approach to deal with child welfare cases that represents an alternative to mainstream procedures. Under the guise of family group conferencing, the agency convenes a meeting of the child, his/her parents, extended family members, elders, counsellors, perhaps a priest or the Chief of the community—whoever the client chooses

11 Ibid.

12 See the website of teh Mi'kmaw Legal Support network at www.mlsn.ca.

to invite, meeting in a location where the client is comfortable. Under the leadership of a skilled and respected facilitator, and following the ceremonial and other traditions of the talking circle approach, the meeting is convened and information about the case is shared. Participants also discuss potential solutions, but at this point family members have the option to exclude those attending who are not family members so that they can discuss how they want to resolve the issue under consideration. A plan is developed, including a timeline, who is responsible for what, what supports are needed, when a follow-up meeting will be held, and so forth. When the larger group reconvenes, the proposed resolution is presented and discussed. Ultimately, the "settlement" needs to be approved by Mi'kmaq Family and Children's Services, and sometimes by the court system, to be implemented. [13]

It is not surprising, therefore, that in many of our meetings we heard a call for introducing an Aboriginal circle kind of option into the human rights context. More specifically, there is widespread support for the idea that a healing circle approach be introduced as a discrete option under "Settlement Initiatives," standing alongside mediation as a "third way" to resolve human rights complaints in Nova Scotia. As with mediation, this would need to be an optional procedure—that is, it would only come into play if both parties agreed that this is the approach they wanted to use.

It should not be assumed that Aboriginal parties to a complaint would automatically want to take advantage of this approach. Indeed, we heard of a case in Saskatchewan where both parties were Aboriginal but one of them was adamant in insisting that the mainstream route be taken. We also heard, in a part of Nova Scotia where attachment to Mi'kmaq cultural traditions has been weakened, that people in that area would be unlikely to use a culturally based approach.

Neither should it be assumed that non-Aboriginal parties to a complaint would automatically be resistant to using a healing circle approach. They may find it would result in a more rapid settlement to a dispute, one that is less expensive than would be the case with the formal complaint process, and one that results in less negative publicity.

There is also some evidence from other jurisdictions that non-Aboriginal people gravitate over time to using Aboriginal approaches because they find them more appealing. Among the Navajo, for example, some criminal justice cases can proceed either under a formal tribal court process or through a more traditional "peacekeepers" process, and the popularity of the latter is growing even among non-Aboriginal parties to a dispute. As noted above, a healing circle approach is strongly rooted in Aboriginal culture and world views. It is holistic in orientation, includes spiritual and ceremonial elements, makes use of the circle concept, and seeks to acknowledge harm as well as achieving reconciliation and restoring balance. It is definitely not another type of mediation, and it must be implemented by Mi'kmaq or other Aboriginal people. It is not a perfect solution

13 For a more complete description, see Joan Glode and Fred Wien, "Evaluating the Family Group Conferencing Approach in a First Nations Context: Some Initial Findings," forthcoming in C. Chamberland, S. Leville, and N. Trocme (eds.), *Des enfants à protéger, des adultes à aider: deux univers a rapprocher* (Sainte-Foy: Presses de l'Université du Québec, 2007).

for all types of cases,[14] but it would go a long way toward the objective of providing a human rights complaint process that is not so foreign to Mi'kmaq and other Aboriginal participants.

Accordingly, we will be recommending that the healing circle approach be added as an explicit and discrete option for resolving human rights disputes, under the Commission's settlement initiatives category. We will further recommend that the NSHRC contract with an appropriate Mi'kmaq organization, such as the Mi'kmaw Legal Support Network, to conduct healing circles on behalf of the Commission. We note that the Mi'kmaw Legal Support Network has extensive experience with the healing circle approach, and has already applied it in one federal human rights case brought to it by the RCMP, with excellent results.

VIII. CONCLUSION

In this report, we have laid 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 of this framework and action plan 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

14 This approach also needs to deal with power imbalances, for example. It may also not be appropriate in cases where the complaintant and respondent align with strong factional divisions within a community.

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

We believe that these steps are in keeping with what we heard in our meetings and interviews. They will receive broad support from the Mi'kmaq and wider Aboriginal

community in Nova Scotia, and will be seen to be reasonable measures in the eyes of other Nova Scotians. They are also in keeping with measures being considered in other parts of the country. Together, these steps represent a realistic and achievable action plan for implementation in the short and medium term, even as more fundamental solutions are sought in the longer term.

We conclude with an observation that came from one of the persons with whom we met:

"If you can't make change with all of the input we have given you, then change will never happen at the Nova Scotia Human Rights Commission."

APPENDIX A
LIST OF MEETINGS WITH ORGANIZATIONS AND INDIVIDUALS

Bear River Council
Eskasoni Council
Membertou Council
Millbrook Council
Acadia Open Forum
Bear River Open Forum
Eskasoni Open Forum
Indian Brook Open Forum
Membertou Open Forum
Millbrook Open Forum
Native Alcohol and Drug Abuse Counselling Association (NADACA)
Healing Our Nations
Mi'kmaq Family and Children's Services
Mi'kmaw Legal Support Network
Eskasoni Mental Health and Social Work Services
Native Council of Nova Scotia
Micmac Friendship Centre
Confederacy of Mainland Mi'kmaq Board of Directors
Confederacy of Mainland Mi'kmaq Staff
Nova Scotia Native Women's Association
Atlantic Policy Congress of First Nations Chiefs
Mi'kmaw Kina'matnewey
Canadian Human Rights Commission
Tripartite Committee on Social Issues
Tripartite Committee on Justice
Nova Scotia All Chiefs Meeting
Nova Scotia Barristers' Society
Nova Scotia Chamber of Commerce
Nova Scotia Human Rights Commission, Sydney Office
Nova Scotia Human Rights Commission, Halifax Office
Kenny Prosper, Hospital Interpreter
Dan Paul, Historian
Viola Robinson, Lawyer
Dan Christmas, Membertou Band Advisor
Sr. Dorothy Moore, Education Consultant
Elizabeth Cusack, Lawyer
A person with a disability
Interviews with six Provincial/Territorial Human Rights Commissions

NOVA SCOTIA

Human Rights Commission

Printed by: Eastern Woodland Publishing