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HUMAN RIGHTS  
COMMISSION

COMMISSION  
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DROITS DE LA PERSONNE

**Submission to the  
Committee on the Elimination of Racial  
Discrimination  
By  
The Canadian Human Rights Commission**

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## 1 INTRODUCTION

The Canadian Human Rights Commission (hereinafter “the Commission”) is Canada’s national human rights institution. It has been accredited “A-status” by the International Coordinating Committee of National Human Rights Institutions (ICC), first in 1999 and again in 2006 and 2011.

The Commission was established by Parliament through the *Canadian Human Rights Act* (hereinafter “the CHRA”) in 1977. It has a broad mandate to promote and protect human rights. The purpose of the CHRA is to extend the laws of Canada to give effect to the principle that all individuals should have an opportunity equal with others to make for themselves the lives that they are able and wish to have, without being hindered or prevented from doing so by discriminatory practices which are based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted.<sup>1</sup>

The Commission promotes the core principle of equal opportunity and works to prevent discrimination in Canada by:

- promoting the development of human rights cultures;
- understanding human rights through research and policy development;
- protecting human rights through effective case and complaint management; and
- representing the public interest to advance human rights for all Canadians.<sup>2</sup>

The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The federal government regulates employers and service providers in areas such as banking and cross border transportation, as well as “Indians and lands reserved for Indians”. Provinces and territories regulate other sectors such as education and housing (excluding those on Indian reservations) and have their own human rights laws.

The Commission fully supports the broad civil, political, economic, social and cultural rights enshrined in the *Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter “the Convention”). The Commission recognizes the historic and ongoing situation of inequality in Canada with respect to many Aboriginal peoples<sup>3</sup> and racialized minorities. It has taken action on these issues by investigating complaints, issuing public statements, meeting with interested stakeholders, and intervening in the public interest in court cases, including cases before the Supreme Court of Canada.

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<sup>1</sup> *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 2, available online at: < <http://laws-lois.justice.gc.ca/eng/acts/h-6/>>.

<sup>2</sup> See Canadian Human Rights Commission 2010 Annual Report, available online at: < [http://www.chrc-ccdp.gc.ca/publications/ar\\_2010\\_ra/toc\\_10\\_tdm-eng.aspx](http://www.chrc-ccdp.gc.ca/publications/ar_2010_ra/toc_10_tdm-eng.aspx)>.

<sup>3</sup> Section 35(2) of the *Constitution Act, 1982* provides that “Aboriginal Peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

The Commission is committed to working with the Government to ensure continued progress in the protection of equality in Canada for all individuals, regardless of race, colour, or national or ethnic origin. It is in the spirit of constructive engagement that the Commission submits these comments to the Committee on the Elimination of Racial Discrimination (hereinafter “the Committee”).

Part I of this report outlines the Commission’s concerns relating to the realization of human rights for Aboriginal peoples in Canada. Part II raises other issues of concern.

## **2 ABORIGINAL PEOPLES**

The Commission would like to acknowledge and commend the federal government for endorsing, in 2010, the *United Nations Declaration on the Rights of Indigenous Peoples*. There are, however, ongoing issues of inequality for Aboriginal peoples in Canada that the Commission would like to bring to the attention of the Committee.

### **2.1 The Indian Act (Article 2(1)(c))**

Article 2 of the Convention provides broad protection against discrimination, stating:

*State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.*

To this end, Article 2(1)(c) obliges a State Party to:

*take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.*

The *Indian Act*<sup>4</sup> is a piece of federal legislation dating back to 1876 which sets out the federal government’s obligations with respect to and regulates the management of “Indians and lands reserved for Indians”.

The provisions of the *Indian Act* regulate and affect many aspects of the daily lives of Aboriginal peoples. This includes the criteria for having “Indian status”<sup>5</sup> and band membership, as well as the entitlements that flow from this status such as housing on reserves and the guardianship of children.

Many Aboriginal organizations in Canada have called on the government to amend or modernize various provisions in the *Indian Act* which they feel are discriminatory<sup>6</sup>, and

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<sup>4</sup> R.S.C., 1985, c. I-5., available online at: < <http://laws-lois.justice.gc.ca/eng/acts/I-5/>>

<sup>5</sup>The *Indian Act* sets out the requirements for determining who is an “Indian” for the purposes of the *Indian Act*.

<sup>6</sup> See, for example: *The Canadian Human Rights Act and Aboriginal Women, Report of the Native Women’s Association of Canada on the Readiness of First Nations Communities to Comply with the CHRA*,

several complaints relating to its operation have been filed with the Commission. As a result, the Commission is in the process of conducting a human rights analysis of the *Indian Act*, which it intends to table in Parliament later this year.

Regardless of the outcome of this report, the Commission urges the Government of Canada to continue to improve the relationship between it and Aboriginal peoples and to ensure that this relationship is built on fundamental human rights principles: equality and freedom from discrimination, an adequate standard of living, and self-determination.

## **2.2 Access to Human Rights Protection (Articles 2(1)(c), 6)**

As stated above, Article 2(1)(c) of the Convention obliges State Parties to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination.

Further, Article 6 states that:

*State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to the Convention, as well as the right to seek from such Tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*

For more than 30 years, section 67 of the CHRA prevented individuals from filing complaints of discrimination resulting from the application of the *Indian Act*.<sup>7</sup> The Commission called for the repeal of section 67 in two reports to Parliament – one in 2005 and the other in 2008 – arguing that the exclusion of people governed by the *Indian Act* from human rights law was discriminatory and contrary to democratic principles.<sup>8</sup> Section 67 was finally repealed in 2008 and, as of June 2011, human rights complaints can now be filed against both the federal government and First Nations community governments in their capacity as employers and service providers operating under the *Indian Act*.

The Commission commends the federal government for taking the necessary step to correct this historic injustice. However, two concurrent issues could limit the practical access of Aboriginal peoples in Canada to the human rights protection of the CHRA: 1)

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available at < <http://www.aadnc-aandc.gc.ca/eng/1314987507277>>; and *Report of the Congress of Aboriginal Peoples on the Readiness of First Nations to comply with the CHRA*, available at < <http://www.aadnc-aandc.gc.ca/eng/1314987270226>>.

<sup>7</sup> s.67 of the *Canadian Human Rights Act* stated: “Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to the Act”. For more information, see:

<[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills\\_ls.asp?ls=c21&Parl=39&Ses=2](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?ls=c21&Parl=39&Ses=2)>.

<sup>8</sup> *A Matter of Rights*, Special Report of the Canadian Human Rights Commission on the Repeal of section 67, October 2005, available online at: <[http://www.chrc-ccdp.ca/proactive\\_initiatives/section\\_67/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/proactive_initiatives/section_67/toc_tdm-eng.aspx)>. See also *Still 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*, January 2008, available online at: < [http://www.chrc-ccdp.ca/proactive\\_initiatives/smr\\_tqd/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/proactive_initiatives/smr_tqd/toc_tdm-eng.aspx)>.

attempts to narrow the application of the CHRA and 2) the lack of resources within Aboriginal communities to facilitate compliance with the CHRA.

### **2.3 Attempts to Narrow the Application of the CHRA (Article 6)**

As mentioned previously, Article 6 requires State Parties to ensure that all individuals have access to seek an effective remedy from a competent national tribunal or other State institution.

Section 5 of the CHRA gives the Commission the mandate to address allegations of discrimination based on race, colour, and national or ethnic origin in the provision of services, including services provided by the Government. The historic disadvantage suffered by Aboriginal communities has created an important reliance on essential services funded by the federal government. These include access to potable water, education, housing, and child welfare services.

Human rights complaints have been filed against the Government of Canada alleging discrimination in the provision of services to these communities. In response, the Government is arguing to narrow the application of the CHRA by taking the position that the provision of funding to First Nations is not a 'service' under section 5 of the CHRA. This issue is currently being argued before the courts in Canada, with the Commission representing the public interest.<sup>9</sup>

It was hoped that the repeal of section 67 would be a catalyst for positive change for Aboriginal peoples, many of whom are living in conditions described as "unacceptable" in a country as rich as Canada.<sup>10</sup> However, the positive effects of the repeal could be nullified if the Government is successful in narrowing the application of the CHRA.

The Commission is concerned that, if the Government of Canada is successful in these court actions, Aboriginal peoples in Canada will once again be denied the human rights protection offered by the CHRA, thereby defeating Parliament's intent when it repealed section 67.

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<sup>9</sup> *First Nations Child and Welfare Caring Society of Canada and Assembly of First Nations and Chiefs of Ontario and Amnesty International v. Attorney General*, (2011) 4 CHRT. Available online at: <<http://chrt-tcdp.gc.ca/search/files/2011%20chrt%204.pdf>>.

<sup>10</sup> Canada, Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations and Family Services Program-Indian and Northern Affairs, May 2008, (Ottawa: Minister of Public Works and Government Services Canada), Chapter 4, available online at: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200805\\_e\\_30714.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_e_30714.html)>. See also, 2011 report of the Auditor General, Chapter 4, available online at: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201106\\_e\\_35354.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_e_35354.html)>.

## **2.4 Resources for Aboriginal Communities to Comply with the CHRA (Article 2(2))**

As a result of the repeal of section 67 of the CHRA, Aboriginal governments operating under the auspices of the *Indian Act* have new obligations and responsibilities with respect to ensuring human rights. These include the responsibility to raise awareness about human rights and the CHRA, and modifying policies and infrastructure, for example, by making facilities accessible to persons with disabilities.

Individuals can also now file complaints of discrimination under the CHRA against First Nations governments relating to these governments' actions as employers, or in the provision of services on reserve. These governments must, therefore, enhance their capacity to investigate and resolve human rights complaints.

The human and financial resources needed by many Aboriginal communities to fulfill these responsibilities and obligations will be substantial. As noted above, the historical disadvantage perpetuated against these communities has left them largely dependent upon funding provided by the federal government. Therefore, the ability of Aboriginal communities to respond to these new realities will be limited if there is no concurrent infusion of resources into these communities on the part of the Government of Canada.

The Commission considers it imperative that Aboriginal communities have adequate resources to protect human rights in their communities.

## **2.5 First Nations Funding On-Reserve (Article 2(2), 5(e))**

Under Article 2(2) of the Convention:

*States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them full and equal enjoyment of human rights and fundamental freedoms.*

Further, under Article 5(e), State Parties are obliged to eliminate racial discrimination in the enjoyment of economic, social and cultural rights, including the right to housing, education, public health, medical care and social services.

There is a persistent and growing gap in the well-being of First Nations<sup>11</sup> people as compared to others in Canada. As noted by the Auditor General of Canada in her June

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<sup>11</sup> The present section deals with the situation of First Nations peoples living on-reserve. This is not meant to diminish the status of or challenges faced by other Aboriginal peoples and communities in Canada, including those of the Métis and Inuit peoples.

2011 June Status Report, “[i]t is clear that living conditions are poorer on First Nations reserves than elsewhere in Canada.”<sup>12</sup>

The reasons why improvements in First Nation well-being still lag so far behind other Canadian communities are complex. The Auditor General has identified several impediments to progress, including lack of an appropriate funding structure.<sup>13</sup>

The Government of Canada is involved in the design, funding and delivery of services on-reserve that are delivered by the provinces off-reserve, including education and social development programs, housing, and drinking water. The federal government uses contribution agreements to fund the delivery of these services. Through these agreements, First Nations receive a certain level of funding to provide various programs and services in their communities.

Since 1996, funding for on-reserve services has been capped at 2% annually. The population on-reserve, however, has been growing at a much faster rate. As noted by the Auditor General of Canada,

*[f]unding for First Nations programs has increased in recent years, but not at a rate equal to population growth. Indian and Northern Affairs Canada’s funding increased by only 1.6 percent, excluding inflation, in the five years from 1999 to 2004 while Canada’s Status Indian population, according to the department, increased by 11.2 percent.<sup>14</sup>*

First Nations often cite lack of funding as the main reason for inadequate services on reserve, arguing that government funding has failed to keep pace with the needs of their communities.

On December 20, 2011, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, issued a statement expressing his “deep concern about the dire social and economic condition of the Attawapiskat First Nation, which exemplifies the conditions of many aboriginal communities in the country.”<sup>15</sup> The statement noted reports of systemic underfunding of First Nations in Canada and indicated that it does not appear that the Government is responding adequately to requests for assistance.

The Commission echoes the concerns expressed by the Special Rapporteur and has highlighted below specific funding issues relating to access to potable drinking water, housing, education and child welfare services.

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<sup>12</sup> 2011 June Status Report of the Auditor General of Canada, Chapter 4: Programs for First Nations on Reserve, available at: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201106\\_04\\_e\\_35372.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html)>.

<sup>13</sup> *ibid*

<sup>14</sup> 2006 May Status Report of the Auditor General of Canada, Chapter 5: Management of Programs for First Nations, available at <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200605\\_05\\_e\\_14962.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200605_05_e_14962.html)>.

<sup>15</sup> Available online at <

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11743&LangID=E>>.



## Water

Since 2006, the Government of Canada reports that it has spent over \$2.5 billion on improving water quality and ensuring safe waste water disposal for First Nations communities.<sup>16</sup> Government reports show that progress is being made and the Commission commends this progress.

Nevertheless, in her 2011 June Status Report, the Auditor General noted that more than half of drinking water systems on-reserve still pose a significant risk to community members and that major problems remain unresolved with regard to regulation of water quality.<sup>17</sup> She concluded that “First Nations reserves may still be years away from having drinking water protection comparable to what exists off-reserve in Canada.”<sup>18</sup>

Access to adequate sanitation and clean water is essential in order to achieve full enjoyment of the right to life and all other human rights. Further attention must therefore be directed to this important human rights issue.

## Housing

Article 5(e)(iii) of the Convention notes the particular importance of ensuring that all individuals are assured equal access to housing.

The Auditor General has noted persistent problems relating to housing on First Nations reserves over a number of years. In 2003, several concerns were noted, including a substantial housing shortage on-reserve, significant mould contamination in a large proportion of houses, and little assurance that houses on-reserve meet the National Building Code.<sup>19</sup> In 2006, the Auditor General reported that, while progress had been made in addressing some of these issues, unsatisfactory progress had been made in addressing the problem of mould which continues to present a significant health risk.<sup>20</sup>

The Auditor General’s 2011 June Status Report notes that federal government housing initiatives are not keeping pace with the needs on First Nations reserves, and that actions taken to address identified mould issues have yielded unsatisfactory results.<sup>21</sup>

In his December 2011 statement, the UN Special Rapporteur noted that many of the residents of the Attawapiskat First Nation live in unheated shacks or trailers, with no

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<sup>16</sup> House of Commons Debates (Hansard), November 17, 2011 at page 3187, available online at <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5253977>>.

<sup>17</sup> *supra* note 11

<sup>18</sup> *ibid*

<sup>19</sup> 2003 April Report of the Auditor General of Canada, Chapter 6: Federal Government Support to First Nations – Housing on Reserves, available at <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200304\\_06\\_e\\_12912.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200304_06_e_12912.html)>.

<sup>20</sup> *supra* note 14

<sup>21</sup> *supra* note 12

running water.<sup>22</sup> He further noted that the problem is particularly serious as winter approaches in the remote northern area where Attawapiskat is located, where temperatures can reach as low as -28 degrees Celcius.<sup>23</sup>

The adequacy of housing on reserves can affect many aspects of life for Aboriginal peoples including health, education, and socio-economic outcomes. Accordingly, further attention should be dedicated to this important issue.

### Education

Article 5(e)(v) of the Convention notes the particular importance of ensuring that all individuals are assured equal access to education and training.

In Canada, education generally falls within provincial jurisdiction. However, the federal government funds education on First Nations reserves by providing funding to band councils and other First Nations education authorities for education from kindergarten through to adult learners and inclusive of post-secondary education.<sup>24</sup>

The disparities in funding for education have been documented in a number of reports. With respect to primary and secondary school education on-reserve, an Aboriginal and Northern Affairs Internal Audit report concluded that:

*INAC's figures show a level of funding for instructional services per student that ranges between \$5,500 and \$7,500. The Pan-Canadian Education Indicators Project (PCEIP 2003) shows a range of per student expenditures from \$6,800 to \$8,400 across Canada.*<sup>25</sup>

Concerning post-secondary education, in June 2011 the Auditor General reported that:

*Although the Department [now Aboriginal Affairs and Northern Development Canada] has studied various delivery options for post-secondary programs, we found that it has not specifically reviewed post-secondary funding mechanisms. As in 2004, (the department) still allocates funds by First Nations community without regard to the number of eligible students; moreover, band governments have the flexibility to allocate the funds outside the program. Again, as in 2004, we found that the current funding mechanism and delivery model used to fund post-secondary education does not ensure that eligible students have equitable access to post-secondary education funding.*<sup>26</sup>

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<sup>22</sup> *supra* note 13

<sup>23</sup> *ibid*

<sup>24</sup> For more information see: Caledon Institute of Social Policy, *Improving Education on Reserves: A First Nations Education Authority Act*, Michael Mendelson, July 2008, p. 4., available online at: <<http://www.caledoninst.org/Publications/PDF/684ENG.pdf>>.

<sup>25</sup> *ibid* at 6

<sup>26</sup> *supra* note 12

While there has been a move towards First Nations control over education in the past few years and an increase in funding, it appears that adequate funding is still a critical issue.

### **First Nations Child Welfare Organizations**

Article 5(e)(iv) of the Convention notes the particular importance of ensuring that all individuals are assured equal access to social services.

In much the same way as education, child welfare services are generally funded by the provinces; however, on-reserve, these programs are funded by the federal government.

The First Nations Child and Family Caring Society of Canada (FNCFCFS), Assembly of First Nations (AFN), and others filed a complaint under the CHRA against the Government. They allege that child welfare service organizations on-reserve are underfunded as compared to organizations serving non-First Nations children, and that such underfunding constitutes discriminatory treatment in the provision of a service on the basis of race. As a result, First Nations child welfare organizations cannot provide the programs needed to assist First Nations families in crisis. This often translates into higher rates of foster care and lower prospects of surviving a troubled childhood.<sup>27</sup>

The AFN, the FNCFCFS, and the Commission have requested that the Federal Court of Canada review a Canadian Human Rights Tribunal decision on this issue. A hearing is expected to take place in 2012.

The Commission feels that this is an issue of concern, as various reports have documented the challenges that are faced by children after leaving care when the care itself has not been of high standard, including substance abuse, homelessness and poverty. This impacts on the Aboriginal children involved in such programs, on Aboriginal communities, and on Canadian society as a whole.

## **2.6 Socioeconomic Outcomes for Aboriginal Peoples Living Off-Reserve (Article 5(e))**

As stated above, under Article 5(e), State Parties are obliged to eliminate racial discrimination in the enjoyment of economic, social and cultural rights, including the right to housing, education, public health, medical care and social services.

Aboriginal peoples living off-reserve continue to be amongst some of the poorest in Canada, exhibiting far greater rates of poverty, lower rates of educational attainment, and overall poorer health-related outcomes when compared to the non-Aboriginal population.

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<sup>27</sup> For more information see: Trocmé, N., MacLaurin, B., Fallon, B., Knoke, D., Pitman, L., & McCormack, M. (2006). *Mesmimik Wasatek – Catching a drop of light: Understanding the overrepresentation of First Nations children in Canada's child welfare system: An analysis of the Canadian incidence study of reported child abuse and neglect (CIS-2003)*. Toronto: Centre of Excellence for Child Welfare. See also: *A Comparison of First Nations and non-Aboriginal Children Investigated for Maltreatment in Canada at: <<http://www.fncfcs.com/sites/default/files/docs/First-Nations-Fact-Sheet-Revised-Jan2011.pdf>>*.

In 2006, the median income for Aboriginal peoples<sup>28</sup> was 30% lower than for Canadians generally.<sup>29</sup> This income gap of \$8135 in 2006 was smaller than the gap of \$9045 that was found in 1996, indicating that some progress is being made toward income parity.<sup>30</sup> However, if this slow rate of decline in the income gap continues, it will take 63 years for the incomes of the Aboriginal population to catch up to those of the rest of the Canadian population.<sup>31</sup>

Despite increased educational attainment, generally, for Aboriginal men and women, the disparity between the Aboriginal population and the non-Aboriginal population is growing, not declining. Thirty-two percent of the Aboriginal population did not finish high school, as compared with 15% of the remainder of the Canadian population.<sup>32</sup> As concerns post-secondary education, 8% of Aboriginal peoples have a bachelor's degree or higher; this figure is 22% for the remainder of the Canadian population.<sup>33</sup>

The health-related outcomes for Aboriginal peoples living off-reserve continue to be of concern as well. In a 2000 / 2001 study of community health, 23.1% of Aboriginal people living off-reserve rated their overall health as fair to poor, a level 1.9 times higher than for the non-Aboriginal population.<sup>34</sup> Further, 60.1% reported a chronic health condition, compared to 49.6% of the non-Aboriginal population, with a prevalence of diabetes that is double that of the non-Aboriginal population.<sup>35</sup>

In terms of mental health outcomes amongst the off-reserve Aboriginal population, this study found that 13.2% reported experiencing a major depressive episode, a rate 1.8 times higher than that of the non-Aboriginal population.<sup>36</sup> A more recent study found that the off-reserve Aboriginal population exhibits a rate of high psychological distress that is 42% higher than for Caucasian Canadians and that this population is 2 to 5 times more likely to develop a mental health disorder or substance abuse issue.<sup>37</sup>

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<sup>28</sup> In the study cited, "Aboriginal peoples" was defined as those self-identifying as having Aboriginal identity, including First Nations, Inuit, Métis and others. See Wilson, D. & MacDonald, D. (2010), *The Income Gap Between Aboriginal Peoples and the Rest of Canada*, Canadian Centre for Policy Alternatives, available online at <[www.growinggap.ca](http://www.growinggap.ca)>.

<sup>29</sup> Wilson, D. & MacDonald, D. (2010), *The Income Gap Between Aboriginal Peoples and the Rest of Canada*, Canadian Centre for Policy Alternatives, at 3.

<sup>30</sup> *ibid*, at 8.

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*, at 4; see also "Diabetes in Canada: Facts and figures from a public health perspective", available online at <<http://www.phac-aspc.gc.ca/cd-mc/publications/diabetes-diabete/facts-figures-faits-chiffres-2011/highlights-saillants-eng.php#chp6>>.

<sup>33</sup> *ibid*

<sup>34</sup> Tjepkema, M. (2002), *The Health of the Off-reserve Aboriginal Population*, Supplement to Health Reports (13), at 3.

<sup>35</sup> *ibid*

<sup>36</sup> *ibid*, at 6.

<sup>37</sup> Wright, S. (2011), The Social Distribution of Distress and Well-Being in the Canadian Aboriginal Population Living Off-Reserve, *The International Indigenous Policy Journal*, 2(1), at 3.

The Commission urges governments to examine more closely the causes of this persistent inequality and to direct their immediate and sustained attention to designing policies and programs to narrow these gaps.

## **2.7 Overrepresentation of Aboriginal Offenders in the Federal Justice System (Article 5(a))**

Article 5 of the Convention states:

*States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*

*(a) The right to equal treatment before the tribunals and all other organs administering justice...*

Canada's Correctional Investigator noted that, in 2007-2008, 17.3% of the total federal offender population was Aboriginal yet only 4% of the Canadian population identifies as Aboriginal.<sup>38</sup> For Aboriginal women, this over-representation is even more striking at 33.1% of women in federal penitentiaries.<sup>39</sup>

The Supreme Court of Canada has noted that “[t]he drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.”<sup>40</sup> The Court also found that all reasonable and available sanctions other than imprisonment must be considered for all offenders, with particular attention given to the circumstances of Aboriginal offenders.

There are many factors that contribute to the overrepresentation of Aboriginal peoples in federal prisons, including poverty, inter-generational abuse and residential schools, low level of education, substandard housing and health care, and a higher incidence of health issues, such as mental health issues.<sup>41</sup> Canada's Correctional Investigator has also documented systemic barriers that continue to exist in federal corrections, including Aboriginal offenders being released later in their sentence, being classified as higher risk, and being more likely to have their conditional release revoked than non-Aboriginal offenders.<sup>42</sup>

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<sup>38</sup> *Good Intentions, Disappointing results: A Progress Report on Federal Aboriginal Corrections*, Office of the Correctional Investigator, at page 6, available at <<http://www.oci-bec.gc.ca/rpt/pdf/oth-aut/oth-aut20091113-eng.pdf>>.

<sup>39</sup> *ibid*

<sup>40</sup> *R v. Gladue*, [1999] 1 S.C.R. 688, at ¶64.

<sup>41</sup> *ibid* at ¶65; *supra* note 24.

<sup>42</sup> *supra* note 24, at 15-17

Many observers have argued that proposed federal sentencing reforms, such as mandatory minimum sentences, will exacerbate an already troubling human rights situation rather than alleviating it.<sup>43</sup> The Commission shares these concerns and will monitor changes to the human rights environment as these reforms are implemented.

### **3 OTHER ISSUES OF CONCERN**

#### **3.1 Increasing Proportion of Federally-Sentenced African Canadian Offenders (Article 5(a))**

As noted above, Article 5(a) of the Convention obliges State Parties to eliminate racial discrimination in the administration of justice.

Canada's Correctional Investigator has recently noted an increase in the proportion of federally-sentenced inmates who self-identify as African Canadian. In the past 10 years, this proportion has increased from 6% in 2000-2001 to 9% in 2010-2011.<sup>44</sup> The most recent census data available suggests that Canadians of African descent represent 2.5% of the general population. The Correctional Investigator intends to investigate further why this proportion is increasing.

The Commission shares the Correctional Investigator's concern that these statistics may point to a variety of social issues including but not limited to race, educational attainment, and possibly a systemic human rights issue in the administration of justice in Canada.

#### **3.2 National Security and Human Rights ((Articles 5(a), (d)(i), (d)(ii))**

Article 5(a) of the Convention obliges State Parties to eliminate racial discrimination in the administration of justice.

Further, Articles 5(d)(i) and (ii) oblige State Parties to ensure the equality of all individuals in the exercise of their rights relating to freedom of movement and the right to leave any country, including one's own, and the right to return to one's country.

In November 2011, the Commission tabled a Special Report to Parliament, *Human Rights Accountability in National Security Practices*.<sup>45</sup> The report is a distillation of a decade of research by the Commission.<sup>46</sup> The research shows that, despite evidence of good faith

<sup>43</sup> On the 20 September 2011, the Minister of Justice introduced Bill C-10, *Safe Streets and Communities Act*. The Bill has been passed by Parliament and is now before the Senate. For more information see: <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Mode=1&billId=5120829&Language=E>

<sup>44</sup> From information provided by the Correctional Investigator of Canada based on CSC Corporate Reporting System, as of 2011-10-02.

<sup>45</sup> Available at <<http://www.chrc-ccdp.gc.ca/pdf/chrc-specialreport-28112011.pdf>>.

<sup>46</sup> *National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post-9/11 Environment*, available at <[http://www.chrc-ccdp.gc.ca/pdf/ns\\_sn\\_en.pdf](http://www.chrc-ccdp.gc.ca/pdf/ns_sn_en.pdf)> ; *Human Rights Issues in*

on the part of national security organizations in Canada, few such organizations can demonstrate whether human rights practices are followed in their day-to-day activities. The Commission has therefore recommended that Parliament pass legislation requiring national security organizations to publish tracking data showing how they meet their obligations to respect human rights.

The Commission has collaborated with national security organizations on a toolkit for tracking human rights performance and preventing discrimination. It has also developed and published a *Human Rights Impact Assessment for Security Measures* as a companion piece to the Special Report.<sup>47</sup>

It is the sincere hope of the Commission that Parliament will pass the required legislation and that national security organizations will work with the Commission to implement protective mechanisms to safeguard human rights.

### **3.3 Incorporating the Convention into Canada's Domestic Law**

Although Canada has ratified the Convention, it has never introduced legislation incorporating it into its laws.

The Senate Standing Committee on Human Rights has noted that:

*Canada frequently points to the Charter of Rights and the various federal and provincial human rights statutes as fulfilling its obligations for domestic implementation of...international human rights instruments. However, these do not fully discharge Canada's international obligations in the area of human rights. Though similar, and in some respects superior, to the rights recognized in the international treaties to which Canada is a party, the Charter of Rights and its other domestic human rights legislation do not cover all its international human rights obligations.*<sup>48</sup>

In order for the Convention to have full legal effect in domestic law, Canada must, as a “dualist” state, directly incorporate the Convention by introducing enabling legislation; otherwise it will be of no legal effect in Canada.<sup>49</sup>

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*National Security: An Inventory of Agency Considerations*, available at <[http://www.chrc-ccdp.gc.ca/pdf/hrins\\_en.pdf](http://www.chrc-ccdp.gc.ca/pdf/hrins_en.pdf)>; *Effectiveness of Profiling from a National Security Perspective*, available at <[http://www.chrc-ccdp.gc.ca/pdf/profilage\\_eng.pdf](http://www.chrc-ccdp.gc.ca/pdf/profilage_eng.pdf)>.

<sup>47</sup> Available at <[http://www.chrc-ccdp.gc.ca/pdf/security\\_guide\\_secutrite-eng.pdf](http://www.chrc-ccdp.gc.ca/pdf/security_guide_secutrite-eng.pdf)>.

<sup>48</sup> *Promises to keep, Implementing Canada's Human Rights Obligations*, available online at: <<http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm>>.

<sup>49</sup> *ibid*

## 4 CONCLUSION

The Commission has focused much of this report on the inequities and discrimination faced by Aboriginal peoples in Canada, in particular the systemic barriers caused by the provisions of the *Indian Act*, inadequate government funding of services on reserves, the poorer socioeconomic status, educational attainment and health outcomes of Aboriginal peoples off-reserve, and the overrepresentation of Aboriginal offenders in federal penitentiaries. Report after report has documented the same concerns showing that a disproportionate number of Aboriginal people still do not benefit from the most basic services that other Canadians take for granted. Despite the numerous calls for action both within Canada and abroad, the situation for many Aboriginal peoples remains unsatisfactory.