



**Prepared for the Standing Committee on Justice Policy
Committee Hearing Dates: August 8-10, 2006**

***The Proposed “Direct Access” Model
Equals Less Access to Human Rights for the
Most Marginalized and Disadvantaged in
Ontario!***

Joint Submission by the

Native Women’s Association of Canada (NWAC)

And

Ontario Native Women’s Association (ONWA)

**Native Women’s Association of
Canada (NWAC)**

Six Nations of the Grand River
PO Box 331 Ohsweken, ON
NOA 1M0
Tel: 519-445-0900

1292 Wellington St.W
Ottawa, ON, K1Y 3A9
Tel: 613-722-3033

**Ontario Native Women’s Association
of Canada (ONWA)**

212 East Mile St.
Thunder Bay, ON
NOA 1M0
Tel: 519-445-0900

Introduction

The Native Women's Association of Canada (NWAC) was founded as a non-profit organization in 1974 on the collective goal to enhance, promote and foster the social, economic, cultural and political well-being of First Nations and Métis women within First Nations and the broader Canadian society. NWAC is the only national Aboriginal women's group and is an aggregate of 13 Aboriginal women's organizations from across Canada. The Ontario Native Women's Association (ONWA) is an independent Provincial/Territorial Member Association and sister organization of NWAC and we jointly make the following submission.

Over the past thirty years, the equality interests of First Nations and Aboriginal women have maintained a prominent place in policy discussions about the *Indian Act* and in discussions generally about the human rights of Aboriginal women in Canada. This has primarily been the result of efforts by individual First Nations women and organizations such as NWAC and ONWA to keep these issues in the public eye and on the federal and provincial policy agendas. One high priority area for our respective organizations has been the promotion and protection of the human rights of Aboriginal women in Canada.

We are mandated to address the needs and priorities of Aboriginal women, who are perhaps the most marginalized and disadvantaged population having the highest incidence of poverty in Canada – more than twice the rate of non-Aboriginal women. It is our belief, that Aboriginal women are thus uniquely vulnerable to all of the barriers in accessing housing, employment, education, health and other services that are experienced by other low-income people, while simultaneously confronting overt and systemic discrimination particular to our race and our gender.

One of the goals of NWAC and ONWA is to empower Aboriginal women by engaging in international, national and regional advocacy measures aimed at legislative and policy reforms that promote equal opportunity for Aboriginal women, such as access to programs and service delivery. As well, NWAC is committed to ensuring that the unique needs of Aboriginal women is reflected in any and all legislative and policy directives that have the potential to have a significant impact on the lives of Aboriginal women and children.

CONCERNS REGARDING BILL 107:

We would like to thank the Standing Committee on Justice Policy for giving NWAC and ONWA the opportunity to express our concerns and make recommendation that could strengthen Bill 107.

It is our belief that while often viewed as champions of human rights in international fora, Canada has failed to ensure basic, fundamental standards of human rights are applied to Aboriginal peoples, particularly Aboriginal women and children, in Canada. This is true in relation to many aspects of social, economic, cultural, political and civil rights. Several United Nations bodies have been critical of Canada's human rights record and of its treatment of Aboriginal peoples. Specifically in relation to Aboriginal women, Canada has been criticized by domestic and international bodies for failing to protect the equality rights of Aboriginal women.

The provincial governments have a significant role to play in ensuring that Canada observes its international obligations and respects and promotes the human rights of all citizens. Substantive law reforms¹ and reforms to the current human rights system are fundamental for the protection from discrimination and advancement of human rights of Aboriginal women. In this sense, we welcome the commitment by this government to address reforms to the current human rights system including amendments to the Ontario Human Rights Code and human rights mechanisms.

However, we are not convinced that these proposed changes under Bill 107 will result in the kinds of changes that will benefit Aboriginal women. We support the positions taken by other equality seeking groups such as AODA and similarly take the position that the anticipated changes may result in weakening an already struggling human rights system. We anticipate that the proposed changes to the current system may weaken Ontario's ability to maintain its reputation as a leader in advancing the human rights of its citizens.

The proposed sweeping changes under Bill 107 to the Ontario Human Rights Code and changes anticipated by the "direct access" model will have significant impacts on the ability on those most marginalized and disadvantaged members of society to have access to and redress from overt and systemic discrimination, in the province of Ontario. While the proposed changes have been hailed as allowing individuals greater access to human rights tribunals we believe that the social reality of Aboriginal women and other marginalized groups will result in those having greatest need for protection from discrimination even more vulnerable to human rights abuses. Access to a tribunal can not

¹ Substantive law reforms could include aligning the current human rights with the evolution of understanding of substantive equality and with human rights standards contained within international conventions under the UN including: *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *International Convention on the Elimination of All Forms of Racial Discrimination*, *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and to which Canada is a signatory to. Although this is a significant area of reform we feel much more consultation is required on the subject and therefore we will limit the discussion in this submission to the direct impacts of the proposed Bill 107 on the human rights system.

and should not be equated as access to human rights and accessibility for redress by those most in need of human rights protection.

A key ingredient for an effective human rights system is that it is accessible, responsive and addresses the needs of those most members of society most vulnerable to human rights violations. In the Ontario Human Rights Commission Consultation Report identified two principles that must be kept in mind

The first is that the complaints resolution process should be first and foremost about the people: any system design should consider the experiences of those who actually use the system, and how it feels to them...a second principle, that while the complaint resolution process is concerned with resolving individual disputes, it is not only about that. There is a public interest at stake in the resolution of these issues.²

Therefore any amendments to the Ontario Human Rights Code, Human Rights Commission and Tribunal process requires much broader public consultation particularly with those members of marginalized communities and individuals most in need of human rights protections and redress.

While we feel that much more consultation is required we are prepared to offer recommendations in four broad over arching areas that are essential to strengthening the current and the proposed changes under Bill 107. These include: 1.) Accessibility, 2.) Defined Jurisdiction and Adequate Power, 3.) Operational Efficiency and Effectiveness 4.) and Independence and Accountability.

1.) Accessibility:

Definition of Accessibility: an effective human rights system requires that state institutions are readily accessible. Prominent factors affecting accessibility include physical location design and geography, employment of communication technology, timeliness of service and representative of staff by community served³. Accessibility issues also include lack of access to legal representation, complexity of judicial and administrative costs, inordinate delay, lack of knowledge of the system, geography, failure to accommodate disability, language and cultural barriers, marginalization and lack of trust, receptivity of service, and perception of service.⁴

Accessibility is perhaps the most important factor in considering changes to the current human rights system. The current model of human rights has remained relatively unchanged since it first came into force 40 years ago. Since that time the population

² Ontario Human Rights Commission, *Strengthening Ontario's Human rights System: What We Heard*, Consultation Report, October 6,2005, at pg. 35-36 available www.ohrc.on.ca

³ Adapted from the United Nations *Paris Principles* and found in the Ontario Human Rights Commission, *Reviewing Ontario's Human Rights System*, Discussion Paper, fall 2005, available www.ohrc.on.ca

⁴ Expanded upon and taken from the Ontario Human Rights Commission, *Strengthening Ontario's Human rights System: What We Heard*, Consultation Report, October 6,2005, available www.ohrc.on.ca

demographics and needs of those who rely on human rights mechanism has changed dramatically in the province of Ontario.

For Aboriginal peoples the social reality is that there is a growing number of Aboriginal people living in urban and rural settings (it has been estimated that nearly 75% live off-reserve.) Poverty is a fact of life for too many Aboriginal people who remain at the lowest level of the population lagging far behind on all socio-economic indicators from the rest of the Canadian population. There can be no denying that Aboriginal women⁵ in particular have borne the brunt of years of colonization and assimilation practices carried out by the Canadian government and are further marginalized even amongst Aboriginal populations as a whole as evidenced by severe socio-economic disadvantage and marginalization.

While poverty is a key factor in acquiring access to basic human rights such as the right to adequate housing, access to health services and educational and employment opportunities, many times overt and systemic discrimination further compounds the problem. For example, in the area of housing NWAC has heard over the years from numerous women- and in spite of human rights laws that prohibit discrimination on the basis of race and gender- that their experiences, particularly as visibly Aboriginal women, continue to be that landlords find ways to deny leases.⁶ In fact, NWAC has fielded many calls from Aboriginal women across Canada on many potential human rights violations and our organization usually directs these women to file a claim with their regional Human Rights Commission who will investigate and guide them through the complaint and tribunal process as many do not have the means to hire lawyers and pursue other avenues of redress.

Issue: Whether the proposed Bill 107“Direct Access” model is responsive to the needs of those who rely on its service and whether human rights will be more accessible?

Analysis: In the opinion of NWAC the proposed direct access model will weaken existing avenues of redress for violations under the Ontario Human rights Code. Having direct access to a tribunal does not mean that remedial redress from discrimination will be more effective or timely or accessible for already under served population such as Aboriginal women.

⁵ Amongst the population of Aboriginal women, single parents face even greater challenges. Department of Indian and Northern Affairs, *Aboriginal Single Mothers in Canada, 1996 A Statistical Profile*, Jeremy Hull Prologica Research Inc. Winnipeg, Manitoba June 7, 2001 [Concludes: that “Aboriginal single mothers are a substantial segment of the Canadian population, particularly in urban areas, who have high levels of unemployment and transfer payment dependency and low family incomes.]

⁶ For a case decided on by the Ontario Human Rights Tribunal with these similar facts see: Rosemary Flamand v. DGN Investments, Marcel Lacasse, Normand Guenette *HRTO Decision - April 8, 2005*

In fact, we are of the opinion that these kinds of reforms will lead to a further judicialized human rights process whereby members of already marginalized groups will have less means to access avenues of redress by making the system overly complex and dependent on access to legal representation⁷. Many of our constituents do not have the necessary financial means to investigate their own claims and obtain lawyers. The purpose and function of an administrative law system and the role of the Human Rights Commission will be compromised and the legal and financial barriers will act as a deterrent for many Aboriginal women.

Power imbalances will be heightened as claims are forced into an adjudicative model and those without the means to acquire adequate legal representation, i.e Aboriginal women and those in socio-economic marginalized populations, will suffer. It is not clear whether the proposed resource center and/or if publicly funded legal representation will be readily available for those from marginalized communities who wish to pursue claims against respondents' i.e government, landlords, business owners, employers, who have the financial means and resources to drag out cases for years.

Recommendations:

We recommend that the current proposed Bill 107 could be strengthened by giving proper resources to the publicly funded Human Rights Commission who plays an important role in investigating and pursuing individual claims through the tribunal process as well as those on behalf of the public interest.

However to improve accessibility to the Ontario Human Rights Commission (OHRC) the commission needs to be staffed to reflect the claimants it serves and have offices in rural and geographic locations, perhaps even a circuit type Commission and Tribunal hearings that will better meet needs of those in rural areas.

The OHRC and Tribunal process must be accessible by the most vulnerable members of society and must be free of barriers such as financial costs, such as user fees and dependent on legal representation, which would act as a deterrent from pursuing discrimination claims by the most vulnerable members of society. This should be the rule and not the exception or at the very least a guiding principle for a newly reformed Human Rights system.

2.) Defined Jurisdiction/Adequate Power (including resources):

⁷ Two examples of include the human rights reforms in British Columbia whereby a direct access model is heavily criticized for being less accessible for marginalized populations. As well one only needs to look at the current adjudicative models to see how lengthy and costly a case can be.

The Role and Importance of the Human Rights Commissions and Tribunals: An effective human rights system relies on the cooperation and participation of many players, including government, NGO's advocates, unions, and associations. In Canada, human rights commissions have played a significant role and have been the cornerstone of a Canadian human rights model. For commissions with a broad mandate to be effective there is a need to be independent of governmental interference, they require the ability to investigate individual complaints, require resources to promote human rights and educate the public, and require the ability to pursue systemic discrimination complaints on behalf of the public interest for prevention of discrimination across the government and private sectors.

NWAC recognizes the important role that Human Rights Commissions and Tribunals play in upholding the principles of equality and protection for those most marginalized and disadvantaged communities in Canadian society such women, people with disabilities, visible minorities, and other segments of the population that are vulnerable to discrimination. While we feel human rights tribunals are an important aspect of the human rights system, we feel it is necessary to underscore the vital role that the Commission plays in bringing claims of an individual complainant or equality seeking organization who most often do not have had the resources to launch such a broad based investigation and recommend broad based systemic changes and pursue claims on behalf of the public interest in promoting equality and the human dignity of all members of society.

Commissions play a unique and integral role in supporting individuals through the human rights process and by pursuing broad based systemic claims addressed. For an example, in 2001 NWAC along with other equality seeking organizations such as the Canadian Association of Elizabeth Fry Societies successfully launched a joint human rights complaint with the Canadian Human Rights Commission to address systemic discrimination for federally sentenced women in correctional facilities. In 2003 the Canadian Human Rights Commission (CHRC) released its report, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*⁸. The report concluded that there is systemic discrimination and Aboriginal women, racialized women and persons with disabilities are particularly vulnerable and made 19 recommendations that CSC must fulfill to ensure that it is acting consistently with human rights laws in Canada. Many of these broad based systemic claims may not be otherwise been pursued by individual women in prison or community based organizations because of the human and financial resources necessary to bring these kinds of claims forward.

An effective and independent Commission also has the ability to take on proactive initiatives on it own and in this way they play an important role in ensuring that government departments, laws and regulations are consistent with human rights laws. For example, in another instance the Canadian Human Rights Commission was instrumental

⁸ Canadian Human Rights Commission, *Protecting Their rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*, December 2003 available online, < www.chrc-ccdpc.ca/legislation_policies/consultation_report-en.asp>

in bringing to light as a proactive initiative a report on the of section 67 of the Canadian Human Rights Act, which is a section of the act that has exempted the *Indian Act* and actions pursuant to the Indian Act from human rights scrutiny⁹. It is necessary to preserve and enhance the ability of the Ontario Human Rights Commission to act as an independent actor with the power, and adequate resources to fulfill a broad mandate to pursue claims on behalf of those marginalized in this province and to work cooperatively with non-profit and community based organizations dedicated to ending discrimination and prompting equality in Canadian society.

Issue: Whether Bill 107 will usurp the role and function of the Commission and give the tribunal expanded “gate keeping” functions both of which will not benefit the most marginalized and disadvantaged in Ontario?

Analysis: The proposed Bill 107 direct access model proposes that individuals will have direct access to the Human Rights Tribunal process thereby usurping the vital role that Commissions have played in supporting individuals with very limited resources by investigating and pursuing claims through the tribunal process on behalf of the public interest.

This has the potential of amounting to a privatization of human rights. Individuals and the broader community will bear the cost and brunt of this kind of shift, because the newly constituted commission will have a limited capacity to support individuals and pursue claims on behalf of the public interest. Similarly, individuals who do not have the financial means and resources necessary to investigate their own cases and hire legal representation for the Tribunal hearing will be seriously disadvantaged under Bill 107 and this we feel will be a strong deterrent for those who already have very limited resources to pursue cases, such as Aboriginal women.

This proposed “direct access” model will not mean that all individual claimants will have access to an impartial and accessible decision maker in a timely and efficient manner. Rather, the proposed amendment will shift the “gate keeping” function played by the OHRC to the OHRT and give the tribunal unfettered discretion to dismiss claims without a formal hearing process. This may deter most from pursuing claims and those who do will not have an avenue of appeal or redress from decisions of the tribunal, as the tribunal will have significant powers to dismiss a claim with out an open and fair hearing.

In our opinion, the direct access model as proposed by Bill 107 will have a very significant impact on the poor and those with the least means to protect and advance human rights claims. In fact, as stated earlier these kinds of reforms will move human rights processes to an adjudicative model by making the system overly complex and

⁹ Canadian Human Rights Commission *Special Report; A Matter of Right the Repeal of Section 67 of the Canadian Human Rights Act*, October 2005

dependent on access to legal representation and members of already marginalized groups will have less access to avenues of redress for violation of human rights. Many of our constituents do not have the necessary financial means to investigate their own claims and obtain lawyers. The purpose and function of an administrative law system and the role of the OHRC will be compromised only those with the resources to access the “direct access” model will be able to pursue their human rights claims. The financial and anticipated systemic barriers will act as a deterrent for many Aboriginal women.

Recommendations:

It is recommended that for a human rights system to be effective it should create rights and not take them away by being inaccessible by those who depend and rely on a fair, impartial, effective, efficient and accessible redress model.

It is recommended that Bill 107 could be strengthened to be responsive to the needs and ensure accessibility by the most vulnerable members of society by maintaining the jurisdiction and even expanding on the role and purpose of the OHRC and by providing the OHRC with the adequate power and resources to fulfill its broad mandate.

It is further recommended that individuals could be given the choice to have “direct access” to a human rights tribunal and others with less means to pursue that choice directly should have the option of having their claim investigated and pursued by the support of a publicly funded OHRC.

3.) Operational Efficiency and Effectiveness: Because the equality and dignity of every human being is a fundamental and inalienable human right the effectiveness of a human rights system should not be compromised solely by arguments of operational efficiency. It is unclear as to whether the proposed reforms under Bill 107 including the “direct access” model will make the resolution of the human rights system more effective and more efficient. What is clear is that there is a need for reform and improvement in the way most cases are currently processed, including the time it takes to have a claim remedied.

Issue: Whether the proposed Bill 107 direct access model reforms will make the human rights system more efficient and effective?

Analysis: The key issue is how best to balance the need to process claims in a manner that is efficient while being viewed as effective by those who rely on a fair, impartial, accessible and timely resolution of their human rights claims.

The main criticism of the current system is the length of time it takes under the current OHRC system, which is obligated to process every claim filed, followed by a lengthy investigation process with many claims being settled by mediation and few being referred to the OHRT. Although commissions are a cornerstone of our human rights system within federal and provincial jurisdictions human rights commissions in almost every jurisdiction have been seriously under funded and under resourced for years. This is true despite the social reality that more and more people rely on these essential services and despite the growing need for independent human rights commissions to advance the equality interest of individuals including the right to live free from discrimination.

Under Bill 107 it is advanced that by giving individuals direct access to the tribunal process will make things more efficient and the resolution of human rights claims timelier than the commission. However, there is no guarantee or evidence offered that would support the position that giving individuals direct access to the tribunal will speed up the claims process. Assuming that an Aboriginal woman would have the resources to investigate their own claims and hire their own lawyers to bring their cases before the tribunal, by shifting the gate keeping function and having the tribunal operate as judge, jury and final decision- maker will require a significant degree procedural fairness. Under an enhanced adjudicative model the wheels of human rights resolution process would surely come to a grinding halt.

In our opinion, operational efficiency and procedural fairness and effectiveness may mean that some claims and claimants are treated differently, for example some claimants may want to proceed directly to the tribunal process and their claims may not require the rigor of an investigative process laden under the current OHRC. However, others claimants may need the support and guidance through out the process and their claims may be complex and systemic in nature thereby could benefit from the commission playing a more active role in the investigation and pursuit of the case through the tribunal process on behalf of the individual and in the public interest.

It would be more efficient and effective to streamline cases by giving individuals the option of proceeding under an adequately resourced enhanced OHRC or having direct access to a tribunal process, as opposed to treating all claims and claimants the same i.e having access only to a Human Rights Tribunal process or forcing those unwillingly into a Human Rights Commission process. The social reality is that all human rights claims and all those who want to file a human rights claim are not the same. For example, some in an employment relationship may want direct access to a tribunal for a quick decision that may preserve the relationship, while others such as a complex systemic claim that will affect many and who may want the resources and level of investigation and public interests remedies that the OHRC may be better equipped to provide. By allowing choice this would create efficiencies and strengthen the effectiveness of the operations of the human rights system as a whole.

Recommendations:

It is recommended that the provincial government use this unique opportunity to reform and strengthen the operational efficiencies and effectiveness of the current human rights system by creating options and alternatives for the residents of the province of Ontario. Having access to an adequately resourced OHRC process and having direct access to the OHRT need not be an all or nothing approach.

4.) Independence/Accountability:

Issue: Whether Bill 107 will resolve these outstanding issues of accountability and independence of the Human Rights Commission and Tribunal process?

Analysis: Many stakeholders are concerned that the current human rights system does not ensure that state institutions maintain international standards of independence and that this has been detrimental to the effectiveness of the system and many believe that consideration should be given to reviewing and strengthening the independent of state institutions involved in the system¹⁰. Much of the concern revolves around the appointment of commissioners and tribunal members and the reporting structure, for instance the Commission reports to the Attorney General despite the fact that the government is the respondent in many of the human rights claims that are launched.

Under the proposed Bill 107 concerns regarding accountability and a sufficient level of independence of OHRC are not addressed. As we have expressed earlier the proposed changes will shift the role and function of the Commission and give expanded jurisdiction and power to a tribunal who is appointed by government, without the necessary checks and balanced that one would expect to see in a system that safeguards such fundamental rights and freedoms. The public expects, no demands that there is access to an fair and impartial process made experts in the field of human rights. However, we feel that the proposed human rights system under Bill 107 does not address these concerns.

Recommendations:

It is recognized that the Ontario Human Rights Commission plays an important role in safeguarding and advancing the human rights of all citizens in Ontario therefore it is recommended that the commission report directly to parliament as opposed to the Attorney General.

¹⁰ Ontario Human Rights Commission, *Strengthening Ontario's Human rights System: What We Heard*, Consultation Report, October 6,2005, pg.19 available www.ohrc.on.ca

It is recommended that the Ontario Human Rights Tribunal be made up of panel of human rights experts. Appointment should be free from political interference and could be drawn from a short list of names put forward by equality seeking organizations and other non-profit and community based organizations, to better reflect the members of those who rely on their service, including Aboriginal women, visible minorities, peoples with disabilities and other marginalized and disadvantaged members of the public.

SUMMARY OF RECOMMENDATIONS:

1. We recommend that the current proposed Bill 107 could be strengthened by giving proper resources to the publicly funded Human Rights Commission who plays an important role in investigating and pursuing individual claims through the tribunal process as well as those on behalf of the public interest.
2. However to improve accessibility to the Ontario Human Rights Commission (OHRC) the commission needs to be staffed to reflect the claimants it serves and have offices in rural and geographic locations, perhaps even a circuit type Commission and Tribunal hearings who can meet the needs of those in rural areas.
3. The OHRC and Tribunal process must be accessible by the most vulnerable members of society and must be free of barriers such as financial costs, such as user fees and dependent on legal representation, which would act as a deterrent from pursuing discrimination claims by the most vulnerable members of society. This should be the rule and not the exception or at the very most a guiding principle for a newly reformed Human Rights system.
4. It is recommended that for a human rights system to be effective it should create rights and not take them away by being inaccessible by those who depend and rely on a fair, impartial, effective, efficient and accessible redress model.
5. It is recommended that Bill 107 could be strengthened to be responsive to the needs and ensure accessibility by the most vulnerable members of society by maintaining the jurisdiction and even expanding on the role and purpose of the OHRC and by providing the OHRC with the adequate power and resources to fulfill its broad mandate.
6. It is further recommended that individuals could be given the choice to have “direct access” to a human rights tribunal and others with less means to pursue that choice directly should have the option of having their claim investigated and pursued by the support of a publicly funded OHRC.

7. It is recommended that the provincial government use this unique opportunity to reform and strengthen the operational efficiencies and effectiveness of the current human rights system by creating options and alternatives for the residents of the province of Ontario. Having access to an adequately resourced OHRC process and having direct access to the OHRT need not be an all or nothing approach.
8. It is recognized that the Ontario Human Rights Commission plays an important role in safeguarding and advancing the human rights of all citizens in Ontario therefore it is recommended that the commission report directly to parliament as opposed to the Attorney General.
9. It is recommended that the Ontario Human Rights Tribunal be made up of panel of human rights experts. Appointment should be free from political interference and could be drawn from a short list of names put forward by equality seeking organizations and other non-profit and community based organizations, to better reflect the members of those who rely on their service, including Aboriginal women, visible minorities, peoples with disabilities and other marginalized and disadvantaged members of the public.