



First Nations Legal Traditions and Customary Laws and the Human Rights Complaint Process

**A Story, Reflections, Questions, Suggestions and an
Offering**



Prepared by: Aboriginal Human Rights Project

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On June 18, 2011, section 67 of the *Canadian Human Rights Act* (CHRA) that exempted human right complaints under the *Indian Act* was repealed. With the repeal of section 67, for the first time, remedies available under the CHRA complaint process apply to such First Nations matters as registration or non-registration of someone as a First Nation member; use and occupation of reserve lands; employment, wills and estates; education; and housing. This means that a First Nation community could be party to a complaint under the Act and a complaint resolution process of the Canadian Human Rights Commission (CHRC).

The repealing legislation provides that the Canadian Human Rights Commission must give “*due regard*” to “*First Nations legal traditions and customary laws in the interpretation and application*” of the CHRA. How the CHRC will apply First Nations legal traditions and customary laws is a subject of ongoing consideration, but the human rights complaint process includes the opportunity for CHRA complaints to be resolved at the community level according to community processes and protocols.

First Nations peoples have used a variety of resolution mechanisms for many generations. The “Aboriginal Human Rights Project” was intended to learn from those traditions. It had two objectives:

- to support First Nation communities to find ways to identify and learn from their legal traditions and customary laws in order to develop contemporary community-based dispute resolution processes for addressing CHRA complaints; and
- from working with a First Nation community, to generate insights for the CHRC and others as to how the CHRC can give “*due regard*” in handling complaints involving First Nation communities.

As part of this project, the Tsleil-Waututh Nation engaged at the community level in identifying and learning from its legal traditions and customary laws as a step towards developing a community-based dispute resolution process. Also, a dialogue with an Advisory Group of respected First Nation leaders and individuals with expertise in human rights and dispute resolution from BC and Ontario added perspective on how the CHRA could be applied in a way to give due regard to First Nations’ legal traditions and customary laws. Consultation with Professors John Borrows and Val Napoleon of the University of Victoria Law School also added insights. In producing this report, the project team reflected on and has tried to capture the emerging wisdom from all these sources.

This is the final report of the project. An interim report, released in July 2011 to correspond with the changes to the CHRA, outlined the preliminary findings of the work¹. An early and enduring conclusion of this project is that implementing the “*due regard*” provision is not about how First Nation communities in Canada can fit into the existing CHRA processes, but rather about how the CHRA processes involving First Nations can be built on a recognition of indigenous peoples’ rights and the inherent authority of First Nation communities to address and resolve disputes within their communities.

¹ <http://www.mediatebc.com/PDFs/Aboriginal-Human-Rights-Project---Interim-Report--.aspx>

A. The “Way” of the Tsleil-Waututh – A Story

On a rainy afternoon in March 2011, a group of Elders of the Tsleil-Waututh Nation in North Vancouver met together in their community room. They had been called together by former chief and current law student Leah George-Wilson. They invited Bob Watts, of the Six Nations of the Grand River, to facilitate the meeting. Bob is a teacher and practitioner of alternate ways of resolving conflict and served as the Project Leader of the Aboriginal Human Rights Project funded by the Law Foundation of BC and supported by Mediate BC. Leah had accepted an invitation from the project, approved by the Tsleil-Waututh Council, for her community to participate in the project by working with Bob towards articulating a process for the community to use to address human rights complaints.

Bob asked for the Elders’ assistance in identifying their legal traditions and customary laws. He began by asking them what “justice” meant to them. The Elders identified “respect” as a key value and lamented that respect had diminished in the community.

Traditionally they balanced everything with respect not fear.

You learn your respect at home.

Learning the respect when you’re young, that’s what’s missing.

Bob asked “What is important to you as a foundation for justice?” The Elders responded:

- Trust - in the system and in ourselves to be all of these things
- Honour
- Respect
- Responsibility - our responsibility to our collective, our community
- Accountability - not blaming others
- Empathy
- Equality
- Culture.

They talked about what life was like during their childhoods, about the residential schools and how deeply they affected the community, about the importance of their language and how much things had changed. They told stories passed down from their parents and grandparents. They spoke about the importance of family and community and how members of the community helped each other.

We're still a community, even though we're wounded.

Bob asked what would be necessary for a resolution process to be accepted and the Elders agreed that community consultation was essential because the "Nation has an accountability to all of us". The Elders discussed what factors had displaced their values and traditions and how breaches and disputes could be prevented including through increased community and family gatherings.

The Elders met again in February 2012. This time Bob introduced the changes to the *Canadian Human Rights Act* that took effect in June 2011 and explained that it was very important for the Tseil-Waututh to have a say about what happens on their traditional territory. He suggested that they needed to develop guidelines for how human rights disputes should be dealt with or there was a real risk that the government will impose its own rules and procedures. The group began to talk about how they could translate their fundamental values and past and current conflict management approaches into a written workable process, both for human rights and other types of conflicts.

Bob asked: "if you were given the responsibility of building a society, what's the most important principle or value that your society should be built on, what would the foundation be?" The Elders listed integrity, reciprocity, honesty, love, compassion and accountability. However, they agreed that the most important principle was respect.

One of my mother's teachings was, in order to get respect you have to give respect. And to always pay attention to your Elders because they know what they're talking about. When you get older, what they taught you makes a lot of sense. You have to get down to a child's level to talk to them in the way they understand things. Like teaching them life skills in a respectful way. So to get respect you need to give respect.

Love and compassion. You gotta love yourself and then you can love everyone else. Compassion is all about helping each other out.

So love and compassion kind of comes before the reciprocity – it's because of that love and compassion that we want to help each other and reciprocate.

Then they talked about the need for accountability.

You have to hold people accountable for their actions.

Start off with talking to them, try to get through to them in a way that they understand and know what they are supposed to be doing and teaching them to take responsibility for themselves and the things they have done. They have to be held accountable by the community in some way that really gets their attention.

It takes a village to raise a child...so it's everybody's responsibility if someone's doing wrong to let them know. That's where you have to teach respect.

Sometimes you talk to little ones and they'll say you're not my mother, not my father, so those teaching have to be passed on from children to grandchildren to great-grandchildren—the values that we live by.

The Elders then began to talk about traditional ways of dealing with those who broke the law and what justice looked like in their community. They told stories about how disputes were dealt with in the past and the rules they used for dealing with conflict. These rules were never written down but they were well known within the community.

Elders spoke of times when community members shared a common understanding and respect for how to conduct themselves. It was not about obeying rules or laws out of fear, but rather out of respect for oneself and others – “it was respect; you just lived it”. Elders were the “keepers”, imparting the Way through stories, songs and names.

It's about putting our rules and regulation down on paper when we've always lived by those rules and regulations in our communities. We all know the right and the wrongs, but it's trying to put it on paper where somebody else coming from outside the community can look at it and read it and know.

But we live it. And it's real. We understand it. We told our kids about it. Our grandparents told us about it. It's real. But if it's not written down or not in a book, it's not real. And that's what they look at and what they look for. If it's published, then to them it's real. We all know in our hearts what our grandparents taught us, and what they told us is real. If it's a rule that we live by, then it's real.

The government thought they were doing a good thing by making the Human Rights Act apply to Indians but didn't consider that we already have our own way of doing things.

Based on this second day-long meeting of Elders, the project team identified the next steps for community consultation including:

- A working group would be formed of community members to build on the values and principles of the Elders to articulate a conflict management process
- Consultation would then involve different groups within the community including other Elders, youth, families, traditional council members and elected council members
- The working group would take the input and refine the process
- The process would be presented to all members of the Tsleil-Waututh Nation in a community meeting.

Although this formal project has come to an end, the Tsleil-Waututh community intends to continue to move forward by building on what they have learned to date and to

develop a proposed community based dispute resolution process. It is recognized that this will take considerable additional energy and time and will have to be accommodated within current community resources.

B. Reflections

What follows is a summary of reflections on this story and on the project's experience and deliberations, with some commentary on each reflection.

Summary

1. There exists within a First Nation community the capacity to resolve disputes consistent with that community's Way. At the same time, Canada's history of colonization of First Nations creates obstacles to realizing that capacity.
2. Arriving at an appropriate dispute resolution process will involve each community in a challenging exploration of its own traditions and culture as they have evolved over time. This will take time, energy and resources.
3. If a First Nation community does not do the internal work necessary to identify or develop its own dispute resolution process, it risks having to engage in a process that may come from outside and not be consistent with its own Way. If the CHRC does not support the community's work, it risks perpetuating an unhealthy relationship between Canada and First Nations.
4. Canada has good reasons to invest in this work.

Commentary

1. *The Way*

Many people think that First Nations do not have any laws. That is not true. We have the Way: we have our oral law". Tsleil-Waututh leader

The Tsleil-Waututh's engagement in this project demonstrated their capacity for handling disputes arising in their communities in their own Way. Calling it the "Way" is both descriptive and evocative – it underscores that much more than the mode of communication underlies the distinction between whether a law is oral or is written. Members of the Tsleil-Waututh Nation community did not simply conform or comply with a written rule; they acted the way they did because it was the "Way". Tsleil-Waututh Elders spoke of times when community members shared a common understanding and respect for how to conduct themselves. It was not about obeying rules or laws out of fear, but rather out of respect for oneself and others – "it was respect; you just lived it". Elders were the "keepers", imparting the Way through stories, songs and names.

The two meetings in the Tseil Waututh community provided important information about the community's values and principles arising from its legal traditions and customary laws. They also provided significant lessons about the approach needed to identify and extract this knowledge.

In terms of knowledge, the discussions about individual and collective human rights revealed a number of key values embedded in the community's legal traditions and customary laws including:

- respect
- justice
- empathy.

The work with the community's Elders also revealed a number of key principles to guide how human rights matters in that community should be addressed:

- Fairness – an understanding of how a decision is made
- Voice – a sense that people have been heard
- Equal treatment (but not necessarily the “same” treatment)
- Prevention, including ways to build and maintain unity and restore balance in the community.

Core to all these principles is respect (for oneself, others and property) which is a traditional expectation of each community member.

This project with the Tseil-Waututh Nation also demonstrated the obstacles that exist to realizing that community's capacity. The conversation highlighted that the community's traditional expectation of respect has been undermined by trauma and colonialism, particularly the Indian Residential School experience. A human rights complaint may be a signal to the community that this important principle, respect, needs to be rebuilt, and at best, could provide an opportunity to do just that.

2. A Challenging Exploration

Part of the challenge is the complexity of the task itself.

...[M]ost Indigenous law is developed through people talking to one another. The human dimension of these laws means that recognition, enforcement, and implementation make them subject to re-examination and revision through the generations. Indigenous law is not static and can move with the times. The deliberative nature of many Indigenous laws means they can be continuously updated and remain relevant in the contemporary world. When Indigenous people have to persuade one another within their traditions, they must also do so by reference to the entire body of knowledge to which they have access which includes ancient and modern understandings of human rights, due process, gender equality,

and economic considerations. While contemporary concepts will modify and be modified by very old principles and processes, they will also remain distinct by virtue of their particular cultural-legal contexts.²

Documenting a dispute resolution process in this context is not as simple as mapping out methods used in the past, based on traditional stories. While it is true that all communities have conflicts and that each First Nation community has ways to manage conflicts and address disputes, these methods are not static. They have evolved over time to incorporate developing values and principles arising from within the community, its customs and traditions, and from external influences. “Legal traditions and customary laws”, referring in this context to process and methods rather than substantive law, are not stagnant, but are living systems and subject to continual enhancement and continuous evolution to develop and remain relevant under changing circumstances.

Another layer of complexity is that the community may develop different process options for different types of disputes.

This project’s experience with the Tsleil-Waututh community has confirmed that this important work will take considerable time, energy and resources. Even with the support, resources and encouragement available through this project, the process for the Tsleil-Waututh community has only begun. Despite its commitment to see this project through, it will not be easy for the Tsleil-Waututh to find the necessary time and resources, especially in light of the many other weighty initiatives and challenges the community faces. Developing a community-based dispute resolution process is not an easily achievable goal.

3. *The risks of not developing community-based dispute resolution processes*

While the challenge is daunting, the risks involved in not taking the time to explore a community’s own way of resolving disputes are significant. If First Nations communities do not do the work that the Tsleil-Waututh have begun in their community, the default process will be the existing CHRC processes, which may not reflect the Way of First Nations.

The repealing legislation requires that due regard must be given to “First Nations legal traditions and customary laws” in the interpretation and application of the CHRA. Given the diversity of legal traditions and customary laws among First Nations, this suggests a statutory obligation for the CHRC to work with each First Nation to come up with an appropriate dispute resolution process that reflects that Nation’s legal traditions and customary laws.

The CHRC has expressed its willingness to respect a community’s own dispute resolution process before it proceeds with its more formal processes under the CHRA, provided the community process meets the criteria for administrative fairness set by the CHRC and the Courts. It is also willing to adjust its processes so as to respect the community’s legal

² John Borrows, *Canada’s Indigenous Constitution*, University of Toronto Press, 2010, page 35

traditions and customary laws. However without the kind of in-depth work that the Tsleil-Waututh have begun to engage in, it is difficult to see how the CHRC can fulfill the statutory obligation placed on it by the repealing legislation.

The willingness on the part of the CHRC to try is encouraging. However, giving “due regard” to First Nations legal traditions and customary laws is arguably a much broader and profoundly different goal than merely framing First Nation dispute resolution processes as “internal dispute processes” within the current CHRA scheme.

As noted in the project’s interim report, the “due regard provision” holds promise for Canada to advance the rights asserted in Article 34 of the *United Nations Declaration of the Rights of Indigenous Peoples*³, and transform its relationship with First Nations peoples. Implementing the “due regard provision” is not about:

How First Nation dispute resolution processes can fit within existing CHRA processes

but rather about:

How the processes under the CHRA can be built on a recognition of, and made consistent with, internationally adopted Indigenous people’s individual and collective rights.

This restatement of the challenge puts the onus on Canada and the CHRC not only to adjust its own processes, but also to support the efforts of the First Nations communities to develop community-based processes.

4. An investment for Canada

There are broader issues underlying the significance of the repealing legislation and the work to be undertaken by the CHRC and First Nations communities as a result.

The first is that the repealing legislation presents a significant opportunity for reconciliation and the recognition of multi-juridicalism in Canada. Recovering and restoring laws and articulating a First Nations legal framework that incorporates legal traditions in a contemporary context will also help to rebuild and renew First Nation citizenry.

As Professor Val Napoleon says:

Over the past few years, I have been working with indigenous communities to identify and draw law from their stories, practices, and legal cases. I take the position that indigenous legal traditions must:

- (1) be an integral part of conceiving and building indigenous governance,*
- (2) be part of rebuilding our citizenries, and*

³ United Nations Declaration of the Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/en/drip.html>

(3) form the basis for relating to other peoples, and to state governments.

To do this, indigenous peoples need practical and accessible ways to substantively articulate, apply, and teach our legal traditions so that we can collectively manage ourselves, solve problems, and manage our internal and external conflicts.⁴

The work that communities must do to prepare themselves to meet the challenge of human rights complaints under the repealing legislation is work that will also strengthen the community, build effective governance and encourage effective citizenry. This work must be encouraged and supported. The hope is that by supporting First Nations communities to do this work to connect deeply with their legal traditions and customary laws, the relationship between Canada and First Nations will be improved and enhanced.

The second issue relates to the nature of human rights law in Canada. Human rights legislation is about recognizing and protecting the inherent value of all people regardless of their differences. The adoption of Article 34 of the *United Nations Declaration of the Rights of Indigenous Peoples* means turning the usual legislative interpretation and implementation process upside down. As discussed earlier, the “due regard provision” flows from the principles in Article 34. It is a way of carrying out the rights of indigenous peoples which are celebrated in that statement, including their own “*distinctive customs, spirituality, traditions, procedures, practices*”⁵. By supporting First Nations in taking the time to explore the relevance of their traditions and cultures to an appropriate dispute resolution for their community, the CHRC will be taking action in implementing the *United Nations Declaration of the Rights of Indigenous Peoples*, to which it is now a signatory.

Thirdly, the work done by the CHRC, First Nations communities and others interested in the issues flowing from the repealing legislation has the potential to influence not just those issues but also the deeper evolution of human rights concepts in Canada. Canada has much to learn from the conflict resolution practices of indigenous peoples. The thoughtful and creative work being done by First Nations communities has the potential to change how Canadian human rights disputes of all kinds are handled and resolved.

As John Borrows points out:

Human rights can be protected within Indigenous and other Canadian communities without extending the discriminatory practices and attitudes for or earlier imperial policies. This is best done by Indigenous peoples and non-Indigenous Canadians reformulating their traditions in a manner that

⁴ Napoleon, Val, *Drawing on Indigenous Legal Traditions Today: Citizenship and Child Protection*, paper presented at the Child Protection Mediation Conference: Moving Toward Meaningful Engagement, held in Vancouver BC February 26, 2012, at page 2.

⁵ Article 34 - United Nations Declaration of the Rights of Indigenous Peoples.

respectfully integrates traditional and contemporary normative values, and also protects and harmonizes their laws with international human rights standards.”⁶

Fourthly, in implementing the “due regard provision” there is a need to recognize a difference in the “worldview” of Canada, (as represented by the CHRC) and First Nations communities. It appears that the CHRC assumes that one of its roles will be to “judge” the community-based dispute resolution process to assess whether it qualifies as an “internal dispute process” under the current scheme. As noted in the interim report, this project has concluded that it is not appropriate to impose “western norms” when considering dispute resolution processes developed by the communities.

Asserting western norms “as universal undermines the potential and realization of other equally important ways of understanding the world. Traits important to an Indigenous process reflect important tenets of their worldview such as life as an indivisible whole and the importance of oral tradition (just as there are rules for written histories, there are also rules for oral histories and traditions)”⁷.

More promising results, consistent with Article 34, could be accomplished through meaningful dialogue. Professor Julie Macfarlane refers to “transcendent dialogue”:

In transcendent dialogue there is an explicit acknowledgement of differences and a commitment to dialogue as a means of understanding and coordinating those differences, not transformation. The key question for cross-cultural dialogue becomes not how can I accommodate your norms to fit within mine? (assimilation), how can I ensure that my culture is not tainted or changed in any way by yours? (divergence), or how might we mutually influence each other’s traditions (convergence)? Instead it is, how can I understand the moral order and social reality that leads you to think that way? In other words, transcendent dialogue seeks to facilitate the coexistence and acceptance of two parallel realities, via the development of what Natalie Oman describes as a “meta-language of negotiation.” This holds out promise for the building of mutual respect, the avoidance of violence and confrontation, and the enhancement of participation, both between and within cultural groups.⁸

Lastly, it is noted that conflicts involving human rights issues are often more than disputes between two individual people; they may also be a reflection of the relationship of the people with their community and perhaps an indication that the community is facing broader societal or systemic issues needing resolution. A “dispute” can be a symptom of a deeper underlying conflict. Communities should try to include as part of their process a

⁶ Borrows, John, *Canada’s Indigenous Constitution*, University of Toronto Press, 2010, at page 205

⁷ Wenona Victor, *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review*, Prepared by (Stó:lo Nation), PhD Student, Prepared for Canadian Human Rights Commission, April 2007. http://www.chrc-ccdp.ca/research_program_recherche/adr_red/toc_tdm-eng.aspx

⁸ Macfarlane, J. (2004). Commentary: When Cultures Collide. In C. Bell, & D. Kahane (Eds.), *Intercultural Dispute Resolution in Aboriginal Contexts* (pp.94-103). Vancouver: UBC Press, at page 102.

diagnostic piece to identify such underlying concerns and a way to explore those issues in more depth. In this way, systemic causes can be addressed which will assist in preventing similar disputes from occurring in the future and help to create healthier communities.

C. Questions

The work of this project has not resulted in definitive answers. However asking the right questions is a crucial first step. The following are questions that need to be addressed:

1. How do First Nations communities find the time, energy and resources to do the necessary work to establish their own dispute resolution process consistent with their legal traditions and customary laws?
2. How does a First Nation differentiate between the appropriate evolution of its legal traditions and customary laws and the changes to its community processes brought about by colonization which reflect the persisting unhealthy power relationship between colonizers and colonized?
3. Given the constraints of the Canadian Human Rights Commission, how can it avoid putting unrealistic demands on First Nations communities? Given the limited resources of the CHRC, how can its interactions with a First Nation assist rather than hinder the process of recognizing that Nation's legal traditions and customary laws?
4. How can non-Aboriginals in Canada be brought to the table to engage in a transcendent dialogue with First Nations about process and open themselves to the transformation of their own processes?

D. Suggestions

While there is no one way to do this work – we think helpful suggestions to both First Nations and the CHRC can be extracted from the Tsleil-Waututh experience. The Tsleil-Waututh Elders provided feedback on their experience from which the project team extracted some high level guidelines. The suggestions to the CHRC are derived from our experience with the Tsleil-Waututh and from the insights received from the Advisory Group and our discussions with Professors Burrows and Napoleon.

To both First Nations and the CHRC, we suggest the use of stories in your work. John Borrows explains the potential role of stories this way:

Legal traditions and customary laws explained through stories can tell a First Nation about the principles underlying how it used to exercise its laws. The objective is to

*“hear” the story at another level by focusing on the process and principles that guided the actions of the individuals, rather than the specific outcomes.*⁹

Val Napoleon suggests that stories “provide an intellectual architecture that enables thinking with analogy and metaphor as a form of problem solving.”¹⁰ She says that the story is used to ask key questions including:

- What are the legal concepts and categories within this legal tradition?
- What are the legal principles?
- What are the legitimate procedures for collective decision-making?
- What are the legal principles and legal processes for reasoning through issues?

Suggestions to First Nations:

- Take ownership of the project as a community;
- Map out an overall approach;
- Identify community leaders to support and guide the overall approach. The Tsleil-Waututh found that it was helpful to engage as many Elders as possible;
- Decide which types of disputes will be incorporated in the dispute resolution process (just human rights or a broader range of disputes?);
- Identify the approach(es) for recovering customs and traditions and deriving values and principles (perhaps through the use of stories, memories of oral traditions and other methods);
- Decide how the community as a whole will be involved, to make it “real” for them, and ensure that all voices are heard;
- Identify what internal and external resources are necessary to support this approach;
- Check to ensure that the approach is, and will be seen by the community to be, fair and just;
- Clarify how the progress of the work will be communicated to the community and others.

⁹ Borrows, John, *Drawing Out Law: A Spirit's Guide*, University of Toronto Press, 2010, at page 226.

¹⁰ Napoleon, Val, *Drawing on Indigenous Legal Traditions Today: Citizenship and Child Protection*, paper presented at the Child Protection Mediation Conference: Moving Toward Meaningful Engagement, held in Vancouver BC February 26, 2012, at page 4.

- Involve at least one individual who speaks the First Nation’s language, to the extent possible, because of the importance of language and meaning of words and expressions;
- Hold an initial information / education session about the CHRA and the CHRC complaint process to lay the groundwork for the community. Even if the community dispute resolution process will be broader in scope than human rights matters this information is important background to the work;
- Engage a facilitator to lead, guide and assist the group.

Suggestions to the CHRC:

- Engage in “transcendent dialogue” with First Nations about the appropriate dispute resolution process for human rights complaints. This will be a challenge because transcendent dialogue requires an equality between the parties that has not historically been characteristic of the relationship between the Canadian government and First Nations. This means that the CHRC will need to take an unusual approach to its engagement with First Nations, remembering that transcendent dialogue begins with curiosity and questions in order to further understanding.
- Request an invitation: A human rights complaint involving a First Nation community will probably involve relationships, policies or practices that are considered internal to the community. The community will want to respond appropriately to the complaint. However, in approaching the community about the complaint the CHRC would be wise to respect the territory and autonomy of the community. A respectful approach will likely involve the CHRC requesting an invitation to discuss the matter rather than presuming a right to enter and investigate.
- Seek dialogue with community leaders: Each community will organize itself in slightly different ways, and may want to designate one of its leaders to receive and deal with inquiries from the CHRC. The first question for the CHRC might be “who may I speak to about this matter?”
- Inquire about the community’s conflict resolution process: Start with the assumption that the community has ways of dealing with human rights conflicts. They may not have it in written form. The CHRC should ask how the community currently resolves disputes arising in the community.
- Offer assistance, if the community cannot identify a process: Most communities will not have a written conflict resolution process specifically related to human rights matters. Ask the community, what, if any, assistance would be helpful, and be prepared to offer appropriate resources.

- Allow time: The Tsleil-Waututh story illustrates that it takes a community considerable time and resources to develop a conflict resolution process. Communities are at different stages of awareness and preparation with respect to this change in the law and many communities are fully engaged in addressing broader societal issues to rebuild their community and citizenry. Communities will need to be given time to allow them to do this important work. Moving too quickly may result in early and deleterious precedents that prevent true adherence to the due regard provision and unduly constrain the development of “true” community based dispute resolution process by First Nations.

E. An Offering

The Advisory Group recommended that this project develop a “guide” for First Nation communities to develop their own dispute resolution process for addressing human rights disputes, believing that such a guide would assist First Nation communities in responding to the repealing legislation in a practical way. Based on the importance of stories and the strategic use of questions to elicit these stories and traditions, the project team developed the “Guide for First Nations Communities” which is attached as **Appendix 2**.

We offer this Guide as the project’s contribution to First Nations communities. We also offer it to the CHRC as a resource they could provide to First Nations when they become engaged in a human rights complaint. We hope that it appropriately recognizes that each community’s dispute resolution process will be a unique creation of that community.

F. Conclusion

The project’s final activity was to request feedback from the Tsleil-Waututh community and from the Project Leader who facilitated the meetings in the community. Here are highlights of their comments:

Leah George-Wilson:

“...the entire package – the financial resources, the support provided from the project team/project coordinator as facilitator (independent but with expertise and knowledge of First Nations was a perfect balance) all contributed to making the project a success. [It is] difficult to envision how a community could do this itself unless it had some dedicated resources at the project delivery level.”

“A key part of the process was the cooperation and collaboration between the community and project. Collaboratively working out with the project team to determine what would work with the community was a key part of the process. It would not have worked to have the process dictated to the community.”

“[there is a] need to recognize that even with outside resources, an inclusive community-based process such as this will take time given the time constraints of the community members.”

“[The] Elders felt that the process and exercise was very useful and valuable...”

“[The project] also built engagement and a sense of renewal for the Elders. [We] need to hear from Elders more in all forums – the Nation is nothing without its Elders and we need to extract all the knowledge that they have.”

“[The Guide developed by the project] will be a simple tool for helping people to get started on the process.”

Bob Watts:

“Customary laws and traditions must come from the community and must start with the Elders. To do otherwise is to import a system or impose a system based on values that may not be consistent with community values.”

“[The Guide] is both inspirational in terms of what can be done in a short period of time and instructive in terms of how communities can respond to federal law.”

“I hope the CHRC understands that if they are truly going to give due regard to something they have to be patient and support both politically and financially the work of communities to explore their own traditions and customary laws which in many cases have been dormant because of colonization.”

Appendix 1

Project Team:

- Bob Watts, Project Lead, dispute resolution consultant, former CEO Assembly of First Nations, Interim Executive Director of the Truth and Reconciliation Commission, and member of the Six Nations;
- Jane Morley, Q.C., Lawyer, mediator, leadership consultant and dispute resolution consultant;
- Michael Coyle, Professor, Faculty of Law, University of Western Ontario, primary research interests related to aboriginal rights and dispute resolution theory; and
- Kari Boyle - Executive Director, Mediate BC Society (Project Sponsor);
- Kim Thorau -Project Coordinator, Principal with Perrin, Thorau and Associates Ltd.

Advisory Group¹¹:

- Stephen Augustine, Canadian Museum of Civilization’s Curator of Ethnology for the Eastern Maritimes (15 years), Hereditary Chief of Mi’kmaq Grand Council, member of Elsipogtog (Big Cove) First Nation in New Brunswick and on advisory council to federal court with respect to the use of oral history evidence in the court
- Robert P. Birt, Ridgewood Foundation; founding Chair of the Canadian Institute for Conflict Resolution
- Teresa Edwards, Director of Human Rights and International Affairs, Native Women’s Association of Canada and member of Mi’kmaq First Nation
- Leah George-Wilson, Tsleil-Waututh First Nation
- Sherri Helgason, Director, National Aboriginal Initiative, Canadian Human Rights Commission
- Grand Chief Edward John, elected executive member of First Nations Summit and North American Representative to the United Nations Permanent Forum on Indigenous Issues
- Kathleen Lickers, Six Nations of the Grand River Territory, Lawyer
- Maureen Maloney, Q.C., currently a Professor in the School of Public Policy at Simon Fraser University, formerly Chair in Law and Public Policy and Director of Institute for Dispute Resolution at University of Victoria

¹¹ Listed alphabetically.

- David Merner, Executive Director, Dispute Resolution Office, Ministry of Attorney General, British Columbia
- Sharon Sutherland – Assistant Professor, Faculty of Law, University of British Columbia, Mediator
- Vicki Trerise – Mediator, Law Foundation of BC Consultant and L.L.M candidate

Appendix 2

Guide for First Nation Communities

Background

On June 18, 2011, section 67 of the *Canadian Human Rights Act* (CHRA) which exempted human right complaints under the *Indian Act*, and any provisions under that Act, was repealed. With the repeal of section 67, for the first time, remedies available under the CHRA complaint process may apply to such matters as registration or non-registration of someone as a First Nation member; use and occupation of reserve lands; employment, wills and estates; education; and housing.

The repealing legislation provides that the Canadian Human Rights Commission (CHRC) must now give “*due regard*” to “*First Nations legal traditions and customary laws in the interpretation and application*” of the CHRA. How the CHRC will do this is a subject of ongoing consideration, but the human rights complaint process includes the opportunity for CHRA complaints to be resolved at the community-level according to community processes and protocols.

Purpose of This Guide

This Guide is intended as a practical tool and a list of questions for a First Nation community to use in working through and identifying/developing a community-based process for addressing human rights matters, including how that process reflects the community’s legal traditions and customary laws. The questions outlined in the Guide are suggestions only and should be modified in a way that makes sense to each First Nation community. This Guide is based on the following assumptions:

- All communities have processes for managing conflict and addressing disputes
- These ways of managing conflict have evolved over time to incorporate developing values and principles arising from within the community and based on external influences
- Many of these ways of managing conflict are grounded in or reflect legal traditions and customary laws
- Communities have the capacity to develop and use their own process(es) for addressing human rights matters
- Process(es) will be different in each community
- Designing and developing process(es) will take time and process(es) will evolve over time as they are tested in the community.

Acknowledgement:

The contribution of the Tsleil-Waututh Nation, and a group of its Elders, in the development of this tool is acknowledged and recognized. The Tsleil-Waututh community worked collaboratively (supported by the Aboriginal Human Rights Project funded by the Law Foundation of British Columbia) to identify values and principles founded in its legal traditions and customary laws to support the development of its unique community dispute resolution process. General lessons and understandings gleaned from that work were fundamental to the development of this Guide.

Developing a Community-based Conflict Resolution Process

- Examples of potential human rights problems are set out below. If a member of your community made a complaint to the CHRC about a human rights matter, and the CHRC approached your community, how would your community respond to assert its right to a community based conflict resolution process that has due regard for its legal traditions and customary laws? Either the community has an existing process (which should be reviewed) or the community needs to articulate its own process.

The following questions are suggested to guide the community's consideration of these important issues:

1. How does your community deal with conflict of this kind now?
2. To what extent, and in what way, does your community's current process reflect/reveal your community's values, legal traditions and customary laws?
 - a. If you are not sure:
 - i. What sources of information are available to identify the community's values, legal traditions and customary laws as they apply to human rights matters? (stories, language, oral history, customs, other?)
 - ii. Who needs to be involved in this exploration and what kind of approach should be used to allow for a full exploration? (Elders, traditional council, talking circles, community meeting, other?)
 - iii. To what extent, and in what way, have the community's values, legal traditions and customary laws evolved?
 - iv. What does this information about legal traditions and customary laws, and how they have evolved, tell the community about what processes might work today to resolve human rights problems?
 - b. In light of what has been learned about the community's legal traditions and customary laws, what would be an appropriate community process for addressing human rights matters?
 - c. Does this community process for addressing human rights matters ensure fairness? If not, how could it be modified to do so? In answering these questions, you might want to ask the following questions:
 - i. What are the community's notions of fairness?
 - ii. What protections should complainants have in the community process? And, what protections are needed for those against whom accusations are made?
 - iii. Who within the community should be involved in dealing with complaints that an individual's human rights have been violated? Who should not be involved?
 - iv. How should these considerations modify the proposed community process?
3. Are there any underlying issues or relationship problems that might have contributed to the complaint and what steps could be taken to prevent future complaints of this nature?

4. What help or resources does the community need to be able to design and implement an effective conflict resolution process?
- When a human rights complaint arises involving the CHRC, how will the community address the matter with the CHRC, including:
- obtaining information about how the CHRC will give due regard to the community's legal traditions and customary laws; and
 - providing information to the CHRC about the process the community wants to use? Could the way this information is presented reflect the community's legal traditions and customary laws? Would it be helpful to your community to write the process down?

What ongoing review, reflection and revision of your process for addressing human rights complaints would ensure that it continues to reflect the community's values and work well for the community?

Examples of Potential Human Rights Problems

Case 1 - Employment:

A man files a *Canadian Human Rights Act* (CHRA) complaint against a First Nations from the Interior of BC for discrimination on the grounds of national and ethnic origin. The complainant is a member of a Coast Salish First Nation and had married into the Interior First Nation in question. He applied for a job with the Interior First Nation that involved being responsible for the development of education policy. The job was awarded to a less qualified applicant, who was a member of the First Nation, because, unlike the complainant, the other applicant was able to speak the traditional language of the Interior First Nation. The ability to speak the local language was not listed as a criterion for the job. The Band Council asserts that, traditionally, people involved in education in their community were fluent in the community's traditional language.

Case 2 - Housing:

A woman files a complaint against her First Nations Band Council saying that she was denied housing on the grounds of gender discrimination. She had married a non-Aboriginal man in 1978, thereby losing her status as a Band member under section 12(1)(b) of the Indian Act. Her membership was reinstated in the late 1980s, after the passage of C-31, which repealed section 12(1)(b). In 1990, she returned to her community to live with and care for her aging father. After her father's death, her brother and his family took possession of the father's house, as had always been the plan. The woman sought her own housing but discovered that other people, who had come to live on the reserve during the time she had lost her status, were being given priority over her. The Band policy was to allocate housing to those who have lived longest on the reserve. She believes that she is being discriminated against because of her loss of status when she married a non-status Indian. The Band says that they are making decisions in the traditional and customary way.

Example 3 – Real Property:

A woman member of a BC First Nation has filed a complaint with the Canadian Human Rights Commission against the Band council for discrimination on the grounds of family status. She and her family had lived with an older cousin, whom she referred to as uncle, in a house on the reserve and had cared for him for many years because of their extended family ties. The cousin died without making a will, and under the Indian Act rules, the house and land allocation reverted to the Band. The Band followed the usual process and allocated the house to the next person on the list. The complainant believes that the legal traditions and customary laws of her First Nation entitle her to receive the house and land allocation.

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