

Resources

Legislation

Policies

ABORIGINAL EMPLOYMENT PREFERENCES POLICY¹

GENERAL POLICY STATEMENT

It is not a discriminatory practice for an employer to give preferential treatment to Aboriginal persons in hiring, promotion or other aspects of employment, when the primary purpose of the employer is to serve the needs of Aboriginal people.

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1. Introduction

The Commission supports the aspirations of Aboriginal communities for economic self-sufficiency and self-government and views the social and economic situation of Aboriginal people as among the most pressing human rights issues facing Canada. The constitutionally recognized rights of the Aboriginal peoples, including the inherent right to self-government, and the conditions of disadvantage to which most Aboriginal people are subject, call for special measures on the part of the Commission. The Aboriginal Employment Preferences Policy is one such measure.

2. Definitions

"*Preferential treatment*" of Aboriginal persons means giving them priority in decisions on employment matters such as hiring, promotion, training and lay-off. It can include measures such as opening competitions only to Aboriginal persons.

3. Legal Framework

- The Constitution:
- Section 35 of the [Constitution Act](#), 1982 recognizes and affirms "*the existing Aboriginal and treaty rights*" of the Aboriginal Peoples of Canada. This unique constitutional status includes the right to self-government and economic autonomy. This status merits special consideration for measures aimed at enhancing the cultural, economic and political autonomy of the Aboriginal peoples.
- Section 15 (1) of the [Canadian Charter of Rights and Freedoms](#) provides that "*Every individual is equal before and under the law...*" However, section 15(2) provides an exception for "*any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ...*" ;
- Federal Law: Canadian law recognizes that in some circumstances programs that give preference to historically disadvantaged groups, such as the Aboriginal peoples, are necessary in order to prevent, eliminate or reduce disadvantage.
- Section 16(1) of the *Canadian Human Rights Act* CHRA states that:
"It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination ..."²
- The [Employment Equity Act](#) (EEA) requires employers to institute "*positive policies and practices*" (section 5(b)) and include these in its employment equity plan (section 10(a)).
- The EEA also contains special provisions with regard to Aboriginal employers. Section 7 provides:
that where a private sector employer is engaged primarily in promoting or serving the interests of Aboriginal peoples, the employer may give preference in employment to Aboriginal peoples or employ only Aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the [Canadian Human Rights Act](#)."
- Provincial Law: Provincial legislation throughout Canada allows, in certain circumstances, for organizations devoted to the well-being of ethnic groups, as

well as certain types of non-profit organizations, to give preferential treatment to members of their group.³

On the relevant provision in the *Québec Charter of Rights*, the Supreme Court of Canada ruled in *Brossard v. Québec Human Rights Commission* (1988) that the "effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances" [per Beetz, J.].

- International Standards: Recognition of the need for preferential programs to redress Aboriginal disadvantage is also recognized in evolving international standards.
- Article 22 of the Declaration on the Rights of Indigenous Peoples⁴ provides: "Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security."
- ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries⁵ obligates governments to adopt measures: "to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life". Article 4 provides that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned".

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4. Distinction from Special Programs Policy

Under section 16 of the [Canadian Human Rights Act](#) exceptions are envisaged for the promotion of equality through preferential employment practices that would ordinarily be prohibited. For example, under section 16 employers can establish special programs to promote the hiring of women, persons with disabilities, visible minorities or Aboriginal people in preference to other candidates. The Commission's policy on Special Programs outlines how the Commission applies section 16.

The situation of Aboriginal employers differs from that contemplated in the Special Programs Policy. It is the Commission's view that it would be inappropriate to apply that Policy with regard to such employers.

The main difference between the situation of Aboriginal employers and that of other employers, arises from the fact that these special programs are intended to deal with immediate problems of under-representation or disadvantage that are usually temporary in nature, and this is generally not the situation faced by Aboriginal employers - especially Aboriginal governments and quasi-governmental agencies. Such organizations generally have a much higher representation of Aboriginal employees than would be expected under the federal employment equity regime, which bases representation on the number of qualified Aboriginal candidates in the general workforce.

Nevertheless, the ability of employers to institute preferential hiring of Aboriginal people is still desirable and necessary for reasons of self-government, cultural autonomy, and economic development. For example, in order to advance autonomy, a First Nation Government may want to give preference to hiring Aboriginal people for government administrative positions. Likewise, school boards and health authorities have reason to promote the hiring of persons who are culturally attuned to the needs of their students and patients.

In addition, the disadvantage of Aboriginal communities in general, where unemployment rates are usually very high, justifies special consideration to the employment of Aboriginal people.

5. Application of the policy

This policy applies to the investigation, analysis and disposition of complaints received by the Commission alleging discrimination in employment by an employer. Its primary purpose is to serve the needs of Aboriginal people when preference has been given to an Aboriginal person or persons.

Subject to jurisdictional limits, the policy applies to any employer under federal jurisdiction when the primary purpose of such an employer is to serve the needs of Aboriginal people. This includes, but is not restricted to Aboriginal owned or operated entities, such as First Nations government, tribal councils, school boards and health authorities.

6. Policy requirements

Employers applying a preferential employment scheme will not be required to produce evidence of specific disadvantages suffered by Aboriginal people. The general disadvantaged condition of Aboriginal people is sufficient to warrant preferential treatment.

Complaints of discrimination based on grounds not related to Aboriginal preference, such as complaints based on age, disability or sex will continue to be dealt with as appropriate.

Employers will be expected to deal reasonably with non-Aboriginal employees who may be adversely affected by a preferential program as set out in section 7 below.

On application, the Commission will advise parties contemplating implementing an Aboriginal preference program, or those planning to establish a formal policy on preferential hiring, as to whether the proposed program or policy conforms with this policy in particular.⁶ However, the provision of such advice by the Commission does not preclude it from dealing with a complaint against a program or policy on its merits.

The Commission will not accept Aboriginal preference as a defense against an allegation of discrimination if it is convinced that the employer's defense is pretextual, in other words that there is reason to believe that at the time of the impugned employment action, the employer had no clear policy or intent to hire on a preferential basis, and that the defense is being used to avoid liability.

Employers can require job applicants to have knowledge and/or experience with the language, culture, history and customs of a particular First Nation, band or tribe when such requirements are directly related to the job requirements. However, the policy does not allow for preference to be given to members of a particular First Nation, band or tribe.

7. Treatment of non-Aboriginal employees

Commission experience since the original policy was issued in February 1990 indicates that in some instances the treatment of non-Aboriginal employees affected by the exercise of Aboriginal employment preferences appeared to be arbitrary, and not in keeping with the spirit and intent of the Policy and the *CHRA*.

It is the Commission's view that in the application of an Aboriginal employment preferences policy adequate measures must be taken to ensure that non-Aboriginal employees or candidates for employment are treated fairly and reasonably.

Measures that can be implemented by employers to ensure fair treatment of non-Aboriginal employees or candidates for employment may include, but are not limited to, the following:

- Employers should, if possible, have clear written policies regarding their application of Aboriginal employment preferences;
- All job postings and advertisements should indicate whether Aboriginal people will be given preference;
- All employees, as part of their terms and conditions of employment should be made aware of, and required to acknowledge, that Aboriginal people will be given preference in accordance with this policy;
- Where non-Aboriginal employees have accepted, as a term of their employment, that they may be displaced in preference to an Aboriginal candidate, the employer must still treat the non-Aboriginal employee in a fair and reasonable manner, by for example, ensuring that adequate notice of

termination is given. It is not acceptable to dismiss a permanent employee in favour of an Aboriginal employee if no preferential policy or practice was in place at the time of the permanent hiring.

8. Employment equity

The application of an Aboriginal employment preferences policy should not be interpreted as exempting Aboriginal employers from efforts to improve the under-representation of other groups in their workforce. In particular, the employment of Aboriginal women and Aboriginal people with disabilities is encouraged.

9. References

1. [CHRC Policy on Special Programs](#)
2. [HRDC Special Guideline \(No. 8\) on the Application of Section 7](#)

Approved by the Commission: March 25, 2003

Footnotes

1. This Policy replaces the policy approved by the Commission on February 26, 1990.
2. See the CHRA policy on Special Programs for information on how the Commission applies section 16 in the consideration of complaints.
3. For example the *Ontario Human Rights Code* provides that:

Section 24. 1. The right under section 5 to equal treatment with respect to employment is not infringed where,

a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment;
4. The Declaration does not have the status of international law and is not binding.
5. As of March 2003 Canada had not ratified Convention 169.
6. Section 16(2) of the CHRA: The Canadian Human Rights Commission, may

(a) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and

(b) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve.