

Policy statement on Indigenous-specific hiring

Ontario Human Rights Commission

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**Ontario
Human Rights Commission**
**Commission ontarienne des
droits de la personne**

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1. Summary

Indigenous¹ people continue to face the ongoing effects of colonialism, systemic inequalities and discrimination, and under-representation in many different areas of life, including employment. Human rights law in Canada permits hiring practices that, through special programs and special employment, help address ongoing disadvantage and discrimination.

Over the past several years, the Ontario Human Rights Commission (OHRC) has learned that there is significant demand from non-Indigenous employers for guidance on how to appropriately hire for Indigenous-specific positions, while meeting their obligations under Ontario's *Human Rights Code* (*Code*). The need for this guidance has been exacerbated by widespread reports of alleged Indigenous identity fraud by non-Indigenous people. In response, Indigenous peoples and organizations have called for action, and it has become essential that hiring practices and policies for Indigenous-specific positions include a process to confirm claims of Indigenous identity.

In this statement, the OHRC:

- Reiterates its respect for the collective rights of Indigenous peoples to self-determination, autonomy, and self-government, and the distinct ways each Nation defines and exercises their sovereignty.
- Recognizes that only rights-bearing Indigenous peoples and representative organizations can determine who is Indigenous (for

the purposes of this policy statement, by referring to Indigenous peoples and representative organizations as “rights-bearing” the OHRC primarily means Indigenous peoples and representative organizations who hold inherent Aboriginal and/or Treaty rights in Canada).²

- Confirms that hiring Indigenous employees for Indigenous-specific positions is permissible under the *Code* for the purposes of attempting to achieve substantive equality.
- Takes the position that, when engaging in *Code*-permitted hiring practices for Indigenous-specific positions, employers *should* confirm that a candidate meets any requirement that legitimately relies on a person’s Indigenous identity and/or lived experience (in addition to self-identification).
- Takes the position that employers have a responsibility to guard against any harmful, inaccurate, or fraudulent claims from non-Indigenous candidates by working with local Indigenous peoples and organizations to develop hiring policies and practices for Indigenous-specific positions that ensure claims related to Indigenous identity are confirmed appropriately and on a case-by-case basis.
- Confirms that employers do not need to prove that Indigenous people are disadvantaged to implement special programs or special employment processes to hire for Indigenous-specific positions because ongoing anti-Indigenous systemic discrimination is a well-established fact.

2. About this policy statement

For the purposes of clarity, this policy statement is strictly limited to analyzing the legal protections and obligations related to hiring for Indigenous-specific positions.

The OHRC recognizes that this limitation represents a significant barrier to a holistic understanding of key questions (e.g., How has colonialism impacted Indigenous peoples and their relationships to identity?). As such, the OHRC has developed a companion document to this policy statement (*Context guide for the Policy statement on Indigenous-specific hiring*, or Context Guide) to present additional information about the historic and modern context behind this policy statement, explore vital concepts such as the collective right of Indigenous peoples to self-determination, and provide guidance on meaningful steps to ensure that hiring processes for Indigenous-specific positions are protected from exploitation.

Furthermore, although the *Code* covers every aspect of the workplace environment,³ this policy statement's scope is limited to hiring practices as it is wise practice to confirm claims of Indigenous identities at the recruitment stage of an employment relationship. Efforts to confirm claims of Indigenous identities at later stages may raise potential employment law issues. Employers must ensure they respect all their human rights obligations under the *Code* and recall that they must also still comply with other applicable and valid employment laws or regulations when making decisions related to Indigenous identity confirmation processes.

It is worth noting that this policy statement was developed in the context of many years of strategic prioritizing by the OHRC to promote the rights of Indigenous peoples and advance reconciliation (see the Context Guide for more details). In alignment with commitments under the OHRC's 2023-25 strategic plan,⁴ this policy statement was developed at the request of, and in consultation with, the Indigenous Reconciliation Advisory Group (Advisory Group), which is made up of representatives from diverse First Nations, Inuit, Métis, and urban Indigenous communities and organizations who provide advice to the OHRC based on their deep substantive knowledge of discrimination and inequality experienced by Indigenous people.

This policy statement was also informed by social science and legal research (with a particular focus on recent efforts carried out by academic institutions to address concerns related to Indigenous identity misappropriation) as well as consultations with key First Nations, Inuit, and Métis experts across Canada.

For the purpose of this statement, the OHRC uses the term "identity" because many of the issues this policy statement aims to clarify are based on challenges that have arisen from self-identification.⁵ However, the OHRC recognizes that Ontario's human rights system and the Commission itself are colonial institutions and does not wish to perpetuate the ongoing colonial practices that have contributed to inaccurate claims of Indigenous identity (e.g., imposing legal definitions on Indigenous people(s)).

With a view to balancing this acknowledgement and the need for the guidance provided in this statement, interpretations of this policy

statement should be informed by parallel research on the most current and appropriate terms in use, as defined by Indigenous peoples themselves, in order to respect evolutions in terminology (e.g., shift from “Aboriginal” to “Indigenous” in the 2010s) as well as Indigenous peoples’ right to self-determination.

3. How is hiring for Indigenous-specific positions protected under legislation?

3.1 Hiring and the *Code*

Section 5 of the *Code* affirms that every person has a right to equal treatment in employment without discrimination because of their identification with one or more protected personal characteristics known as prohibited grounds of discrimination.⁶ Section 5 is the main *Code* provision protecting Indigenous persons from discrimination in hiring, and all other stages of employment up to and including termination.

3.1.1 *Code* protections for Indigenous persons

Indigenous identity is a very complex issue.

The *Code* does not define or describe “Indigeneity” or the complexities of Indigenous identity(ies) (i.e., who is Indigenous, who can self-identify as Indigenous, or what would be considered authentic markers of Indigenous identity). Neither does the *United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)*⁷ – which reflects the

diversity of Indigenous peoples around the world⁸ – or the *Constitution Act, 1982*, beyond clarifying that, for the purpose of the Act, “[the term] aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.”⁹

This absence of rigid definitions in both domestic and international modern legal instruments intentionally recognizes that Indigenous peoples are not a monolithic group that can fit under a single umbrella definition, that “the identification of an [I]ndigenous people is the right of the people itself,”¹⁰ and that the surviving legacy of colonialism has significantly impacted Indigenous identity. These concepts, and the relationship of Indigenous identity to the right of self-determination, are explored in the Context Guide.

While “Indigeneity” is not a *Code*-protected ground, Indigenous persons are protected by the *Code* typically through the ground of ancestry as well as the intersections of ancestry, race, place of origin, ethnic origin, and/or creed.

3.1.2 Hiring under special programs

Section 14 of the *Code* allows for **special programs**¹¹ designed to help people who experience hardship, economic disadvantage, inequality, or discrimination for the purpose of promoting substantive equality.¹² This includes special programs intended to support Indigenous people and to address their unique experiences of discrimination and marginalization. The *Code* also protects these programs from human rights claims by people who do not experience the same disadvantage.

Substantive equality means understanding and meeting the needs of disadvantaged persons or groups. It considers discriminatory barriers in their many forms, not all of which are obvious or intended. People from groups experiencing historical and ongoing disadvantage often do not have access to the same opportunities as others. Special programs help to level the playing field.¹³

Example: A school board has collected data and found that very few of its teachers are First Nations, Inuit, or Métis. It creates a special program aimed at building a larger pool of Indigenous teachers who can be hired into available positions. More Indigenous teachers will also help promote a more inclusive learning environment and substantive equality for Indigenous students, as well as promote reconciliation initiatives among all students and staff.

Additionally, to ensure the effective implementation of a special program that is designed to support Indigenous people in areas other than employment (e.g., academic scholarships for Indigenous students, service centres tailored to Indigenous needs, housing projects for Indigenous families), an employer might still have a legitimate reason to seek to prioritize hiring an Indigenous person based on their knowledge and lived experience of Indigenous rights, languages, cultural traditions, histories, and/or spiritualities.

Example: For an Ontario university seeking to work towards reconciliation through the implementation of an Indigenous studies program, it may be reasonable to specifically hire

Indigenous faculty with the knowledge and lived experience specific to the courses being taught.

The OHRC encourages the development and use of special programs as effective ways to achieve substantive equality by helping reduce discrimination and address historical and ongoing disadvantage. The OHRC has produced *Your guide to special programs and the Human Rights Code*¹⁴ to provide guidance for employers considering hiring under special programs or updating policies and existing special programs.

Special programs require a clear and specific rationale, as well as adequate eligibility criteria. See the Context Guide for further details on these requirements and on how to ensure they are appropriately met.

3.1.3 Hiring under special employment

Section 24 of the *Code* provides special employment provisions that further define the scope of the general right against discrimination in employment. Under section 24(1) of the *Code*, a religious, philanthropic, educational, fraternal or social institution or organization can seek to specifically hire an Indigenous person if the organization is primarily focused on serving the interests of Indigenous people and if being Indigenous is a legitimate or “reasonable and *bona fide*” requirement of the job.¹⁵

Example: It may be a reasonable and a *bona fide* requirement that an urban Indigenous child welfare organization hire

Indigenous social workers to serve the children and families they work with in a culturally appropriate way.

Example: It may be a reasonable and a *bona fide* requirement that an Inuit organization hire an Inuit administrative staff with knowledge of Inuktitut and of Inuit ways of knowing, doing, and being in order to effectively and safely converse with clients and staff in their language, assist them with filling out administrative forms, and address their needs in a culturally appropriate way.

In understanding why Indigenous identity can constitute a “reasonable and *bona fide* qualification” in the context of section 24(1), it must be underlined that in addition to the diversity of worldviews among Indigenous peoples and individuals, there exists commonalities and areas of overlap in how they engage with the world and in their experiences of colonialism, which are reflected in some shared elements across distinct Indigenous peoples’ ways of knowing, doing, and being (e.g., relationality, holism).¹⁶ These perspectives are often at odds with dominant Western worldviews, which is why it becomes critical to ensure that “Indigenous perspectives are the lens through which Indigenous issues are understood”¹⁷ and why Indigenous identity can constitute a valid occupational requirement.

Example: An organization that provides health services to Indigenous people is recruiting a nurse. With consideration for the distinct ways in which Indigenous peoples may relate to medicine, it would be a “reasonable and *bona fide* qualification” to require that the successful candidate be an Indigenous nurse with a demonstrated understanding of Indigenous health practices.

As employers work to better grasp these commonalities, the OHRC cautions against the traps of essentialism and tokenism – through which Indigenous people are reduced to colonial stereotypes – which should be avoided: it is one thing to respect and empower Indigenous people to carry their cultural knowledge with them in their professional roles, it is another to box them in assumptions to which they did not consent. Furthermore, acknowledging the distinct ways of knowing, doing, and being that may be known to an Indigenous candidate thanks to their identity does not replace due considerations for other key occupational requirements (e.g., knowledge of local customs and ceremonies, fluency in an Indigenous language, understanding of trauma-informed practices). Understanding and respecting a candidate's Indigenous identity and the unique experience associated with it is a necessary element of culturally appropriate hiring practices, but it is insufficient on its own.

See the Context Guide for further details on special employment and on wise practices to ensure that hiring processes for Indigenous-specific positions are carried out effectively and appropriately.

3.2 The role of unions

In addition to their direct obligations under the *Code* as service and membership providers, unions must exercise their powers under Ontario labour law in a non-discriminatory manner and have an obligation to not impede an employer's efforts to address discrimination.¹⁸ When seeking to hire Indigenous people through special programs or special employment, employers should consult

with union representatives – as unionized members may be impacted by new or updated hiring practices – while also underlining their goals and needs (e.g., to remedy systemic underrepresentation) to ensure that actions promoting human rights and equality can be effectively pursued.

3.3 Federal and international context

The *Canadian Charter of Rights and Freedoms*¹⁹ recognizes the importance of addressing historical disadvantage by protecting special programs to help marginalized groups. The Supreme Court of Canada has also recognized the need to protect “ameliorative programs” established by legislation that are designed to address the conditions of a disadvantaged group.²⁰

Not all employers operating in Ontario are covered by the *Code*. Federally regulated employers²¹ are governed by the *Canadian Human Rights Act*, which also permits special programs.²² The Canadian Human Rights Commission (CHRC) has developed a special program guide with a section on Indigenous-specific employment to provide assistance to federally regulated employers,²³ including First Nations governments and other First Nations organizations.²⁴

Among the TRC’s 94 Calls to Action to redress the legacy of residential schools and advance reconciliation, Call 92 can serve as rationale for the development of special programs. It calls upon the corporate sector of Canada to adopt the *UN Declaration* as a reconciliation framework to be applied to corporate policy and operational activities involving Indigenous peoples and their lands and resources, including ensuring that Indigenous people have equitable access to jobs, training, and education opportunities.²⁵

International human rights law also recognizes the importance of advancing the “equal effective enjoyment of all human rights and fundamental freedoms”²⁶ through special measures.²⁷ Special measures under international human rights law are protected from being deemed discriminatory as long as they do not lead to the maintenance of separate rights or standards and are discontinued when the objectives of the measures are reached.²⁸ The *UN Declaration* aligns with UN treaty mechanisms in this area and calls on States to implement special measures where appropriate to improve the economic and social conditions of Indigenous people(s) in Article 21(2).²⁹

4. Need for appropriate confirmation of Indigenous identity claims

In responding to allegations in mainstream media that high-profile public figures have fraudulently claimed to be Indigenous and discussing the complexities of Indigenous identity, Indigenous experts and leaders who gathered at the the inaugural National Indigenous Identity Forum (co-hosted by First Nations University of Canada (FNU) and the National Indigenous University Senior Leaders’ Association (NIUSLA) in 2022) generally concluded that Indigenous peoples must lead processes to establish appropriate ways to confirm claims of Indigenous identity, and that self-identification is no longer a reasonable approach.³⁰ The late Honourable Murray Sinclair put it simply in a 2021 statement as the incoming Chancellor of Queen’s University:

It is clear that self-identification of Indigeneity no longer works. Self-declaration is an important part, but it is just the beginning. We must go beyond an honour system and include voices from Indigenous communities across Turtle Island.³¹

Participants at the forum “felt that validation of Indigenous identity should be obtained whenever compensation is being expended (e.g., research and scholarship funding, awards), for hiring, admission of students, recognition, and tax exemption purposes.”³²

The *Code* permits employers to confirm claims of Indigenous identity during the hiring process and the OHRC takes the position that employers should do so in cases where hiring is being done for an Indigenous-specific position created as part of a special program or under special employment.

Example: If a candidate for an Indigenous liaison position to facilitate public engagement with Indigenous groups self-identifies as Métis and claims to have cultural knowledge and lived experience of being consulted by governments and proponents on land use matters, the employer should confirm the candidate’s Métis identity and cultural knowledge during the hiring process.

Participants in an engagement process held in 2023 by the federal tri-agency ad hoc Working Group on Indigenous Citizenship and Membership on behalf of the three federal research funding agencies³³ emphasized that “it is neither the right nor the responsibility of colonial institutions to determine citizenship or membership”³⁴ and

recommended that the role played by employers should focus on “affirmation of citizenship and membership, and not measuring identity.”³⁵

It bears reminding that this tension between “confirming” and “determining,” as well as the complex nature of Indigenous identity, requires that employers have “an awareness that solutions will not be ‘one-size-fits-all’.”³⁶ Confirmation processes should be tailored and proportional to the rationale behind and needs of a given position.

Example: An organization launches a recruitment process under section 24(1) of the *Code* for two Indigenous-specific positions: an Indigenous affairs manager and an Anishinabemowin interpreter/translator. The distinct occupational requirements for the two positions are tied to different elements that may relate to Indigenous identity (e.g., expertise about Indigenous protocols and proficiency in Anishinabemowin) and may therefore involve different confirmation processes.

Employers must act carefully to ensure that any confirmation process follows inclusive design principles³⁷ and does not directly or constructively³⁸ discriminate against Indigenous people (i.e., members of the protected groups intended to benefit from a special program or special employment) by relying on underinclusive definitions of who is Indigenous and overly rigid evidentiary requirements to substantiate a claim. Particular attention should be paid to ensuring that confirmation processes do not perpetuate the marginalization of Indigenous individuals whose identities may have been disproportionately impacted by colonial policies, such as Indigenous women, as they may

face greater difficulty providing streamlined information to confirm their identity claims. Indeed, a special program is not insulated from being challenged as discriminatory by individuals whom a special program is designed to assist.³⁹

Thus, employers seeking to hire Indigenous people for Indigenous-specific positions and to confirm their identity claims need to build, maintain, honor, and respect relationships with rightsholders and local Indigenous peoples and organizations that serve the community, and meaningfully engage with them to develop policies and practices on appropriate confirmation processes.

Some employers in Ontario and across Canada have begun developing and/or implementing confirmation policies in consultation with local Indigenous peoples and organizations. Common trends among wise practices have emerged and are shared for informational purposes in the Context Guide.

It must be noted that confirming a candidate's claim to belong to an Indigenous people in Canada may require distinct steps from confirming a claim to belong to an Indigenous people outside Canada. This difference is addressed in the Context Guide.

Endnotes

¹ In this policy statement, the term “Indigenous” is primarily used to collectively describe First Nations, Inuit, Métis and urban Indigenous people(s), although a distinctions-based approach is applied when feasible. The OHRC acknowledges that: using the distinctive terms First Nations, Inuit, Métis and urban Indigenous better recognizes that there are distinct groups of Indigenous peoples in Ontario who have their own cultures, histories, languages, spiritual beliefs, territories, political organizations, etc.; and further recognizes that there are also distinctions within First Nations, Inuit, Métis and urban Indigenous groups (for example, there are many different First Nations in Ontario).

² In Canada, this is notably affirmed by section 35 of the *Constitution Act, 1982*. For greater clarity, this does not include communities or groups in various stages of claim with the Government of Canada or with provincial/territorial governments and whose outcome is not yet determined (these groups and organizations may become “rights-bearing” once outcomes of those processes are finalized). Where specified, “rights-bearing” may also refer to Indigenous peoples and representative organizations outside of Canada that hold rights in the jurisdiction of the foreign country in which their ancestral and modern territories is located.

³ Ontario Human Rights Commissions [OHRC], *Human Rights at Work 2008 – Third Edition*, (2008) at Chapter IV; available online: <https://www.ohrc.on.ca/en/human-rights-work-2008-third-edition/iv-human-rights-issues-all-stages-employment>

⁴ OHRC, *Human Rights First: A Plan for Belonging in Ontario*, (2023) at 9; available online: <https://www3.ohrc.on.ca/sites/default/files/Strategic Plan Human Rights First ENGLISH - OHRC 2023-25.pdf>

⁵ Jean Teillet, *Indigenous Identity Fraud: A Report for the University of Saskatchewan*, (2022) at 9; available online: <https://indigenous.usask.ca/documents/deybwewin--taapwaywin--tapwewin-verification/jean-teillet-report.pdf>

⁶ Ontario *Human Rights Code*, R.S.O.1990, c. H.19 [Code]; available online: <https://www.ontario.ca/laws/statute/90h19>. At section 5: “Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual

orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.”

⁷ The *UN Declaration* was affirmed as a “as a universal international human rights instrument with application in Canadian law” through the *United Nations Declaration on the Rights of Indigenous Peoples Act, 2021*; available online: <https://laws-lois.justice.gc.ca/eng/acts/u-2.2/page-1.html>

⁸ United Nations Permanent Forum on Indigenous Issues [UNPFII], *Who are indigenous peoples?*, (2015); available online: https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

⁹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, [Charter] at section 35 (2); available online: <https://laws.justice.gc.ca/eng/const/page-12.html>

¹⁰ United Nations Office of the High Commissioner for Human Rights [OHCHR], *About Indigenous Peoples and human rights*, webpage. Retrieved on September 4, 2024, from: <https://www.ohchr.org/en/indigenous-peoples/about-indigenous-peoples-and-human-rights>

¹¹ Section 14 special programs are not limited to hiring practices. Organizations can establish special programs to promote substantive equality and address disadvantage in *Code*-protected social areas beyond employment (that is, in accommodation (housing); contracts; goods, services and facilities; and membership in unions, trade or professional associations). For example, section 14 programs could involve funding for service delivery, research, awards, grants or scholarships for Indigenous individuals or groups.

¹² *Ontario (Human Rights Commission) v. Ontario*, 1994 CanLII 1590 (ON CA) [Roberts]; available online: <https://www.canlii.org/en/on/onca/doc/1994/1994canlii1590/1994canlii1590.html?resultIndex=1&resultId=ce47fad6242c486cbbd237e370d540a1&searchId=2024-09-06T11:11:15:117/f91aabe251fd4108a2dc00ed940fb1af&searchUrlHash=AAAAAQAYT250YXJpbYBldW1hbiBSaWdodHMgQ29tbWlzc2lvbiB2LiBPbnRhcmlvIHJvYmVydHMAAAAAQ>. The Court of Appeal for Ontario affirmed that section 14 of the *Code* has two purposes:

1. Protecting affirmative action programs from challenge by people who do not experience disadvantage.
2. Promoting substantive equality to address disadvantage and discrimination in all its forms.

¹³ OHRC, *Employment and contracting provisions in Impact and Benefit Agreements are special programs under Ontario's Human Rights Code*, (2014); available online: <https://www.ohrc.on.ca/en/employment-and-contracting-provisions-impact-and-benefit-agreements-are-special-programs-under>

¹⁴ OHRC, *Your guide to special programs and the Human Rights Code*, (2013); available online: <https://www.ohrc.on.ca/en/your-guide-special-programs-and-human-rights-code>

¹⁵ *Code*, *supra* note 6, at Section 24 (1) (a): The *Code* permits “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 or disability [to employ] only, or [give] preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment”.

¹⁶ Indigenous Corporate Training Inc., *Indigenous Worldviews vs Western Worldviews*, webpage. Retrieved on September 9, 2024; available online: <https://www.ictinc.ca/blog/indigenous-worldviews-vs-western-worldviews>

¹⁷ Adam Gaudry and Danielle Lorenz, “Indigenization as inclusion, reconciliation, and decolonization: navigating the different visions for indigenizing the Canadian Academy”, (2018) *AlterNative: An International Journal of Indigenous Peoples*, 14(3), at 224; available online: <https://journals.sagepub.com/doi/10.1177/1177180118785382>

¹⁸ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; available online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/910/index.do>

¹⁹ *Charter* at section 15 (2); available online: <https://laws.justice.gc.ca/eng/const/page-12.html>

²⁰ *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483; available online: <https://www.canlii.org/en/ca/scc/doc/2008/2008scc41/2008scc41.html>. The Supreme Court of Canada ruled that a commercial fishing license provided to three First Nations to allow fishing on one extra day of the year was not discrimination under the *Charter* because its object was to improve the conditions of a disadvantaged group under section 15(2) of the *Charter*.

²¹ Federally regulated employers include: federal government departments, agencies and Crown corporations; First Nations governments and some other First Nations organizations (see also, note 24, below); chartered banks; television and radio stations; interprovincial communications and telephone companies; interprovincial transportation companies; and other federally regulated industries, like some mining companies.

²² *Canadian Human Rights Act* (R.S.C., 1985, c. H-6); available online: <https://laws-lois.justice.gc.ca/eng/acts/h-6/>. At section 16 (1): "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, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group."

²³ Canadian Human Rights Commission [CHRC], *Levelling the field : developing a special program under the Canadian Human Rights Act or the Employment Equity Act*, (2021) at 13; available online: <https://publications.gc.ca/site/eng/9.904723/publication.html>

²⁴ CHRC, *Human Rights Handbook for First Nations: Rights – Responsibility – Respect*, (2011); available online: <https://publications.gc.ca/site/eng/391641/publication.html>. At 3-4: "The Canadian Constitution divides legal responsibility, or jurisdiction, between the federal and provincial or territorial governments. Self-governing First Nations also have responsibilities, as negotiated between the First Nation and the federal government. As a result, jurisdiction may vary from one First Nation to another. The federal government regulates some employers and service providers including...First Nations governments and some other First nations organizations ... However, not every organization run by First Nations people or located in a First

Nations community is federally regulated. Other businesses and service providers in First Nations communities, like restaurants and grocery stores, are regulated by provincial or territorial human rights legislation.” In Ontario, these employers fall under the *Code*.

²⁵ Truth and Reconciliation Commission [TRC], *Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (2015) at 336; available online:

https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf. Call to Action #92:

“We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Aboriginal peoples and their lands and resources. This would include, but not be limited to, the following: i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Aboriginal peoples before proceeding with economic development projects. ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.”

²⁶ OHCHR, *The concept of ‘special’ measures in international human rights law*, (2005) at 3; available online:

<https://www.un.org/esa/socdev/enable/rights/documents/ahc6ohchrspmeasures.doc>

²⁷ United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, (1966), 7 March 1966, 660 UNTS 195, [1975] ATS 40, 5 ILM 32, (entered into force 4 January 1969, accession by Canada 14 October 1970), at Article 1(4); available online: [https://www.ohchr.org/en/instruments-](https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial)

[mechanisms/instruments/international-convention-elimination-all-forms-racial](https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial);

United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, (1979), 18 December 1979, 1249 UNTS 13, 19 ILM 33 (1980), UN Doc. A/RES/34/180, (entered into force 3 September 1981, accession by Canada 10 December 1981), at Article 4; available online:

<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>; and United Nations,

Convention on the Rights of Persons with Disabilities, (2006), 13 December 2006, 2515 UNTS 3, 46 ILM 443 (2006), UN Doc. A/RES/61/106, (entered into force 3 May 2008, accession by Canada 11 March 2010), at Article 5(4); available online: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

²⁸ OHCHR, Committee on Elimination of Racial Discrimination, *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial [sic] Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009) at 6-9; available online: <https://www.refworld.org/legal/general/cerd/2009/en/70344>

²⁹ United Nations, *Declaration on the Rights of Indigenous Peoples*, (2007), 13 September 2007, A/61/53 [UN Declaration]; available online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf. At Article 21(2): “States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.”

³⁰ First Nations University of Canada [FNU] and the National Indigenous University Senior Leaders' Association [NIUSLA], *Indigenous Voices on Indigenous Identity: What Was Heard*, (2022) at 21; available online: https://fnuniv.ca/wp-content/uploads/Indigenous-Voices-on-Indigenous-Identity_National-Indigenous-Identity-Forum_Report_March-22_June-22-FINAL.pdf

³¹ The Honourable Murray Sinclair, *Statements on Indigenous identity*, (2021) as related in *Queen's Gazette*; available online: <https://www.queensu.ca/gazette/stories/statements-indigenous-identity#:~:text=far%20from%20adequate.,It%20is%20clear,-that%20self%2Didentification.>

³² FNU and NIUSLA, *supra* note 30, at 22.

³³ The three agencies are: The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council (NSERC) and the Social Sciences and Humanities Research Council

(SSHRC).

³⁴ Government of Canada, Canada Research Coordinating Committee, *What We Heard: A Report from the Three Federal Research Funding Agencies' Ad Hoc Working Group on Indigenous Citizenship and Membership*, (2023) at 16; available at <https://www.canada.ca/en/research-coordinating-committee/priorities/indigenous-research/2023/report-what-we-heard.html>

³⁵ *Ibid.* at 18.

³⁶ University of Manitoba, *Listening to First Nations, Métis and Inuit Communities: Engagement on Recognizing and Supporting Indigenous Identity and Kinship*, (2023) at 26; available online:

<https://umanitoba.ca/indigenous/sites/indigenous/files/2023-05/IndigenousIdentityReport2023-FNL-Web.pdf>

³⁷ British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3, at para 68; available online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1724/index.do>

³⁸ *Code*, *supra* note 6, at section 11.

³⁹ *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII); available online:

<https://www.canlii.org/en/on/onhrt/doc/2010/2010hrto360/2010hrto360.html?resultIndex=1&resultId=16c0ed4e57ad4042a898d3178907eecc&searchId=2024-09-05T11:18:41:749/e64e9aa612104b65b2cd0790612d43cf&searchUrlHash=AAAAQA PQmFsbCB2LiBPbnRhcmIvAAAAAE>. The Human Rights Tribunal of Ontario found that: “when a challenge to a program comes from a person whom the program is designed to assist, the general prohibitions against discrimination apply. The role of s. 14 is to address challenges from those who are not the intended beneficiaries of a particular program.”