Legislative Summary **LS-546E**

BILL C-44: AN ACT TO AMEND THE CANADIAN HUMAN RIGHTS ACT

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LEGISLATIVE HISTORY OF BILL C-44

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	13 December 2006	First Reading:	
Second Reading:	21 February 2007	Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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Bill C-44, An Act to amend the Canadian Human Rights Act, received first reading in the House of Commons on 13 December 2006. The bill repeals section 67 of the federal human rights statute, which has restricted access to its redress mechanisms with respect to "any provision of the *Indian Act* or any provision made under or pursuant to that Act."(1)

On 21 February 2007, following second reading, Bill C-44 was referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, which considered the legislation in 16 meetings from March through June 2007. Although those who appeared before the Committee were virtually unanimous in their support of the repeal of section 67, almost all non-government witnesses – including national, regional and local First Nations organizations and communities, the Canadian Human Rights Commission, bar associations and other legal experts – were also critical of the legislation on one or more counts involving process and substance. Opposition to the bill concerned, in the main, perceived inadequacies in the consultative process leading up to the bill. The absence of an interpretive clause in the bill to balance individual and collective rights, the abbreviated transition time preceding implementation, and uncertainty about resources for implementation were also cited among major causes for concern.

On 19 June 2007, the Committee adopted an opposition motion recommending that debate on the repeal of section 67 be suspended for up to 10 months in order to enable the government to initiate a broad consultative process with respect to that repeal, with the subsequent resumption of debate to include submissions by First Nations representatives as to the outcome of consultations. The Committee's report was tabled in the House on 20 June 2007. On 26 July 2007, a majority of members who were convened to

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S., c. H-6, section 67.

an unusual midsummer meeting for the purpose of clause-by-clause consideration of Bill C-44 voted to suspend such consideration, pending consultations in accordance with the 19 June motion.

BACKGROUND

A. Overview of the *Canadian Human Rights Act* (CHRA)[2]

The CHRA, enacted in 1977, prohibits discriminatory practices on the basis of an exhaustive list of grounds[3] in areas of employment, accommodation and the provision of goods, services or facilities that are customarily available to the public. The CHRA applies to federal legislation, federal government departments, agencies and Crown corporations, and federally regulated businesses and industries such as banking and communications.

The human rights system operates on a complaint basis. The functions of the Canadian Human Rights Commission (CHRC), which administers the CHRA, include evaluation of complaints to determine whether they fall under its jurisdiction, complaint investigation, conciliation or settlement of valid complaints and/or, where warranted, reference to adjudication by a tribunal with broad remedial powers. The CHRC is also authorized to issue binding guidelines on how provisions of the CHRA apply in a given class of cases.

In addition, the CHRA sets out certain exceptions to the general principle of non-discrimination in order to balance the individual's right to freedom from discriminatory treatment with other rights of societal value. Under the *bona fide* occupational or justification defence, an employment, service or accommodation policy or practice is not discriminatory where it is shown to be necessary in the circumstances.

B. Section 67, the *Indian Act* Exception

1. History

Section 67 of the CHRA (originally subsection 63(2)) reads:

> Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.

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(2) The text under this heading draws on *The Canadian Human Rights Act: Processing Complaints of Discrimination*, BP-394E, and *The Canadian Human Rights Act Review Panel – 2000 Report: A Summary*, PRB 01-30E, prepared by Nancy Holmes of the Law and Government Division, Parliamentary Information and Research Service, Library of Parliament, in 1997 and 2002 respectively.

(3) They are race, national or ethnic origin, age, sex, sexual orientation, marital status, family status, physical and mental disability, and conviction for which a pardon has been granted.

The sole exception of this nature in the CHRA, section 67 has affected primarily First Nations people governed by the *Indian Act*, explicitly shielding the federal government and First Nations community governments from complaints of discrimination relating to actions arising from or pursuant to the *Indian Act*. According to then Minister of Justice Ron Basford, section 67 was a necessary measure in 1977 in light of the government's undertaking not to revise the *Indian Act* pending the conclusion of ongoing consultations with the National Indian Brotherhood(4) and others on broad *Indian Act* reform.(5)

Not surprisingly, the provision has been a source of controversy since the CHRA's inception. It was seen as particularly prejudicial to First Nations women deprived of "status" under sections of the *Indian Act* then in effect that were widely acknowledged to be discriminatory.(6) During parliamentary review of the proposed legislation (Bill C-25), witnesses before the then House of Commons Standing Committee on Justice and Legal Affairs described the exception as "unjust," "objectionable," an "affront" and a "serious disregard for human rights."(7) The Canadian Bar Association proposed that the exemption be limited "to any provision made under or pursuant to [the *Indian Act*] that constitutes a preference or advantage to Indian people and is not discriminatory in any other respect,"(8) while other witnesses recommended its deletion from the bill. An amendment to that effect was defeated in Committee.(9)

Although the Minister viewed section 67 as a temporary necessity, suggesting that "Parliament is not going to look very favourably on continuing this exemption forever or very long,"(10) the "*Indian Act* exception" remained in effect despite Bill C-31's long-awaited 1985 amendments to the *Indian Act* that removed its most egregiously discriminatory provisions, and

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(4) The National Indian Brotherhood, formed in 1968 to represent registered First Nations people, became the Assembly of First Nations in 1982.

(5) House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 6A:23, 10 March 1977.

(6) Specifically, paragraph 12(1)(*b*) provided that an Indian woman lost her status upon marriage to a non-Indian. Under the Act, non-Aboriginal women who married registered Indian men gained status. The status of Indian men was not affected by marriage to non-Indian women.

(7) House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 7A:5, 29 March 1977 (Brief of the Canadian Labour Congress); Issue 8A:37, 45, 31 March 1977 (Briefs of the Advisory Council on the Status of Women); Issue 9:14, 26 April 1977 (testimony of Indian Rights for Indian Women).

(8) House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 7A:61, 29 March 1977.

(9) House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 15:46, 25 May 1977.

(10) House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 15:45, 25 May 1977.

remains in effect to the present. It is generally believed the restriction continues to affect largely First Nations women. In particular, reinstated "Bill C-31 Indians" claim residual discrimination under the amended Act in relation to transmission of status, membership in First Nations communities, and associated matters.(11)

2. Scope

The section 67 exception does not represent an absolute bar to use of the CHRA scheme by First Nations people. As Minister Basford explained in 1977, "like all other Canadians, Indians will have the general protection of the [CHRA] in all except the special situations where their rights and status are governed by the *Indian Act*."(12)

Nor is the exception applicable to First Nations communities with self-government agreements or legislation in place that are no longer regulated by that Act.(13) As a result, First Nations councils acting within the limited authority set out in the *Indian Act* are exempt from human rights review under section 67, while First Nations governments with broader authority outside the Act are not so immunized. Most of the relevant agreements make no reference to the CHRA; the non-treaty "stand-alone" Westbank First Nation Self-Government Agreement does so, providing explicitly for the CHRA's application to Westbank, and including an interpretive provision with respect to that application.(14)

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(11) Bill C-31 repealed paragraph 12(1)(*b*), while introducing measures that differentiated among First Nations parents' capacity to pass on status to their children, separated Indian status from band membership, and authorized First Nations communities to control their membership.

(12) House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 6A:23, 10 March 1977.

(13) They include the Cree of Northern Quebec, the Nisga'a Nation in British Columbia, the Tlicho First Nation in the Northwest Territories and most Yukon First Nations communities. It should be noted that sections 63 and 66 of the CHRA combine to give territorial human rights legislation precedence over the CHRA, although not entirely expelling its jurisdiction: see Larry Chartrand, *The Indian Act Exception – Options for Reforming the Canadian Human Rights Act*, Research Paper prepared for the Canadian Human Rights Review Panel, 1999, p. 27.

(14) The provision reads:

> Nothing in this Agreement limits the operation of the *Canadian Human Rights Act* in respect of the Westbank First Nation and Westbank Lands and Members. The interpretation and application of the *Canadian Human Rights Act* in respect of Westbank First Nation and Westbank Lands and Members shall take into account:
>
> a. the nature and purpose of this Agreement; and
>
> b. the entitlement of Westbank First Nation to provide programs and services either exclusively or on a preferential basis to Members, where justifiable; and
>
> c. the entitlement of Westbank First Nation to give preference to its Members in hiring employees and contractors for Westbank First Nation operations, where justifiable.
>
> Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, section 291.

Section 67 has no effect on Charter-based equality rights court proceedings alleging discriminatory treatment under the *Indian Act*. Charter claims raising matters that might, but for the exception, be the subjects of complaints under the CHRA, remain available to First Nations people and others.(15) In practice, this option is considered onerous for potential litigants owing to the complexity, costs and protracted nature of Charter litigation.

3. Judicial Interpretation

Under a well-established principle of statutory interpretation, exceptions to quasi-constitutional human rights legislation are to be narrowly construed.(16) Accordingly, the application of the CHRA by the Canadian Human Rights Tribunal and the courts has turned on whether the *Indian Act*, or regulations or by-laws made under the Act, give the band council or the Department of Indian Affairs express authority to undertake the contested action or decision. If so, section 67 prevents Tribunal review, even in obvious cases of discrimination. Conversely, the section 67 exception does not shield discriminatory actions or decisions that are not authorized by the *Indian Act*. In the result, section 67 has not prevented First Nations community members from gaining access to CHRA mechanisms in a number of cases where that express authority has been found to be lacking.(17) In other cases, the authority of the *Indian Act*, and hence the application of the section 67 exception, have been upheld.(18)

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(15) The May 1999 ruling of the Supreme Court of Canada in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203, ruled that subsection 77(1) of the *Indian Act* denying off-reserve First Nations members the right to vote in band elections held under the Act violated the Charter's equality rights provision. In *Perron* v. *Canada (Attorney General of)*, 2003 CanLII 44366 (ON S.C.), (2003), 105 C.R.R. (2d) 92, the plaintiffs allege subsection 6(2) of the *Indian Act*, having to do with the passing on of status, violates the Charter, the Aboriginal rights provision of the *Constitution Act, 1982* and the *Canadian Bill of Rights*.

(16) See *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

(17) In *Desjarlais* v. *Piapot Band No. 75*, [1989] 3 F.C. 605 (C.A.), a band council motion of non-confidence resulting in the firing of a band administrator was found not to fall within the section 67 exception, as it was "nowhere, expressly or by implication, provided for by the *Indian Act*"; in *Jacobs* v. *Mohawk Council of Kahnawake*, [1998] 3 C.N.L.R. 68 (CHRT), a similar finding applied to the denial of services funded by the Department of Indian Affairs to persons not within the band's criteria for membership, as the funding arrangement required the band to provide services according to the Department's eligibility criteria; in *McNutt* v. *Shubenacadie Indian Band*, [1998] 2 F.C. 198 (T.D.), section 67 did not apply to a band council decision on eligibility for social assistance that was not authorized by the *Indian Act*; in *Courtois* v. *Canada (Department of Indian Affairs and Northern Development)*, [1991] 1 C.N.L.R. 40 (CHRT), section 67 did not apply to a band council "moratorium" on education services for the children of reinstated women, as the council had no authority over such services under the *Indian Act*.

(18) In *Laslo* v. *Gordon Band (Council)*, [2000] F.C.J. No. 1175 (C.A.) (Q.L.), the section 67 exception applied to a band council's denial of housing to a reinstated First Nations woman that was explicitly authorized by the *Indian Act*; in *Canada (Canadian Human Rights Commission)* v. *Canada (Department of Indian Affairs and Northern Development (re Prince)*, [1994] F.C.J. No. 1998 (T.D.) (Q.L.), the Court found that the *Indian Act* authorized a departmental policy requiring First Nations students to attend the school closest to their home.

Expert observers consider the result has been "an inconsistent and arbitrary application of the [CHRA] to the First Nations people, communities and governments that are subject to the *Indian Act*."(19)

C. Developments Related to Section 67, 1992-2006

First Nations women have long objected to, and have lobbied for repeal of, the section 67 exemption that has limited their access to the federal human rights system. Human rights advocates, including the CHRC, have taken a similar position. Nor is Bill C-44 the first government bill to propose removal of the controversial provision. Over the years, other statutory initiatives as well as policy statements have addressed the need to repeal section 67. Some of these developments are briefly reviewed below.

1. Bill C-108, An Act to amend the Canadian Human Rights Act and other acts in consequence thereof (1992)

Repeal of section 67 was among numerous amendments to the CHRA proposed by Bill C-108 in December 1992. The bill did not proceed beyond first reading, and died on the *Order Paper* with the dissolution of the 34th Parliament in June 1993.

2. *Promoting Equality: A New Vision* (2000)

The Canadian Human Rights Review Panel appointed to conduct a comprehensive review of the CHRA acknowledged the significant implications of the section 67 issue for Aboriginal people.(20) Its report indicates that different segments of the Aboriginal population consulted raised a range of human rights concerns related to the limited availability of government and band programs and services. Although some participants in the review process argued against the application of the CHRA to Aboriginal governing bodies, "all the groups representing Aboriginal women asked for the repeal of [the section 67] exception."(21)

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(19) See, for example, Wendy Cornet, "First Nations Governance, the Indian Act and Women's Equality Rights," in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports*, 2001, published by Status of Women Canada, http://www.swc-cfc.gc.ca/pubs/pubspr/066231140X/200111_066231140X_30_e.html. This view is reiterated in reports of the Canadian Human Rights Review Panel (2000) and the Canadian Human Rights Commission (2005).

(20) Summaries of research papers prepared for the CHRA Review Panel, including those focusing on section 67, may be consulted via the Justice Canada Web site at: http://www.justice.gc.ca/chra/en/research.html.

(21) Canadian Human Rights Review Panel, *Promoting Equality: A New Vision*, Department of Justice, Ottawa, 2000, p. 129, http://www.justice.gc.ca/chra/en/toc.html.

Ultimately, the Panel concluded "a blanket exception like section 67 is inappropriate,"[22] but stressed the importance of an interpretive measure "to balance the interests of Aboriginal individuals seeking equality without discrimination with important Aboriginal community interests."[23] The Panel recommended repeal of section 67, application of the CHRA to federal and Aboriginal governments pending development of an Aboriginal human rights code, and incorporation in the CHRA of an interpretive provision to assist in interpreting existing justifications.[24]

3. Bill C-7, the First Nations Governance Act (2003)[25]

Although the primary aim of the controversial First Nations Governance Act was to set out requirements related to "governance" codes for First Nations communities, Bill C-7 would also have repealed section 67 and added an interpretive provision largely borrowed *verbatim* from the CHRA Review Panel's 2000 report.[26] It required that the (undefined) needs and aspirations of the Aboriginal community affected by a complaint against an Aboriginal governmental organization be taken into account in interpreting and applying the CHRA, "to the extent consistent with principles of gender equality."[27]

Witnesses appearing before the then House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources expressed support for these initiatives, but described the proposed interpretive clause as unclear and difficult to apply. The CHRC proposed options for achieving greater clarity, and stressed the need for effective

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(22) *Ibid*., p. 130.

(23) *Ibid*., p. 131.

(24) According to the Panel, such a clause: would supplement the *bona fide* justification; should both defeat claims for services by individuals unconnected to First Nations communities and support a measure of preferential services and employment; and should not justify sex discrimination: *ibid*., p. 132.

(25) The bill was originally introduced in the 1st Session of the 37th Parliament as Bill C-61, but died on the *Order Paper* when Parliament was prorogued in September 2002. Bill C-7 was at report stage when it, too, died on the *Order Paper* with the prorogation of Parliament in November 2003. The bill was not reintroduced.

(26) The Joint Ministerial Advisory Committee (JMAC) appointed to assist in the development of governance legislation, although agreeing that removal of section 67 should be linked to insertion of a balancing interpretive provision, had concluded against repeal pending the government's comprehensive response to the Review Panel's recommendations, which has yet to take place: Joint Ministerial Advisory Committee, *Recommendations and Legislative Options to the Honourable Robert Nault, P.C., M.P., Minister of Indian Affairs and Northern Development, on the First Nations Governance Initiative – Final Report*, March 2002.

(27) Bill C-7, clause 41. In October 2005, provisions identical to those of Bill C-7 were tabled in the Senate in Bill S-45, An Act to amend the Canadian Human Rights Act. The private member's bill died on the *Order Paper* at second reading with the dissolution of the 38th Parliament in November 2005.

consultations with First Nations and other concerned parties. It also questioned its capacity and that of First Nations communities to deal effectively with the repercussions of repealing the section 67 exemption, citing increased workload and increased training and resource needs of affected communities. The Native Women's Association of Canada and the National Aboriginal Women's Association expressed concern with respect to the potential effect of the interpretive clause on traditional collective rights.

4. *A Matter of Rights* (2005)

The CHRC special report on repeal of section 67 "[promoted] the resolution of a long-standing and unacceptable gap in human rights protection"(28) for First Nations people, suggesting that, in light of strong objections to and calls for repeal of the provision since 1977, "[it] can be assumed that, but for the existence of section 67, many complaints would have been filed with the Commission."(29) The report noted the exemption's inconsistency with Canada's domestic and international human rights obligations;(30) reviewed legal and constitutional developments in relation to Aboriginal rights since 1977; and acknowledged the perceived conflict between collective Aboriginal rights and individual rights.(31)

Echoing the Canadian Human Rights Review Panel, *A Matter of Rights* also stressed that, "[i]n repealing section 67, it is important to ensure that the unique situation and rights of First Nations are appropriately considered in the process of resolving human rights complaints." It reiterated the Panel's view that this would best be accomplished by the addition of an interpretive clause to the CHRA in order that "individual claims to be free from discrimination are considered in light of legitimate collective interests."(32) Given the importance of proper formulation of such a clause through consultations with First Nations, the CHRC proposed a two-step process, recommending that:

> 1. Section 67 of the *Canadian Human Rights Act* be repealed immediately.
>
> 2. The repeal legislation include provisions to enable the development and enactment, in full consultation with First Nations, of an interpretative provision, which will take into consideration the rights

(28) Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act*, October 2005, p. 1, http://www.chrc-ccdp.ca/pdf/Report_A_Matter_Of_Rights_en.pdf.

(29) *Ibid.*, p. 3.

(30) *Ibid.*, pp. 8-9.

(31) *Ibid.*, p. 13.

(32) *Ibid.*, p. 14.

> and interests of First Nations. The interpretative provision will guide the Commission, and the Canadian Human Rights Tribunal, in the application of the *Canadian Human Rights Act* with regard to complaints against First Nations governments and related institutions.
>
> 3. The application of the *Canadian Human Rights Act* to First Nations, and related institutions, be suspended for a transitional period of between 18 and 30 months in order to allow
>
>   a) consultations on, and enactment of, the proposed interpretative provision;
>
>   b) preparatory actions to ensure that First Nations and the Commission have in place the measures necessary to effectively, efficiently and quickly resolve complaints.
>
> 4. The application of the *Canadian Human Rights Act* to the Government of Canada, with regard to matters previously shielded by section 67, take effect immediately on repeal with no transition period.
>
> 5. The Government of Canada and First Nations, when negotiating self-government or claims agreements, consider the inclusion in those agreements of special provisions dealing with human rights protection and promotion.(33)

It is worth noting that, according to the CHRC special report, effective resolution of human rights complaints in the First Nations context may require adjustment to institutional human rights mechanisms currently in place, to be determined collaboratively following repeal of section 67. In addition to redress under the CHRA, "[t]he need for a community-level response to human rights disputes is especially important for First Nations considering [their] diversity and special nature," that is, since most communities affected by the repeal are rural or isolated, with diverse cultural and linguistic traditions and differing administrative capacities. The report stressed that

> [e]nsuring that First Nations have adequate human and financial resources to design and implement viable human rights systems is of critical importance. ... [S]ignificant investment in capacity building will be required. It is essential that First Nations not be forced to divert resources from critical programs, such as housing and education, in order to fulfil statutory human rights obligations.(34)

(33) *Ibid.*, p. 24.

(34) *Ibid.*, p. 18.

The report also observed that a number of issues related to the *Indian Act* raise human rights concerns. It urged the government to undertake a review of the Act for potential conflict with the CHRA and other human rights instruments, with particular attention to the impact of Bill C-31 and related status and membership issues.

5. *Access to Justice and Indigenous Legal Traditions*: Proposal to Support the Immediate Repeal of Section 67 of the *Canadian Human Rights Act* (2006)

In this May 2006 proposal advocating a "comprehensive multi-year plan to fully engage and meaningfully consult with First Nations and Aboriginal communities on the repeal of Section 67,"(35) the Native Women's Association of Canada supported CHRC recommendations for immediate repeal of section 67 and insertion of an interpretive clause, but noted that

> adding an interpretative provision to the CHRA will not ensure that there is meaningful access to human rights protections for many First Nations individuals ... particularly for those in remote communities. ... [E]quitable access to human rights law requires much more than simply changing the "black letter of the law". [Not] providing women and [F]irst Nations communities with the means to access the justice system is just as much a failure and just as unacceptable from a human rights perspective as the current inadequacies of the substantive law as it affects First Nations women.(36)

6. Recent Reports of United Nations Human Rights Bodies

In December 2004, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, reporting on his Mission to Canada, recommended that section 67 be repealed and that the CHRC be enabled to consider complaints by First Nations people related to the *Indian Act*.(37)

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(35) Native Women's Association of Canada. *Access to Justice and Indigenous Legal Traditions*: Proposal to support the Immediate Repeal of Section 67 of the *Canadian Human Rights Act*, 2006, p. 3, http://www.nwac-hq.org/_includes/pdf.php?press_id=29.

(36) *Ibid*., p. 12. NWAC's "bottom-up" approach involved, in part, broad community consultations with a strong educational component, and collaboration between government and communities in the development and implementation of "community-driven, culturally appropriate human rights mechanisms."

(37) United Nations, Economic and Social Council, Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Mission to Canada*, E/CN.4/2005/88/Add.3, 2004, p. 24, http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.88.Add.3.pdf.

In April 2006, the Human Rights Committee observed that "balancing collective and individual interests on reserves to the sole detriment of women is not compatible with the [International Covenant on Civil and Political Rights]." It recommended immediate repeal of section 67 and adoption, in consultation with Aboriginal peoples, of measures to end discrimination in matters of band membership and matrimonial property.(38)

In May 2006, the Committee on Economic, Social and Cultural Rights noted that ongoing discrimination in relation to Indian status and band membership affected First Nations women's enjoyment of rights under the International Covenant on Economic, Social and Cultural Rights. It, too, recommended repeal of section 67 and removal of residual discrimination from the *Indian Act*.(39)

DESCRIPTION AND ANALYSIS

Bill C-44 consists of three clauses.

Clause 1 repeals section 67 of the CHRA, thus eliminating the shield that has, since 1977, barred complaints of discrimination against the federal and First Nations governments in relation to acts and decisions authorized by the *Indian Act*. In removing the section 67 exception, the government intends to ensure Aboriginal people have access to full human rights protections under the CHRA on the same basis as other Canadians, and to "empower First Nations people with the ability to seek recourse."(40)

As the foregoing discussion attests, authorities consulted suggest that the implications of repeal for First Nations people, communities and the existing CHRA system could be significant. If realized, the anticipated high volume of hitherto prohibited claims of

(38) United Nations, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, par. 22, http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf.

(39) United Nations, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant – Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, E/C.12/CAN/CO/5, par. 17, 45, http://www.unhchr.ch/tbs/doc.nsf/0/87793634eae60c00c12571ca00371262/$FILE/G0642783.pdf.

(40) Department of Indian Affairs and Northern Development, News Release, "Canada's New Government Introduces Legislation To Strengthen Human Rights Protection For Aboriginal Canadians," Ottawa, 13 December 2006.

discrimination – against the federal government in relation to *Indian Act* provisions,[41] and against First Nations community council and governmental actions and decisions pursuant to the Act – may strain the financial and human resource capacities of many community governments, as well as those of the CHRC. Relations within communities may also undergo strain as newly available external redress mechanisms are exercised.

A transitional provision in clause 3 allows First Nations community governments some time to plan for the repeal of section 67. It states that an act or omission by an Aboriginal authority in the exercise of powers conferred or imposed by the *Indian Act* may not be the subject of a complaint under the CHRA within six months of Bill C-44's receiving royal assent. The CHRC's recommended transition period was intended, in part, precisely to enable preparations for the resolution of complaints by First Nations communities and the CHRC, and it appears the CHRC will hold discussions with Aboriginal organizations on implementing the change to the CHRA.[42] Bill C-44 does not exempt the federal government from immediate application of the CHRA with respect to *Indian Act*-related matters.

Clause 3 offers at least partial mitigation of the immediate impact of repeal on First Nations communities. The transition period it sets out is, however, substantially below the 18-30 months proposed by the CHRC and endorsed by NWAC. In the CHRC's recommendation, suspension of the CHRA's application to First Nations bodies was tied explicitly to consultations on development and enactment of an interpretive provision that would take account of First Nations' interests and guide application of the CHRA. In this light, the briefer transition period in Bill C-44 may relate to the fact that the legislation does not contain, or make reference to the development of, an interpretive provision to balance individual and collective rights under the CHRA. Given the importance attributed to such a measure by the Canadian Human Rights Review Panel, the CHRC and others, its absence may complicate interpretation and application of the CHRA in the First Nations context.

It remains to be seen whether, notwithstanding the lack of a statutory provision within the CHRA, the CHRC intends to issue guidelines that might serve as an interpretive tool, or the government intends supplementary measures in relation to the repeal of section 67. It is

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(41) In particular, those implemented by Bill C-31.

(42) Canadian Human Rights Commission, News Release, "Canadian Human Rights Commission To Hold Discussions With Aboriginal Organizations To Implement A Change To The Canadian Human Rights Act," Ottawa, 13 December 2006.

also possible that the government considers the CHRA's existing *bona fide* justification defence provision a sufficient balancing measure for dealing with complaints of discrimination arising in the First Nations context.(43)

Finally, clause 2 of Bill C-44 provides for a parliamentary committee to undertake a comprehensive review of the effects of that repeal within five years of the bill's enactment, and to report on that review within the following year. The review provision appears to reflect government recognition of the potential repercussions resulting from removal of the *Indian Act* exception from the CHRA.

COMMENTARY

Bill C-44 drew an immediate response from national First Nations organizations whose constituents stand to be the most directly affected by repeal of section 67.

In a joint press release, the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) support repeal in principle, but only following a consultative process with First Nations. In the absence of prior consultation, the AFN National Chief describes Bill C-44 as "a recipe for ineffectiveness [that] will add new costs for First Nations governments already under-resourced" and as inconsistent with the CHRC recommendation for an 18-30 month transition period. NWAC's President expresses concern that repeal without meaningful consultation "could only lead to disaster," and is critical of the government's failure to respond to the 2006 NWAC plan related to the anticipated removal of section 67. Both organizations call for an open process to assess the impacts of repeal and collaborative development of an implementation plan.(44)

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(43) Paragraph 15(1)(*g*) provides that it is not a discriminatory practice if "an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation." Application of this provision in relation to a complaint against a First Nations government would require the government to demonstrate that an established discriminatory limitation it had imposed had been reasonably necessary and that no less discriminatory alternative had been available.

(44) Assembly of First Nations and Native Women's Association of Canada, Bulletin, "Assembly of First Nations, Native Women's Association of Canada call for full consultation before the repeal of Section 67 of the Canadian Human Rights Act," Ottawa, 13 December 2006, http://www.nwac-hq.org/_includes/pdf.php?press_id=30.

NWAC's fuller response to Bill C-44 also criticizes the absence of an "essential" interpretive provision "to safeguard important collective rights while balancing the rights of individuals." It views the bill's six-month transition period as inadequate to prepare communities for application of the CHRA, and "[cautions] the government to slow down and ensure that this is done right," since "this action may actually hurt more Aboriginal women than it will benefit."(45)

Not all First Nations organizations oppose the legislation. The National Chief of the Congress of Aboriginal Peoples reportedly endorses Bill C-44 as a step toward elimination of the *Indian Act*, and disputes the need for additional consultation on a matter of human rights.(46) The Grand Chief of the Nishnawbe Aski Nation is also quoted as supporting the legislation as a means to gain "access to universal rights."(47)

Editorial comment in all regions endorses Bill C-44, largely without reservation. Repeal of section 67 is variously described as a necessary reform, a long-overdue measure that acknowledges equal rights for First Nations people, opens chiefs and councils to scrutiny, serves as a necessary constraint on their power over First Nations people, and provides access to human rights mechanisms as a first step toward accountability. It is suggested that individual rights are legitimate entitlements that should not be trumped indefinitely by group interests. Objections about lack of consultation by the AFN, NWAC and others are viewed in the main as without merit, as are suggestions that the bill promotes assimilation.

There are also suggestions that the government should be open to assisting First Nations communities to deal with the practical consequences of removing the *Indian Act* exception,(48) and that the legislation's positive objective may be marred by a paternalistic approach, represented by the absence of prior consultations and an abbreviated transition period.(49)

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(45) Native Women's Association of Canada, "Key Messages for the Native Women's Association of Canada – Re: Repeal of Section 67 of the Canadian Human Rights Act," Ottawa, 13 December 2006, http://www.nwac-hq.org/_includes/pdf.php?press_id=27.

(46) Mindelle Jacobs, "Time for Talking is Over," *Edmonton Sun*, 17 December 2006, p. 17.

(47) Canadian Press, "Tory bill would open floodgates to native rights complaints," *The Record* [Kitchener-Waterloo], 14 December 2006, p. D8.

(48) "Rights exemption embarrassing," *Cape Breton Post* [Sydney], 28 December 2006, p. A6.

(49) "Rights on reserves," *The Globe and Mail* [Toronto], 16 December 2006, p. A30.