Legislative Summary **LS-577E**

BILL C-21: AN ACT TO AMEND THE CANADIAN HUMAN RIGHTS ACT

Mary C. Hurley
Law and Government Division

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LEGISLATIVE HISTORY OF BILL C-21

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	13 November 2007
Second Reading:	13 November 2007
Committee Report:	4 February 2008
Report Stage:	28 May 2008
Third Reading:	28 May 2008

SENATE	
Bill Stage	**Date**
First Reading:	29 May 2008
Second Reading:	12 June 2008
Committee Report:	
Report Stage:	16 June 2008
Third Reading:	17 June 2008

Royal Assent: 18 June 2008

Statutes of Canada 2008, c.30

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-21, An Act to amend the Canadian Human Rights Act, received first reading in the House of Commons and was deemed referred to the Standing Committee on Aboriginal Affairs and Northern Development on 13 November 2007. The legislation, as tabled, was identical to former Bill C-44, which was introduced in the 1st Session of the 39th Parliament and died on the *Order Paper* following extensive consideration at committee stage when Parliament was prorogued on 14 September 2007.(1)

Like its predecessor, Bill C-21 repeals section 67 of the federal human rights statute, which has restricted access to the legislation's redress mechanisms with respect to "any provision of the *Indian Act* or any provision made under or pursuant to that Act."(2) In December 2007 and January 2008, the Aboriginal Affairs Committee considered Bill C-21 clause by clause in four meetings, adopting five significant opposition amendments having to do with interpretive and process matters, and leaving the repeal provision itself intact. On 28 May 2008, by unanimous consent of the House of Commons, the bill was deemed concurred in at report stage, with government amendments modifying two of the Committee's proposals, and deemed read a third time and passed. Both committee and report stage amendments are outlined below under the "Description and Analysis" heading. **Bill C-21 was introduced in the Senate on 29 May, and was adopted with no further changes on 17 June 2008. The legislation was given Royal Assent on 18 June.**

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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) By motion adopted 25 October 2007, the House of Commons provided for the reinstatement of bills in the 2nd Session at the same stage in the legislative process they had reached when the previous session was prorogued.

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

BACKGROUND

A. Overview of the *Canadian Human Rights Act* (CHRA)[3]

The CHRA, enacted in 1977, prohibits discriminatory practices on the basis of an exhaustive list of grounds[4] 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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(3) 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.

(4) 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(5) and others on broad *Indian Act* reform.(6)

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.(7) 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."(8) 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,"(9) while other witnesses recommended its deletion from the bill. An amendment to that effect was defeated in Committee.(10)

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

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

(7) 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.

(8) 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).

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

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

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,"[11] 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 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.[12]

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*."[13]

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.[14] 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

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

(12) 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.

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

(14) 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.

Agreement does so, providing explicitly for the CHRA's application to Westbank, and including an interpretive provision with respect to that application.(15)

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.(16) 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.(17) 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

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(15) 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.

(16) 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*.

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

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.(18) In other cases, the authority of the *Indian Act*, and hence the application of the section 67 exception, have been upheld.(19)

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*."(20)

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.

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(18) 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*.

(19) 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.

(20) 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).

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.(21) 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."(22)

Ultimately, the Panel concluded "a blanket exception like section 67 is inappropriate,"(23) but stressed the importance of an interpretive measure "to balance the interests of Aboriginal individuals seeking equality without discrimination with important Aboriginal community interests."(24) 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.(25)

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(21) Summaries of research papers prepared for the CHRA Review Panel, including those focusing on section 67, may be consulted via the Justice Canada website at: http://www.justice.gc.ca/chra/eng/res-rec.html.

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

(23) Ibid., p. 130.

(24) Ibid., p. 131.

(25) 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.

3. Bill C-7, the First Nations Governance Act (2003)[26]

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.[27] 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."[28]

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 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.

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(26) 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.

(27) 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.

(28) 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.

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"[(29)] 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."[(30)] The report noted the exemption's inconsistency with Canada's domestic and international human rights obligations;[(31)] reviewed legal and constitutional developments in relation to Aboriginal rights since 1977; and acknowledged the perceived conflict between collective Aboriginal rights and individual rights.[(32)]

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."[(33)] 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 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.

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(29) 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.

(30) Ibid., p. 3.

(31) Ibid., pp. 8–9.

(32) Ibid., p. 13.

(33) Ibid., p. 14.

> 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.(34)

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.(35)

(34) Ibid., p. 24.

(35) 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.(36)

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,"(37) 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.(38)

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*.(39)

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(36) In January 2008, during clause-by-clause consideration of Bill C-21 by the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, the CHRC released a follow-up special report, entitled *Still a Matter of Rights*, http://www.chrc-ccdp.ca/pdf/report_still_matter_of_rights_en.pdf.

(37) 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*, Ottawa, 2006, p. 3.

(38) 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."

(39) 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.galdu.org/govat/doc/canada.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.(40)

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*.(41)

D. Legislative History of Bill C-44

The legislative history of this predecessor to Bill C-21 which, as mentioned, died on the *Order Paper* in September 2007, is worth noting. In February 2007, following second reading, the bill was referred to the 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, the abbreviated transition time preceding implementation, and uncertainty about resources for implementation were also cited among major causes for concern.(42)

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(40) 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.

(41) 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.

(42) 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

DESCRIPTION AND ANALYSIS

As introduced, Bill C-21 consisted of three clauses. The House Aboriginal Affairs Committee amended the bill by modifying 2 of these clauses and adding three new clauses. Two of the latter were, in turn, modified by the House of Commons at report stage.

A. Repeal (Clause 1)

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."(43)

As the foregoing discussion attests, authorities consulted as well as witness testimony before the House Aboriginal Affairs **and Senate Human Rights Committees** suggest that the implications of repeal for First Nations people, communities and the existing CHRA system could be significant. If realized, the anticipated volume of hitherto prohibited claims of discrimination – against the federal government in relation to *Indian Act* provisions,(44) 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.

(cont'd)

submissions by First Nations representatives as to the outcome of consultations. The Committee's report was tabled in the House on 20 June. On 26 July, a majority of members convened to 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. This motion was superseded by the Committee's 20 November decision to proceed to clause-by-clause consideration of newly introduced Bill C-21 on 4 December 2007.

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

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

B. Interpretation and Non-derogation (New Clauses 1.1 and 1.2)

A significant number of First Nations and other witnesses before the House Committee took the position that Bill C-21 should be amended by the addition of measures that would reflect the First Nations context at issue.

Suggested amendments included, most notably, insertion of a statutory interpretive provision for the purpose of ensuring individual rights and interests are balanced against the community's collective interests when a complaint under the CHRA is lodged against a First Nations government or authority.(45) Several witnesses also favoured adding a non-derogation clause to Bill C-21 in order to ensure that the repeal of section 67 does not have the effect of abrogating or derogating from the constitutionally protected Aboriginal and treaty rights of First Nations people.

Accordingly, a majority of Committee members adopted the following opposition amendments to Bill C-21:

> 1.1 The repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the First Nations peoples of Canada, including:
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired; and
>
> (*c*) any rights or freedoms recognized under the customary laws or traditions of the First Nations peoples of Canada.
>
> 1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests.

(45) Before the Committee, the CHRC agreed about the key importance of an interpretive balancing principle and proposed immediate inclusion of a broad statutory *statement of principle*, to be followed by further dialogue with First Nations and other stakeholders to determine by what regulatory, policy or other means to give this principle practical effect.

It is worth noting that, with the exception of paragraph (*c*), the original text of new clause 1.1 adapted the non-derogation language contained in section 25 of the *Canadian Charter of Rights and Freedoms* to the First Nations setting and repeal of section 67. Government members on the House Committee expressed concern about the potential effect of the untested language in paragraph (*c*) on the ability of the CHRC to deal effectively with complaints of First Nations people. The CHRC shared this concern. In a special follow-up to its 2005 report released prior to the end of clause-by-clause consideration, it advised against the insertion of a non-derogation provision in the legislation itself, noting, in particular, that new clause 1.1(*c*) could have "the unintended consequence of shielding First Nations . . . from legitimate equality claims, thus re-instituting section 67 in another form."(46)

On 16 May 2008, during report stage debate, the CHRC caution was cited as consistent with the government's view of the "broad and unprecedented nature" of new clause 1.1. In the result, despite ongoing concern about the suitability of such provisions in light of constitutional guarantees, the government proposed to replace clause 1.1 with the non-derogation language most often used in selected federal legislation since 1998. It reads:

> For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

Before the Standing Senate Committee on Human Rights, the CHRC did not oppose the inclusion of the government's revised non-derogation provision. AFN spokespersons did not support the revision, which, in their view, offered weakened protection for Aboriginal and treaty rights. They requested Senators to either reinstate the original amendment or adopt the non-derogation language of pre-1998 federal provisions that reflected the terms of section 25 of the *Canadian Charter of Rights and Freedoms*.(47)

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(46) See note 36. This CHRC recommendation was based in part on the December 2007 report of the Standing Senate Committee on Legal and Constitutional Affairs, entitled *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights*. It recommended inserting an umbrella non-derogation provision in the federal *Interpretation Act*, a proposal that the CHRC encouraged the government to consider.

(47) Section 25 reads, in part: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada . . ."

New clause 1.2 sets out a non-exhaustive listing of bodies to be included in the term "First Nation government" for purposes of a complaint under the CHRA, and requires "due regard to First Nations legal traditions and customary laws" in that context. Government concerns about the breadth of the clause and its potential to shield discriminatory practices against women gave rise to a second report stage amendment. It explicitly stipulates that the principle of gender equality be factored into the interpretive exercise in relation to a complaint against a "First Nation government," i.e., that the exercise give due regard to First Nations traditions and laws, and the balancing of individual and collective rights, "to the extent that they are consistent with the principle of gender equality." This addition mirrors the equivalent language proposed in Bill C-7, the First Nations Governance Act, which died on the Order Paper in 2003,(48) and reflects the concern of the 2000 Review Panel that an interpretive provision not have the effect of justifying discrimination based on sex.(49)

AFN spokespersons expressed reservations to the Senate Committee concerning the underlying intent and uncertain effect of the revised interpretation provision. It remains to be seen what policy or regulatory measures the CHRC develops in collaboration with First Nations representatives – its consistently expressed intention – to effect the now statutory interpretive directive.

C. Transitional Provision (Clause 3)

A transitional provision in clause 3 allows First Nations community governments some time to plan for the repeal of section 67. As introduced, clause 3 stated that an act or omission by an "Aboriginal authority" in the exercise of powers conferred or imposed by the *Indian Act* might not be the subject of a complaint under the CHRA within 6 months of Bill C-21's receiving Royal Assent. Bill C-21 does not exempt the federal government from immediate application of the CHRA with respect to *Indian Act*-related matters. Although the provision offered at least partial mitigation of the immediate impact of repeal on First Nations communities, the transition period it set out was substantially below the *18–30* months proposed by the CHRC, and the *36* months preferred by the AFN, NWAC and others.

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(48) See text accompanying note 28.

(49) See note 25.

Virtually all witnesses before the Aboriginal Affairs Committee stressed that a transitional period substantially longer than the 6 months provided for in Bill C-21 was of critical importance to enable communities to develop the capacity to deal with human rights issues and establish effective redress systems. Proposals for a suitable transitional time frame varied from 18 to 36 months. In response, a majority of Committee members amended clause 3 by replacing the original 6-month period with 36 months, and "Aboriginal authority" with the same broadly inclusive term "First Nation government" of new clause 1.2 above.

D. Review Provision (Clause 2)

As introduced, Bill C-21 provided for a parliamentary committee to undertake a comprehensive review of the effects of the repeal of section 67 within five years of the bill's enactment, and to report to the Senate and/or the House of Commons on that review within the following year, or such further time as Parliament might authorize. The review provision appeared to reflect government recognition of the potential repercussions resulting from removal of the *Indian Act* exception from the CHRA.

The House Aboriginal Affairs Committee amended clause 2 to provide for a *joint government–First Nations* review of the effects of repeal within the same five-year period, and a report to *both* houses of Parliament within a year of the initiation of the joint review.

E. Study Provision (New Clause 4)

Witnesses before the Aboriginal Affairs Committee, including the CHRC, the AFN, NWAC and many others, underscored the critical need for adequate financial and human resources to address the effects of repealing section 67, and expressed concern about the absence of government commitments to ensure such resources would be available.

In response, a majority of Committee members approved the following amendment:

> 4. The Government of Canada, together with the appropriate organizations representing the First Nations peoples of Canada, shall, within the period referred to in section 3, undertake a study to identify the extent of the preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the *Canadian Human Rights Act*. The Government of Canada shall report to both Houses of Parliament on the findings of that study before the expiration of the period referred to in section 3.

CHRC and NWAC witnesses before the Senate Standing Committee on Human Rights again highlighted the caution that ensuring sufficient resources is key to achieving effective implementation of the effects of repeal. According to CAP's spokesperson, this view represents a "general consensus" among stakeholders.

COMMENTARY

The government's proposed repeal of section 67 in the form of the former Bill C-44 drew an immediate response from national First Nations organizations whose constituents stand to be the most directly affected by it. The following paragraphs provide a summary overview of initial reactions to the legislation and briefly canvass response to its reintroduction and parliamentary progress as Bill C-21, and the CHRC's follow-up to its 2005 report.

A. Bill C-44

In a joint press release following the introduction of Bill C-44, the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) supported repeal in principle, but only following a consultative process with First Nations. In the absence of prior consultation, the AFN National Chief described the bill 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 expressed concern that repeal without meaningful consultation "could only lead to disaster," and was critical of the government's failure to respond to the 2006 NWAC plan related to the anticipated removal of section 67. Both organizations called for an open process to assess the impact of repeal and collaborative development of an implementation plan.(50)

NWAC's fuller response to Bill C-44 also criticized the absence of an "essential" interpretive provision "to safeguard important collective rights while balancing the rights of individuals." It viewed the bill's six-month transition period as inadequate to prepare communities for application of the CHRA, and "[cautioned] 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."(51)

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(50) 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.afn.ca/article.asp?id=3219.

(51) 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.

Not all First Nations organization opposed the legislation. The National Chief of the Congress of Aboriginal Peoples (CAP) endorsed Bill C-44 as a step toward elimination of the *Indian Act*, and disputed the need for additional consultation on a matter of human rights.(52) The Grand Chief of the Nishnawbe Aski Nation was also quoted as supporting the legislation as a means to gain "access to universal rights."(53)

Editorial comment in all regions endorsed Bill C-44, largely without reservation. Repeal of section 67 was 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 was 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 were viewed in the main as without merit, as were suggestions that the bill promoted assimilation. The government's intention to reinstate legislation repealing section 67, announced in the 17 October 2007 Throne Speech, drew little editorial response.

There were 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,(54) and that the legislation's positive objective could be marred by a paternalistic approach, represented by the absence of prior consultations and an abbreviated transition period.(55)

B. Bill C-21

The introduction of legislation identical to the former Bill C-44 prompted renewed cautions about the federal initiative from both NWAC and the AFN and renewed support from CAP.

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

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

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

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

NWAC urged again that Bill C-21 be delayed to enable a thorough consultative process, reiterating concern about potential harm to First Nations women from fast-tracking the process. Its President questioned whether the human rights process is equipped to deal with subjects of complaints involving matters such as membership and housing. In her view, "[m]ost First Nations communities have no relationship with the Canadian Human Rights Commission and such an imposed form of 'formal equality' may feel very much like further colonialism. It is important for both the CHRC and First Nations communities to have the resources to build a relationship that acknowledges and respects human rights."(56)

The AFN repeated its call for an "adequate transition and implementation period" in relation to Bill C-21, and recommended that the legislation be amended to include interpretive and non-derogation measures. The National Chief stressed the need for "time and resources . . . to assess this bill's impact on First Nation communities," and asked for a ministerial commitment to "work jointly with First Nations to identify the extent of preparation, capacity, and fiscal and human resources required to comply with the application of the Act."(57)

The AFN Women's Council also highlighted the need for additional resources at the community level. In its view, "[t]he federal government is responsible for the deplorable water and housing situation many First Nations communities face. While Bill C-21 may provide an important opportunity to address this crisis, First Nation Governments are on the front lines and must also be afforded assistance to prepare for these types of complaints."(58) The Assemblée des Premières Nations du Québec et du Labrador expressed disappointment in the reintroduction of the legislation, and reiterated its call for "proper consultations" and "adequate funds so that [First Nations communities] can properly evaluate its effects and to develop sound means to mitigate any possible harm to our collective rights."(59)

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(56) Native Women's Association of Canada, "Repeal of S. 67 Requires Consultation and Resources," Ottawa, 16 November 2007, http://www.nwac-hq.org/en/documents/PressReleasereRepealofS67Nov16-07.pdf.

(57) Assembly of First Nations, "Assembly of First Nations National Chief Phil Fontaine seeks support and assurances from the Federal Government on proposed changes to Bill C-21," Ottawa, 20 November 2007, http://www.afn.ca/article.asp?id=3941.

(58) Assembly of First Nations Women's Council, "The Chair of the Assembly of First Nations Women's Council, and other female chiefs, are concerned about the implementation process of Bill C-21," Ottawa, 4 December 2007.

(59) Secretariat of the Assembly of the First Nations of Québec and Labrador, "Bill C-21: The AFNQL asks for a year's delay," Wendake, 16 November 2007, http://apnql-afnql.com/en/actualites/pdf/comm-2007-11-16.pdf.

In welcoming the bill's reintroduction, CAP's National Chief cautioned that critics of the legislation would "use the [minority government] situation to delay [and] deny Aboriginal people in Canada the basic human rights that all other Canadians [enjoy]."(60) According to CAP, its own consultation with off-reserve and "grassroots" First Nations people demonstrated that First Nations women victimized by human rights violations feel "that there is an urgent need to deal with this problem through the repeal of section 67." The National Chief maintained that "[a]ny suggestion that there hasn't been an opportunity to address how this proposed Act can be implemented . . . is not dealing with fact. . . . There's no evidence at all to support that granting access to First Nations peoples of the same redress mechanisms as all other Canadians even remotely compromises inherent and treaty rights in any way." He urged immediate enactment of Bill C-21.(61)

In **January 2008**, former Minister of Indian Affairs Robert Nault suggested that maintaining the *Indian Act* exemption "allows the federal government and First Nation governments to avoid making fundamental reforms to ensure equality," including reforms to the registration provisions of the *Indian Act* and to federal underfunding of services such as education. In his view, removal of the *Indian Act* exemption "is about the relationship between First Nation people and the governments that are there to serve them." The former minister urged all-party support for Bill C-21 as a matter of principle.(62)

As reviewed above, at least some of the matters of concerns raised by NWAC, the AFN and its Women's Council, and the APNQL were addressed in amendments to the legislation by the House of Commons Aboriginal Affairs Committee based on witness proposals, particularly those of the AFN.

A nearly four-month delay in the progress of Bill C-21 following the House Committee's February 2008 report prompted editorial comment that was largely critical of the opposition for insisting on amendments that were unacceptable to the government, thereby potentially jeopardizing the legislation and further delaying fuller human rights

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(60) Congress of Aboriginal Peoples, "CAP National Chief urges Canadians to get involved: The time is now," Ottawa, 13 November 2007, http://www.abo-peoples.org/media/current/PR_CAP_IntroC21_Nov13_07.html.

(61) Congress of Aboriginal Peoples, "Brazeau urges Parliament to move immediately on passage of human rights protective legislation: No need for further consultation or to deny threats to Aboriginal rights," Ottawa, 4 December 2007, http://www.abo-peoples.org/media/current/PR_Brazeau_HR_Legislation_Dec5_07.html.

(62) "Native Exemption: Equal protection of rights," *The Globe and Mail*, 23 January 2008, p. A17.

protection for First Nations people.(63) Other commentary endorsed the amendments, suggesting that, although application of the CHRA to First Nations people is desirable, the key issue from a First Nations perspective centres on ensuring that respect for individual rights does not undermine recognition and protection of First Nations' collective rights.(64) According to a third view, the absence of parliamentary agreement on Bill C-21 arose, in part, from opposition to the government's likely objective of weakening, incrementally, the "parallel society" of First Nations reserves. This polarization, it was suggested, pointed to the need for an important debate.(65) The eventual support of opposition parties for the government's compromise report stage amendments was welcomed editorially as a "minor miracle" of co-operation.(66)

CAP's National President endorsed passage of Bill C-21 as a step toward reform of Aboriginal governance, suggesting that the extension of human rights protection "will ultimately lead to the dismantling of the *Indian Act*."(67)

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(63) "The Indian Act and human rights: On this, all should agree," *The Globe and Mail*, 16 April 2008, p. A18; "The land human rights forgot," *National Post*, 17 April 2008, p. A18.

(64) Doug Cuthand, "Group rights of First Nations need protection, too," *The Star Phoenix* [Saskatoon], 18 April 2008, p. A13.

(65) Gordon Gibson, "Equal Charter protection, please: Let's be honest about the lack of human rights on reserves," *The Globe and Mail*, 7 May 2008, p. A21.

(66) "Human Rights on Reserves: heartening co-operation," *The Globe and Mail*, 27 May 2008, p. A16.

(67) Congress of Aboriginal Peoples, "Thirty years later first nations gain human rights protection: Passage of Bill C-21 'historic,'" Ottawa, 20 June 2008, http://www.abo-peoples.org/media/current/PR_Passage_of_Bill_C21_June08.html.