



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



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1] INTRODUCTION



It is time to repeal section 67 of the *Canadian Human Rights Act* (CHRA). It's a matter of rights.

As a result of section 67, some First Nations¹ people living on reserve are denied full access to the human rights complaint resolution system available to other people in Canada. Section 67, part of the original 1977 CHRA legislation, was to be a temporary measure, a short-term expedient. Twenty-eight years later, it is still in place.

Human rights legislation, which includes provisions for the redress of human rights complaints, has been enacted in Canada at the federal, provincial and territorial levels. While issues of effectiveness and access remain, generally, any Canadian who believes that they have been the victim of discrimination can file a complaint with a human rights commission or tribunal. Any Canadian, that is, except those who happen to be a member of a First Nation living on lands governed under the *Indian Act*. These Canadians have been left out of the human rights protection that others take for granted.

In issuing this report, the Commission is promoting the resolution of a long-standing and unacceptable gap in human rights protection. A solution to this issue may or may not result in more responsibilities for the Commission. The Commission does not have a proprietary interest in how this problem is resolved. Its only concern is that it is resolved.

The Commission recognizes that traditional First Nation systems of governance already incorporate human rights principles. Furthermore, the Commission does not believe that section 67 must be repealed because First Nations have a special problem regarding discrimination. There are problems of discrimination in First Nation communities, but this is not unique to First Nations, as the Commission's work amply illustrates.

¹ In this report "First Nations" is used, in general, to refer to First Nation governments operating under the *Indian Act* and which are statutorily recognized as "band governments". This is not meant to diminish the status of other Aboriginal Nations and communities including those of the Métis and Inuit peoples and others that operate outside the *Indian Act*.

2] THE IMPACT OF SECTION 67



Section 67 restricts the ability of people living or working in communities operating under the *Indian Act* to file complaints of discrimination if the discrimination they are complaining about is related to the *Indian Act*. Section 67 is the only provision in Canadian human rights law that restricts access of a particular group of persons (people living or working in First Nations communities) to the human rights process.

The *Canadian Human Rights Act* prohibits discrimination based on eleven grounds.² To ensure effective protection against discrimination, the Act provides for a system for the investigation and resolution of allegations of discrimination. A person who believes they have been discriminated against can file a complaint against any employer or service provider under federal jurisdiction including federal departments and agencies. This includes complaints regarding provisions of federal legislation and regulations.³

Generally speaking, any action, policy or legislation within federal jurisdiction can be the subject of a human rights complaint. The Canadian Human Rights Commission must consider all complaints on their merits. With limited exceptions,⁴ no legislation or action carried out by the federal government or a federally regulated entity is free from human rights scrutiny.⁵ Section 67, however, runs contrary to this inclusive approach. The section reads as follows:

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

As a result of section 67, some actions carried out by the Government of Canada or a First Nation government (or by a related agency, such as a school board) can be exempt from human rights scrutiny. Given the broad scope of the *Indian Act*, which affects many aspects of the daily lives of First Nation people, the impact of section 67 is significant. In effect, it creates a zone of law and decision making within which First Nation people have a restricted right to pursue claims of discrimination.

The impact of this exclusion can be better appreciated by considering some of the matters provided under the *Indian Act* that cannot be challenged in either their substance (in that the provision itself may be discriminatory) or their application (in that the provision may have been applied in a discriminatory manner):

- registration or non-registration of someone as a First Nation member;
- use of reserve lands;
- occupation of reserve lands;
- wills and estates;

2 These grounds are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

3 Thus, for example, the CHRA was used to successfully challenge provisions of the *Unemployment Insurance Act* because they discriminated on the basis of sex.

4 The Commission also opposes limitations with regard to mandatory retirement, pension plans created prior to 1977, and the fact that some federally incarcerated inmates cannot file complaints against the Correctional Service of Canada.

5 In May 2005 the Supreme Court ruled that, with limited exceptions, the CHRA also applies to employees of Parliament, *Canada (House of Commons) v. Vaid*, 2005 SCC 30.

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- education;
 - housing;
 - ministerial decisions with regard to incompetent individuals and guardianship; and
 - the enactment of by-laws.⁶

First Nations people living off reserve, especially those who regained status under Bill C-31, sometimes have conflicts with their First Nation governments regarding the allocation of resources such as education funding and housing. However, as a result of section 67, they may be excluded from filing a human rights complaint, even if they have reason to believe that their lack of access to these resources was discriminatory.

As a result of a line of tribunal and court decisions, the scope of the section 67 exemption has been interpreted narrowly. For an action by a First Nation or the Department of Indian Affairs and Northern Development (DIAND) to come under the section 67 exemption, the legal authority for making the action or decision must result directly from the *Indian Act*.⁷ For example, a First Nation government might make an administrative decision on allocating First Nation rental housing, which does not require an individual land allotment under the *Indian Act*. This decision would not be exempt from Commission scrutiny. However, a decision allocating individual land allotments by Certificate of Possession, carried out in accord with the *Indian Act*, would be exempt.

Consequently, the application of section 67 is arbitrary in many areas. It can lead to different results in similar circumstances, depending on whether the discriminatory act flowed from the *Indian Act* or not. Section 67 also precludes complaints against the Government of Canada alleging that provisions of the *Indian Act* itself are discriminatory.

Due to the narrowed application of section 67, there are decisions of First Nations governments and the federal government that fall outside the scope of the exemption and that therefore can be subject to review under the CHRA. The Commission deals, on average, with 20 such complaints per year.

Cases that have reached the Commission and the Tribunal from First Nations communities reveal the same range of human rights complaints as occur off reserve. There are complaints based on various grounds, such as sex, age, disability and race. The focus of complaints has included the denial or termination of employment, the denial of access to programs or services administered by a First Nation government, and sexual harassment in the workplace.

It is, of course, not possible to determine how many complaints of discrimination might have been filed under the CHRA but for section 67. Nor is it possible to know what impact such complaints may have had on forcing or promoting reform of potentially discriminatory provisions of the *Indian Act* and First Nation by-laws.

However, it is clear that since 1977, many First Nation people, particularly First Nation women, have vigorously objected to section 67. They called for its repeal so that they could challenge provisions of the Act and actions by both DIAND and First Nations that they considered to be discriminatory. A particular focus of attention was the alleged continuing gender discrimination created by the 1985 Bill C-31 amendments of the *Indian Act*. It therefore can be assumed that, but for the existence of section 67, many complaints would have been filed with the Commission since 1977.

⁶ By-laws enacted pursuant to the *Indian Act* can have wide applications covering many areas of activity.

⁷ *Desjarlais (Re)*, [1989] 3 F.C. 605; (1989), 12 C.H.R.R. D/466; [1990] 1 C.N.L.R. 39; 102 N.R. 71 (C.A.).

Perhaps a less well appreciated effect of section 67 is the overall impact it has had on the perception of the access First Nations people have to a human rights redress process. Incomplete information and misconceptions about section 67 have led to a widespread belief that *all* actions carried out by First Nations or DIAND are exempt from human rights scrutiny. As a result, many First Nation people, who in fact could file a complaint of alleged discrimination, do not do so.

A further anomaly in the operation of this exemption is the fact that self-governing First Nations, operating outside the *Indian Act*, are subject to the CHRA. There is no acceptable rationale for this difference in treatment between First Nation communities.

3] HISTORY OF SECTION 67



It was 28 years ago, in 1977, that Parliament considered legislation⁸ to enact a comprehensive federal anti-discrimination code, the *Canadian Human Rights Act*, and to establish the Canadian Human Rights Commission. In introducing the legislation, the Minister of Justice, the Honourable Ron Basford, noted:

*The existence of fundamental human rights and freedoms, including the right of every individual to participate in society without... discrimination, is a basic and underlying principle which has long been recognized by the Parliament and Government of Canada.*⁹

He went on to state that the purpose of the new legislation was “to give... legal recognition to these rights by providing, for the first time, a comprehensive set of rules against discrimination at the federal level.”

The principle of comprehensiveness was, however, subject to an important exception: section 67,¹⁰ the last clause of the Act. The Minister explained that this exception was necessary because the government had made a commitment to First Nation representatives that there would be no modifications to the *Indian Act* except after full consultations.

With the obvious exception of section 67 itself, the legislation made no reference to the *Indian Act*, and did not alter it in any way. Nevertheless, the Government believed that applying the proposed human rights regime to matters falling under the *Indian Act* could, in substance, result in changing the *Indian Act*. This was because, as the Minister conceded, certain provisions of the *Indian Act*, and actions carried out pursuant to it, quite possibly would not pass human rights scrutiny and might be struck down if complaints regarding them were considered by the new Human Rights Commission.

The most contentious of these issues concerned the situation of First Nation women who married non-Status Indians. Section 12(1)(b) of the then *Indian Act* required that if a First Nation woman registered under the *Indian Act* married a man without Indian status, she would lose her entitlement to status. However, First Nation men who married non-Indian women did not lose status. In fact, their wives, although they sometimes had no First Nation ancestry, were entitled to full status. The effect of this discriminatory provision was the effective banishment of over one hundred thousand women, their spouses, and their children from their communities and traditional homelands. This caused great psychological, emotional and economic suffering. This was especially true in cases where marriages broke down and First Nation women were not allowed to return home.

In the pre-Charter 1970s, the Canadian courts had proven ineffective in remedying sexual discrimination in the *Indian Act*. In *Attorney-General of Canada v. Jeanette Lavell, Richard Isaac et al. v. Ivonne Bedard* [1974] S.C.R. 1349, the Supreme Court of Canada held that section 12(1)(b) was fully operative, irrespective of its inconsistency with the *Canadian Bill of Rights* on account of discrimination based on sex.

⁸ Bill C-25: An Act to Extend the Present Laws in Canada that Proscribe Discrimination and Protect the Privacy of Individuals, 1977.

⁹ Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, March 10, 1977.

¹⁰ Then section 63.

Having exhausted domestic remedies, advocates of repealing section 12(1)(b) began to consider recourse to the human rights complaints mechanisms under the *United Nations International Covenant on Civil and Political Rights*. In December 1977, shortly after the passage of the CHRA, Sandra Lovelace made a formal complaint against Canada to the United Nations Human Rights Committee.¹¹

Meanwhile, the federal government had begun discussions with the National Indian Brotherhood (which later became the Assembly of First Nations) on reform of the *Indian Act*, including repeal of section 12(1)(b). These discussions were cited by Justice Minister Basford as the reason for exempting the *Indian Act* from the soon-to-be-enacted *Canadian Human Rights Act*.

During the Parliamentary Committee hearings on the human rights legislation, Mr. Basford came under pressure to justify the *Indian Act* exemption. The Minister made it clear that section 67 was intended as a temporary measure:

*Parliament is not going to look favourably on continuing this exemption forever or very long and... I take it from the proceedings and my own observations, Parliament, on a nonpartisan basis, would like to see these provisions of the Indian Act changed and corrected.*¹²

Many groups, including those representing women affected by section 12(1)(b), appeared before the Standing Committee and objected to exempting the *Indian Act* from the application of the new law. In words that still ring true today, one Member of Parliament asked during the 1977 parliamentary debate of the Act:

*What kind of human rights legislation is it in Canada when native women are not included? [...] Human rights legislation has to protect everybody and must not provide exemptions here and there... Human rights legislation, to be worth its salt, must include groups which are clearly discriminated against.*¹³

The initial concerns of First Nations women's representatives, that the joint review process would not lead to a remedy for the sex discrimination contained in the *Indian Act*, were ultimately confirmed. The Cabinet/NIB process was not successful. Consequently, the sex discrimination contained in section 12(1)(b) and other sections of the Act continued, as did the section 67 exemption.

In 1981, the United Nations Human Rights Committee ruled in favour of Sandra Lovelace, finding that section 12(1)(b) contravened Canada's obligations under the *United Nations Covenant on Civil and Political Rights*. In 1982, the *Canadian Charter of Rights and Freedoms*, with its strong protection of gender equality,¹⁴ was enacted as part of the *Constitution Act, 1982*.

¹¹ Sandra Lovelace was a Canadian Indian who in 1970 lost her status on marrying a white man, per the *Indian Act*. Lovelace, having exhausted domestic remedies, took her case to the United Nations Committee on Human Rights. She alleged that the Act breached her rights under the *International Covenant on Civil and Political Rights* by denying her Indian status and the right to be part of her community and culture. In 1981 the Human Rights Committee ruled in her favour. They found that the *Indian Act* contravened section 27 of the Covenant, which states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

¹² Standing Committee on Justice and Legal Affairs, May 25, 1977, page 45-46.

¹³ House of Commons Debates, June 2, 1977, page 6201.

¹⁴ Section 28 read, "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

Finally, in 1985, shortly after the equality provisions came into effect, section 12(1)(b) was repealed and other sexually discriminatory provisions were abolished. (Concerns remain, however, about residual sex discrimination in the operation of the Act regarding Indian status and band membership entitlement.)

But section 67 was not abolished.¹⁵ Twenty-eight years after the Minister said Parliament “could not look favourably at continuing this measure,” 20 years after Bill C-31, it is still part of the law of Canada.

¹⁵ Legislation to abolish section 67 was introduced in 1992 and again in 2001. However, in both cases, as a result of issues not related to section 67, the legislation was not enacted.

4] SECTION 67 AND CANADA'S HUMAN RIGHTS OBLIGATIONS



Canadian Human Rights Act

Human rights are universal. With few exceptions, they apply to all human beings, simply by virtue of our common humanity. This idea is reflected in the purpose clause of the *Canadian Human Rights Act*, which specifies that “all individuals” are to be treated equally and without discrimination.

The Supreme Court has ruled that Canadian human rights legislation, including the CHRA, is quasi-constitutional in nature:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.¹⁶

The Court's emphasis on the inadmissibility of exceptions to human rights law “except by clear legislative pronouncement” is important to note. The intent of Parliament in enacting section 67 is clear. There is no doubt that Parliament knew exactly what it was doing. It intended to limit the reach of the CHRA when it came to matters relating to the *Indian Act*. However, it is also clear that, even in 1977, this limitation was seen as untenable in the long term and one that should be removed quickly.

In another decision, the Supreme Court commented on the inadmissibility of “political” justifications for the infringements of rights:

If an individual's Charter right or freedom is violated by the state, it is no answer to say the violation was driven or is justified for political reasons. Indeed forms of state discrimination that are undertaken for political reasons are among the most odious...¹⁷

Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* provides for equality before and under the law:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Charter jurisprudence emphasizes the importance of ensuring protection for all vulnerable groups. In the case of *Vriend v. Alberta*¹⁸ the Supreme Court considered whether the Alberta *Individual's Rights Protection Act* (IRPA) violated section 15 of the Charter because it failed to include sexual orientation

¹⁶ *Winnipeg School Division No.1 v. Craton*, [1985] 2 S.C.R. 150.

¹⁷ *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381.

¹⁸ [1998] 1 S.C.R. 493.

as a prohibited ground of discrimination. In deciding that the IRPA was “under inclusive” and, therefore, contrary to the Charter, the Court commented on the damage caused to persons who are denied human rights protection:

In excluding sexual orientation from the IRPA’s protection, the Government has, in effect, stated that “all persons are equal in dignity and rights,” except gay men and lesbians. Such a message, even if it is only implicit, must offend section 15(1), the section of the Charter, more than any other, which recognizes and cherishes the innate human dignity of every individual. (Egan, at para. 128)

Vriend dealt with a situation of legislative omission (sexual orientation was not included in the IRPA), while section 67 is an explicit legislative exclusion. Nevertheless, the same reasoning can be applied regarding section 67. Due to section 67, a specific group of Canadians, defined largely by being members of a First Nation, are denied the right, in limited but important circumstances, to have their human rights complaints considered. As the Supreme Court noted, this type of exclusion can send a powerful message to society.

The exclusion sends a message [...] that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

Section 67 has yet to be challenged under the Charter. However, given the history of disadvantage experienced by First Nations people, especially women and their children as a result of section 12(1)(b), and applying the reasoning in *Vriend*, arguably section 67 would not withstand Charter scrutiny.

International human rights instruments and mechanisms

The restricted application of the CHRA, as a result of section 67, is also arguably contrary to several provisions of international human rights instruments to which Canada is a party.

The *Universal Declaration of Human Rights* provides for equality before the law, access to an effective remedy in the case of discrimination, and limits to the situations in which a right guaranteed under the Declaration can be abrogated. Arguably, section 67 runs contrary to Article 7 and Article 8 of the Declaration.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Likewise, Article 26 of the *International Covenant on Civil and Political Rights* says:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In December 2004, Rodolfo Stavenhagen, the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, issued a report on his summer 2004 mission to Canada. The report recommended:

That the Canadian Human Rights Commission be enabled to receive complaints about human rights violations of First Nations, including grievances related to the Indian Act; and that section 67 of the Human Rights Act be repealed, as requested insistently by various organizations, including the Human Rights Commission, to which the Government of Canada agreed in principle in 2003.¹⁹

First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments²⁰

On May 31, 2005 the Government of Canada and the Assembly of First Nations signed a Political Accord. The Accord is based on 11 principles “that are to be read together and are mutually supportive”. These principles include: upholding the honour of the crown; constitutionalism and the rule of law; and recognition of the inherent right of self-government and aboriginal title. The eighth principle, “Human Rights”, states:

First Nations and Canada are committed to respecting human rights and applicable international human rights instruments. It is important that all First Nations citizens be engaged in the implementation of their First Nation government, and that First Nation governments respect the inherent dignity of all their people, whether elders, women, youth or people living or away from reserves.

Report of the House of Commons Standing Committee on Aboriginal Affairs on Matrimonial Real Property

The lack of an on-reserve matrimonial real property regime is a long standing human rights issue. As long ago as 1988, the Manitoba Aboriginal Justice Inquiry noted the discriminatory impact that the lack of an equitable division of property could have on Aboriginal women:

*There is no equal division of property upon marriage breakdown recognized under the *Indian Act*. This has to be rectified. [...] we believe that this matter warrants immediate attention. The Act’s failure to deal fairly and equitably with Aboriginal women is not only quite probably unconstitutional, but also appears to encourage administrative discrimination in the provision of housing and other services to Aboriginal women by the Department of Indian Affairs and local governments.²¹*

More recently, in June 2005, the Standing Committee on Aboriginal Affairs tabled a report entitled, “*Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*”.²² The report acknowledged the need to provide a means for people living in on-reserve communities to seek

¹⁹ E/CN.4/2005/88/Add.3: Report of Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people – Mission to Canada. The reference in the last sentence to the government’s 2003 agreement in principle to repeal section 67 refers to the inclusion of a repeal provision in an omnibus First Nations Governance Bill which subsequently did not proceed.

²⁰ For a copy of the Accord see: <http://www.afn.ca/article.asp?id=1218>.

²¹ *Report of the Aboriginal Justice Inquiry of Manitoba*, Chapter 13: Aboriginal Women, online: <http://www.ajic.mb.ca/volume1/chapter13.html>.

²² *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*, Report of the Standing Committee on Aboriginal Affairs and Northern Development, June 2005. See: <http://www.parl.gc.ca/InfocomDoc/38/1/parlbus/commbus/house/AANO/report/RP1906551/aanorp05-e.htm>.

redress of possibly discriminatory actions carried out by First Nations governments or DIAND as a result of the lack of a matrimonial property regime. During testimony before the Committee, Chief Tina Leveque noted that *“Repealing [section 67 of the Canadian Human Rights Act] would expose the Indian Act to those protections and provide mechanisms to enforce equality and fairness...”*²³

To complement its recommendations to resolve the matrimonial real property issue the Standing Committee recommended:

That, in broad consultation with First Nations organizations and communities, the government undertake immediate review of section 67 of the Canadian Human Rights Act with a view to amending that legislation:

- *to insert an interpretive clause requiring a balance between individual and community interests;*
- *to protect on-reserve First Nations individuals from discrimination under the Indian Act.*

As detailed later in this report, the Standing Committee’s recommendations are consistent with the recommendations of the Commission.

²³ Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development (hereinafter called Evidence), 12 April 2005.

5] ABORIGINAL RIGHTS AND HUMAN RIGHTS



In 1977 the general assumption was that, but for section 67, the Commission would assume responsibility for all complaints regarding First Nations and DIAND. Such complaints would have been dealt with in the same manner as other complaints received by the Commission. At that time Band Councils, as First Nation Governments are called in the *Indian Act*, were largely administrative extensions of DIAND. The idea of local autonomy, much less the inherent right of self-government, was just emerging in the consciousness of non-Aboriginal Canadians as a policy issue.

A great deal has changed since 1977. Today, although some 600 First Nations still operate under the *Indian Act*, First Nations have a great deal more control of their own affairs than they did in 1977. This is so, even though the recognition of inherent lawmaking powers by First Nations independent of a self-government agreement remains a significant outstanding legal and political issue.

In 1982 the “existing aboriginal and treaty rights of the aboriginal peoples of Canada” were constitutionally “recognized and affirmed” under section 35 of the *Constitution Act, 1982*. Section 25 of the Charter was enacted to ensure that the rights set out in the Charter would not be interpreted to “abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.”

In 1994, the Government of Canada recognized that the Aboriginal peoples of Canada had an inherent right to self-government as an existing right included within those protected by section 35 of the *Constitution Act, 1982*. The Government made a commitment to negotiate self-government agreements with First Nations that would operate within the existing constitutional framework, including the Charter.

Jurisprudence, including decisions of the Supreme Court, has established that in dealing with First Nations, recognition and consideration must be given to the unique history, status, culture, customs and rights of First Nation communities and individuals. (In this context, recognition should also be given to traditional systems of Aboriginal governance and dispute resolution that incorporate universal human rights principles.) Above all, the courts have enjoined governments in Canada to ensure that in all dealings with the Aboriginal peoples of Canada, the honour of the Crown is upheld:

*The honour of the Crown is always at stake in its dealings with Aboriginal peoples... It is not a mere incantation, but rather a core precept that finds its application in concrete practices.*²⁴

²⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

6] INDIVIDUAL AND COLLECTIVE RIGHTS



The *Canadian Charter of Rights and Freedoms*, the *Constitution Act, 1982*, and the jurisprudence recognize that the “existing treaty and Aboriginal rights” of the Aboriginal peoples of Canada include certain rights of a collective nature. Although these collective rights have yet to be fully defined, it is clear that they include matters such as the inherent right to self-government; hunting, fishing and gathering rights; collective land rights; and the right to the preservation of traditional languages, cultures and traditions.

The recognition of collective rights is seen by some as controversial because of a perceived conflict with more “traditional” individual rights, such as the right to be free from discrimination. The question is asked: what will happen when an individual right and a collective right collide? This is a valid question.

The discussion in Canada on the perceived tension between individual rights and collective rights is also an issue on the international scene. The modern conception of human rights finds its roots in the western philosophical traditions of individual autonomy. In contrast, countries in the developing world and indigenous peoples have sometimes asserted a need for the international community to recognize collective rights, such as the right to communal land ownership, as equally indispensable to human welfare.

The international community recognizes this duality of rights. The 1993 *Vienna Declaration of the World Conference on Human Rights*²⁵ affirmed:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

The Declaration goes on to recognize “the inherent dignity and the unique contribution of indigenous people to the development and plurality of society” and to specify that:

Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.

²⁵ *Vienna Declaration and Program of Action*, World Conference on Human Rights, Vienna, 14-25 June 1993, A/Conf.157/23 See: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

7] AN INTERPRETATIVE PROVISION



In 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. One means of doing this would be to add a statutory interpretative clause relating to the application of the CHRA in a First Nation context. Such a clause would require the Commission and the Tribunal to consider complaints against First Nations in the context of their particular circumstances. This would ensure that, where warranted, individual claims to be free from discrimination are considered in light of legitimate collective interests.

Legal and constitutional precedents

This approach is consistent with Canadian law and human rights principles that require human rights codes to be interpreted and applied in a way that recognizes the individual circumstances and interests of both complainants and respondents. It also recognizes that no right is absolute and that flexibility is required when the rights of various groups conflict.

For example, section 1 of the *Canadian Charter of Rights and Freedoms* recognizes this idea by guaranteeing and affirming Charter rights while subjecting those rights to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Given the importance of these entrenched Charter rights, the Supreme Court has developed strict rules for determining when a section 1 justification can be sustained.

Similarly, the CHRA allows for exceptions in carefully defined circumstances. A respondent in a human rights case can put forward a “*bona fide* occupational requirement” (BFOR) or a “*bona fide* justification” (BFJ) for why it treated an individual in a way that would otherwise be contrary to human rights law.²⁶ The Canadian Human Rights Tribunal applied this type of reasoning in the *Jacobs* case,²⁷ in which it recognized that the Mohawk Council of Kahnawake could make a BFJ claim to protect collective interests.

The *Jacobs* case involved Trudy and Peter Jacobs, who although brought up in the community of Kahnawake, did not meet the 50 percent blood quantum criteria that had been established for membership. The First Nation government argued that excluding the Jacobs was necessary to preserve the linguistic and cultural integrity of the community. The Tribunal accepted that such an argument could form the basis of a BFJ defence under the Act. However, the justification was in the end rejected because the Tribunal was not satisfied that the same objective could not be achieved in a manner that would be less harmful to the Jacobs.

It should also be noted that some Canadian human rights codes allow organizations to give preference in hiring to members of their particular group.²⁸

²⁶ For example, an airline can refuse to hire a pilot who does not have the visual acuity required to safely fly an aircraft.

²⁷ *Jacobs v. Mohawk Council of Khanawake* (1998), Canadian Human Rights Tribunal.

²⁸ For example, section 24. (1) of the *Ontario Human Rights Code* provides:

The right under section 5 to equal treatment with respect to employment is not infringed where:

- a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

Section 25

It has been suggested that in order to protect the legitimate collective interests of First Nations, an interpretative provision should parallel section 25 of the Charter by explicitly stating that the CHRA must be interpreted so as not to “abrogate or derogate” from constitutionally protected rights. This is a legitimate concern. However, the Commission believes that such a provision would be redundant. Section 25 is part of the Charter and is constitutionally entrenched. All Canadian laws, including the CHRA, are subject to the Charter.

There is, nevertheless, a need to provide some guidance on how the CHRA will be applied in the First Nation context, if section 67 is repealed. This is in part because claims under sections 25 and 35 are difficult to prove to the standard required by the Supreme Court. Some interests and concerns of First Nation communities may not meet the strict criteria needed to assert a constitutional right, but are nevertheless worthy of consideration in resolving a human rights claim. This may be particularly true with regard to rights relating to language, culture and traditions. These types of concerns may more appropriately be dealt with under human rights legislation.²⁹

Key features of an interpretative provision

The Canadian Human Rights Act Review Panel³⁰ made recommendations for what might be included in an interpretative clause. The Panel recommended that an interpretative provision:

- ensure that the Aboriginal community’s needs and aspirations are taken into account in interpreting the rights and defences in the Act;
- ensure that an appropriate balance is established between individual rights and Aboriginal community interests;
- operate to aid in interpreting the existing justifications and not as a new justification that would undermine the achievement of equality; and
- not justify sex discrimination or be used to perpetuate the historic inequalities created by the *Indian Act*.³¹

The Commission believes, in general, these are sound principles to guide the interpretation of the CHRA in its application to the First Nation context. The Review Panel did not make a recommendation for specific wording of an interpretative clause. One proposal³² for legislative wording that attempted to incorporate the principles recommended by the Panel reads as follows:

²⁹ It should be noted that the Commission and Tribunal have neither the capacity nor the expertise to interpret sections 25 and 35.

³⁰ *Promoting Equality: A New Vision*, Canadian Human Rights Act Review Panel, 2000.

³¹ This reflects section 35(4), *Constitution Act*, 1982:

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

³² This wording was included in Bill C-7, the *First Nations Governance Act*, which died on the Order Paper when Parliament was prorogued in fall 2003.

16.1 In relation to a complaint made under this Act against an aboriginal governmental organization,³³ the needs and aspirations of the aboriginal community affected by the complaint, to the extent consistent with principles of gender equality, shall be taken into account in interpreting and applying the provisions of this Act.³⁴

In commenting on this proposed wording before a Parliamentary Committee, the Chief Commissioner endorsed the principle of an interpretative provision but expressed concern with some of the proposed language:

While we support the objectives of the interpretative clause, we do have a concern with the vagueness of the current drafting. What exactly is the scope of the term “needs and aspirations” of the community and how do these relate to the need to protect individuals from discrimination? The Commission’s experience with the interpretation of the Canadian Human Rights Act by the Canadian Human Rights Tribunal and the courts leads us to believe that determining the correct balance between these two interests could lead to lengthy and costly litigation. Although some litigation is to be expected, greater clarity in the legislation would help minimize it and would ensure a more effective complaint resolution process.³⁵

Implementation of an Interpretative Provision

The proper formulation of an interpretative provision is an important matter, which must be carefully considered through a consultative process with First Nations. As important as it is, however, the process of formulating an interpretative provision should *not* be allowed to further delay the repeal of section 67. Therefore, the Commission recommends a two-step process. First, repeal section 67 immediately. And, second, initiate a process to develop an interpretative provision within a set period of time.

The repeal provision could include an enabling provision allowing for the federal enactment of an interpretative provision. Such an enabling provision might include reference to some of the key features of an interpretative provision discussed above, such as the need to ensure gender equality

33 The interpretative provision would be used only in relation to complaints against an Aboriginal government organization. This phrase excludes DIAND and other federal departments. It includes all Aboriginal government organizations and not just First Nation governments. Consequently, organizations such as school boards and hospital authorities would be covered by the clause.

34 While this wording makes specific reference to gender equality, it has also been suggested that reference also be made to other vulnerable groups such as persons with disabilities and two-spirited people (gays, lesbians, bi-sexual and transgendered people).

35 Submission of the Canadian Human Rights Commission to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, January 28, 2003.

and to protect collective interests. Enactment could be carried out through the regulatory process. This might involve the Commission using its existing guideline-making authority³⁶ to develop an interpretative provision in consultation with First Nations.

As the interpretative clause will apply only to complaints filed against First Nations, the Act should apply to complaints regarding the Government of Canada immediately upon repeal.

In the Supreme Court decision in *Corbiere*,³⁷ which required that the right to vote be extended to off reserve First Nation members, the Court ordered a transition period of 18 months. The Commission believes a similar period should be provided for the development of an interpretative provision and other transitional preparations with an outside limit of 30 months.

36 Under section 27(2) of the CHRA, the Commission has the authority to enact guidelines on how the Act should be applied with regard to a particular class or group of complaints:

27(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

Guideline binding

27(3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

Guidelines under the Act are “statutory instruments” giving them the same legal weight as regulations. The constitutionality of the Commission’s guideline making power was affirmed by the Supreme Court in the case of *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884.

37 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

8] FIRST NATIONS HUMAN RIGHTS REDRESS



The Commission's primary objective is the immediate repeal of section 67. Doing so will ensure that First Nations people have the same access to human rights dispute resolution as other people in Canada. This matter of fundamental rights must be acted on quickly.

In this context, the underlying principles of the Act (the right to be free from discrimination and to have access to redress) must be distinguished from the institutional mechanisms that the Act establishes to resolve human rights complaints. While the Commission is firmly committed to the fulfillment of the principles of the Act, the institutional mechanisms to ensure this may differ from what is currently in place and may evolve. This may mean a diminished role for the Commission, as the direct administration of human rights resolution processes is devolved to First Nations. This could result from further amendments to the CHRA or from the enactment of special First Nations human rights legislation, if deemed appropriate.

The Commission believes that a detailed discussion of the mechanisms to be adopted would not be productive now and would likely distract from the urgent need to repeal section 67. Once section 67 is repealed, it will be necessary for the Commission, First Nations and other interested parties to work collaboratively to determine how the human rights principles at the heart of the CHRA could best be applied in the context of First Nation communities. A transitional period, such as that suggested for the interpretative provision, would allow for this important work to be carried out.

There are two issues that the parties will likely want to consider during the design phase: community-level redress and Commission-level redress.

Community-level redress

Discrimination can occur in a community, a particular workplace or a school. It can also be found within the substantive content or impact of a particular law or within the operations or policies of an employer or service provider. It often concerns organizational dynamics and interpersonal factors that are difficult for an uninvolved party to fully understand. Human rights disputes that are left unresolved harden positions and increase animosity and bitterness between the parties to the dispute. This is why human rights bodies such as the Commission are increasingly attempting to resolve complaints as soon as possible and as closely as possible to where they originated.

The need for a community-level response to human rights disputes is especially important for First Nations considering the diversity and special nature of First Nations. There are more than 600 First Nation communities, most of them rural or isolated, that would be affected by the repeal of section 67. They have diverse cultural and political values, languages, levels of support, knowledge of and interest in the CHRA, and levels of capacity to accommodate legislative and administrative change. For these reasons it will be important for First Nations to determine what mechanisms they wish to implement to resolve disputes before they become human rights complaints.

Ensuring that First Nations have adequate human and financial resources to design and implement viable human rights systems is of critical importance. Although the burden of setting up a human rights system should not be exaggerated, significant 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 fulfill statutory human rights obligations.

Commission–level redress

Those, hopefully few, cases that are not resolved locally may become formal Commission complaints. The Commission is mandated to ensure that it serves all respondents and complainants effectively, fairly and efficiently. In the case of First Nations, this will likely mean that the Commission will want to consider measures to ensure that complaints regarding First Nations are handled in a manner consistent with the particular situation of First Nations communities. This will certainly involve an ongoing dialogue between First Nations and First Nation people on how the Commission can best serve the needs of communities and individuals, in a manner consistent with the CHRA.

9] A FIRST NATIONS HUMAN RIGHTS ACT



The proposed interpretative provision and adaptations of the Commission's procedures would make the CHRA and the Commission more accessible to and consistent with First Nation needs and aspirations. This is an important step. However, in accordance with the constitutional rights of First Nations and the inherent right to self-government, it may also be desirable, if such is the wish of First Nations, to consider specific legislation to deal with human rights in First Nations communities.

There are various institutional models that could be considered, such as the creation of a national First Nations Human Rights Commission and an independent First Nation Human Rights Tribunal. These new institutions might operate in conjunction with the existing Commission and Tribunal or as separate institutions. Alternatively, there might be human rights institutions established in individual First Nations, in regional groups of First Nations or on some other grouped basis. These bodies might act independently or in conjunction with national institutions.

10] HUMAN RIGHTS AND SELF-GOVERNING FIRST NATIONS



As a result of land claims and self-government agreements and the laws made to implement those agreements, some 20 First Nations operate outside the *Indian Act*. Other First Nations are in the process of negotiating such agreements. Self-government agreements generally replace the *Indian Act*. Consequently, First Nations governed pursuant to such agreements are not covered by the section 67 exemption.³⁸

Most self-government regimes make no specific reference to human rights. However, the CHRA applies as a result of provisions in self-government agreements that certain federal laws, such as federal human rights legislation, will apply to First Nations government and take precedence over laws adopted by First Nations governments.

Although self-governing First Nations and their citizens do not suffer the human rights disenfranchisement resulting from section 67, the effective promotion and protection of human rights is more complicated than simply removing the impediment of section 67. The protection and promotion of human rights and nondiscrimination are fundamental to good governance.

In this regard, there have been some encouraging developments. The *Westbank First Nation Self-Government Agreement*³⁹ contains a provision confirming the application of the CHRA to Westbank First Nation Lands and Members, and also provides an interpretative provision. Clause 291 of the *Westbank First Nation Self-Government Agreement* states:

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 the 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.*

Another encouraging development in recent self-government agreements is the inclusion of a clause by which the First Nation commits itself to assisting Canada to meet its international legal obligations. These obviously include obligations in relation to fundamental human rights protected by a range of conventions and treaties. In the *Westbank First Nation Self-Government Agreement*, for example, clause 36 provides:

As a general principle, Westbank First Nation shall take all necessary measures to ensure compliance of its laws and actions with Canada's international legal obligations.

³⁸ The case of *Azak v. Nisga'a Nation* heard before the British Columbia Human Rights Tribunal considered the issue of whether a human rights complaint against an institution of the Nisga'a Nation should be heard by the B.C. Tribunal or referred to the Commission. The Tribunal found that institutions created by federal legislation under the Nisga'a land claims agreement came under the jurisdiction of the CHRA.

³⁹ See: http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wst_e.pdf.

The clause goes on to commit the First Nation to remedy any Westbank law or action found to be inconsistent with Canada's international legal obligations by an international treaty body or other competent tribunal. A similar provision for ensuring compliance with international legal obligations can be found in the Tlicho Self-Government Agreement.

The Commission recommends that 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. First Nations already operating under their own enabling legislation should consider recommending legislative amendments or implementing administrative measures and policies to protect the human rights of their citizens.

11] HUMAN RIGHTS COMPLIANCE



Repeal of section 67 will, for the first time, allow First Nations persons to file human rights complaints with regard to provisions of the *Indian Act* and actions carried out pursuant to the *Indian Act* by the Government of Canada (as well as complaints against First Nation governments). Various provisions of the *Indian Act* invoke human rights concerns and could be the subject of possible complaints to the Commission. This is why section 67 was enacted in the first place and also why it must be repealed.

Although section 12(1)(b) was repealed in 1985, concern remains that the Bill C-31 amendments themselves may not pass human rights muster. Of most concern is that women who lost status before 1985 do not have the same ability to pass status on to their children and grandchildren as do their brothers and male cousins who also married non-status individuals. The lack of any provisions dealing with matrimonial property, a situation severely prejudicial to First Nation women, is, as already noted, another pressing issue. A variety of other issues would also raise human rights concerns.

It is not within the scope of this report to examine these issues in detail. Nor is it clear that these matters could necessarily form the basis of a complaint under the Act. As with all other complaints considered by the Commission, each complaint would have to be considered on its own merits and in accordance with the law and jurisprudence. If section 67 is repealed, the Commission will pursue such complaints to the full extent of the law.

However, the Commission would prefer that the Government take a proactive approach to preventing potential discrimination and not wait for complaints to be filed and potentially lengthy proceedings to take place. The Commission, therefore, urges the Government, in consultation with First Nations, the Commission and other relevant bodies, to review provisions of the *Indian Act* and relevant policies and programs to ensure that they do not conflict with the *Canadian Human Rights Act* and other relevant provisions of domestic and international human rights law. Such a review should focus in particular on the impact of Bill C-31 and how membership and entitlement to status could be managed equitably for all parties.

12] CONCLUSION AND RECOMMENDATIONS



The Canadian Human Rights Commission recommends to the Parliament of Canada 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.**
- 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.**

As explained in the report, this is a matter of rights. Rights that have been denied for twenty-eight years. They must not be denied any longer. The time to act is now. Failure to do so will result in a continuing blemish on Canada's reputation, both at home and abroad, as a defender of the fundamental rights of all.

The Commission looks forward to continuing dialogue with the Government of Canada, parliamentarians and First Nations as the process of repealing section 67 proceeds.