CANADIAN HUMAN RIGHTS COMMISSION

Still 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*

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Cat. No. HR21-58/2008E-PDF
978-0-662-47793-8

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1] INTRODUCTION

One of the key roles of the Canadian Human Rights Commission (CHRC) is to provide expert and objective advice and analysis to Parliament, government and stakeholders. It provides this advice based on its experience administering one of the most respected human rights statutes in the world.

The Commission encourages dialogue with all but it holds no brief for any particular group or viewpoint. As an independent, non-partisan, statutory agency, the Commission has only one aim: to advance equality for all Canadians.

It is in this spirit that the Commission has decided to issue a supplementary report to *A Matter of Rights*,[1] the special report it issued in October 2005, calling for the urgent repeal of section 67 of the *Canadian Human Rights Act* (CHRA).

1 Canada, Canadian Human Rights Commission, *A Matter of Rights: Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act*, (Ottawa: Canadian Human Rights Commission, October 2005). See: *http://www.chrc-ccdp.ca/proactive_initiatives/section_67/toc_tdm-en.asp*

2] BACKGROUND

As a result of section 67, First Nations citizens are denied full access to human rights redress under the CHRA. In preparing *A Matter of Rights*, and after its release, the Commission met with members of Parliament, government officials and First Nations leaders to explain the need to protect the human rights of all Canadians. As a result, for the first time, the need to repeal section 67 became an issue of public attention and concern.

In December 2006, repeal legislation—Bill C-44—was introduced in Parliament.[2] The Chief Commissioner and senior officials appeared twice before the Standing Committee on Aboriginal Affairs to express the Commission's support for repeal while stating strong reservations about various aspects of the proposed legislation.[3]

Virtually all of the witnesses who appeared before the Standing Committee supported repeal in principle. However, their ideas on how best to accomplish it differed significantly.

Bill C-44 died on the order paper when a new session of Parliament was convened. It was the fourth time that Parliament had considered but did not enact repeal legislation. In the Throne Speech of October 16, 2007, the government announced that it would reinstate legislation to guarantee to people living under the *Indian Act* "the same protections other Canadians enjoy under the *Canadian Human Rights Act*." On November 13, 2007, Bill C-21[4] was introduced and deemed to be referred to the Standing Committee on Aboriginal Affairs and Northern Development. Bill C-21 is exactly the same as Bill C-44.

Early in 2008, the Standing Committee on Aboriginal Affairs was still considering Bill C-21. Although some progress has been made, the fact remains that, more than two years after the Commission's first report, section 67 is still in place. First Nations citizens are still denied the protection from discrimination that other citizens take for granted. That is unacceptable in a free and democratic society that values fundamental human rights.

In 2005, the Commission introduced its call for action by stating:

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

It is still a matter of rights. The time for repeal is long past due.

2 This bill was re-introduced in the Second Session of the 39th Parliament as Bill C-21. See footnote 4.

3 Statements by Chief Commissioner, Jennifer Lynch, Q.C., before the Standing Committee on Aboriginal Affairs and Northern Development on Bill C-44, *An Act to Amend the Canadian Human Rights Act*, April 19, 2007, and June 7, 2007.
See: *www.chrc-ccdp.ca/media_room/speeches-en.asp?id=418&content_type=2*
www.chrc-ccdp.ca/media_room/speeches-en.asp?id=427&content_type=2

4 Bill C-21: *An Act to Amend the Canadian Human Rights Act*, 2nd Sess., 39th Parl., 2007.
See: *www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Session=15&query=5314&List=toc*

3] THE ROLE OF THE COMMISSION

The CHRC operates within an important and specific statutory mandate. Parliament has entrusted the Commission with implementing the *Canadian Human Rights Act*, which is based on the principle that:

> ... all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on 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.[5]

Over the course of discussion about section 67, it has become clear to the Commission that many people do not clearly understand the way human rights redress processes work and their potential impact on communities and individuals. For example, critics have argued that the repeal of section 67 will have a significant destabilizing effect on First Nations communities. Some have compared it to the impact of the 1985 legislation that removed sex discrimination from the *Indian Act* (Bill C-31), while other critics said it would result in dismantling the *Indian Act*.

These misconceptions are troubling to the Commission because they may create unrealistic fears. The Commission is also concerned about unreasonable expectations about repealing section 67. Many have predicted that repeal will enable the resolution of a wide range of injustices and inequality not directly related to discrimination. The fact is that repeal will not be a panacea for all the issues Canada and First Nations face in coming to terms with the long history of Aboriginal dispossession, disadvantage and disempowerment. The Commission believes, however, that it will be an important step in that direction.

5 *Canadian Human Rights Act*, (R.S.C.,1985, c. H-6), s.2: Purpose of the Act., See: *http://laws.justice.gc.ca/en/showdoc/cs/h-6/bo-ga:s_2//en?noCookie*

4] WHAT WE HEARD

Since *A Matter of Rights* was issued, the Commission has had the opportunity to discuss the repeal of section 67 with representatives of key First Nations organizations and governments; members of Parliament; and government officials. The hearings on Bill C-44, held by the Standing Committee on Aboriginal Affairs in spring 2007, provided an opportunity for many stakeholders to voice their views.[6]

The Commission has listened and learned. Listening and learning is, after all, key to building, designing and implementing an effective human rights system. Indeed, it is the only way it can be done.

The Commission has undertaken modest outreach activities on its own initiative, albeit with limited resources. The purpose of these meetings was to share information with organizations representing First Nations people across the country; provide our perspective on the need for repeal; and invite preliminary dialogue on the most effective methods of repeal. Our staff and commissioners have met with individuals and First Nations leaders. We have corresponded with more than 30 regional First Nations organizations, participated in conferences organized by First Nations women, and made presentations on repeal at gatherings of chiefs and in other fora. Some of our provincial counterparts have also engaged in talks with Aboriginal people on how human rights protections could be made more effective and accessible, and we have benefitted from this dialogue.

But all of these discussions are just a beginning.

In listening to our First Nations colleagues from coast to coast, we discerned broad themes. Taken together, they demonstrate both an ambivalence about being asked to comply with what some First Nations people have labelled an example of "colonialist oppression" and the absolute need to better protect the rights of people who are among the most disadvantaged in Canada.

The duty to consult

The perspective of many witnesses before the Committee, including the Assembly of First Nations (AFN), is that government has a clear duty to consult with First Nations on any matter that could affect treaty or Aboriginal rights, and that it is a matter of the honour of the Crown.[7] Still others advised that consultation must be on a nation-by-nation basis, and that consultation with "anyone else claiming to represent us" is invalid.

The Native Women's Association of Canada (NWAC), among other groups of First Nations women, has long called for repeal of section 67. NWAC has noted, however, that acting on legislation without a meaningful process of consultation and without building needed community capacity could "lead to disaster."[8] The majority of witnesses before the Standing Committee echoed the need for consultation, albeit for different reasons.

6 For transcripts of the hearings on Bill C-44 held between July 26, 2006, and March 22, 2007, see: *www.cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=391&JNT=0&SELID=e22_.2&COM=10463&STAC=1934210*

7 Standing Committee on Aboriginal Affairs and Northern Development, March 29, 2007.

8 NWAC President Bev Jacobs, Native Women's Association of Canada, News Release (December 13, 2006).

On the other hand, parties such as the Congress of Aboriginal Peoples (CAP), representing off-reserve Aboriginal people, assert that 30 years has been long enough, and that spending more time in discussion or dialogue is fruitless, as immediate action on repeal is needed.

As determined by the Supreme Court,[9] the legal "duty to consult" on matters relating to treaty rights rests with the Crown. It is unclear whether the duty to consult extends to legislative actions. As an independent arm's-length agency of the Government of Canada, the Commission does not represent the interests of the Crown and, therefore, cannot be involved in this type of consultation. The Commission is, however, committed to engaging First Nations in dialogue, to obtain input and to seek collaboration in implementing repeal. We deal with this issue in more depth in the section of our report regarding Principle 5, an adequate transition period.

Recognition of self-government and nationhood

Some First Nations leaders have opposed the repeal of section 67 on the basis that First Nations should be considered sovereign nations, with their own laws and customs, and that neither the CHRA nor other federal or provincial legislation has effect on First Nations territory. We have heard eloquent and moving testimony about the "nation to nation" treaties signed by our Aboriginal and non-Aboriginal forebears, and fears that government action could extinguish collective Aboriginal and treaty rights. These leaders resist the extension of human rights legislation not on the basis of resistance to human rights principles, but on the basis that this legislation is not their own and is therefore not consistent with section 35 of the *Constitution Act*, 1982, which recognizes and affirms Aboriginal and treaty rights.

Respect for collective rights

Many witnesses contended that Aboriginal and treaty rights are experienced collectively, and that First Nations people, having a unique legal and constitutional status, have the right to their customary laws and beliefs. Land can be held collectively by a First Nation, for example, and is not considered to be subject to the individual property ownership rules that exist in most Canadian municipalities. Similarly, Aboriginal people enjoy historical and legally recognized Aboriginal rights—such as the right to fish or harvest timber, and benefit from other natural resources—collectively. At least one First Nations leader compared repeal—without a mechanism to balance collective and individual rights—to "throwing a grenade into collective rights and into the *Indian Act*." Others thought the need to recognize individual rights and the need to protect the most vulnerable people were as important as collective rights and interests, which are already guaranteed by section 35.

9 *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 S.C.C. 73 ("Haida") and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 S.C.C. 74 ("Taku").

A matter of trust

A number of First Nations representatives said government and its bureaucrats have treated their people unjustly: forcing them to move onto reserves; outlawing their customs and spiritual ceremonies; forcing their children into residential schools or a non-Aboriginal child care system; and putting at risk their traditions, languages, cultures and lifestyle. People we heard from recalled with sorrow Canada's failure to implement the recommendations of the Royal Commission on Aboriginal Peoples, the unfulfilled promise of the Kelowna Accord and Canada's vote against the United Nations Declaration on the Rights of Indigenous Peoples. All of these factors influence the degree to which First Peoples trust that action to extend human rights protection is truly in their interests.

The urgency to act

Some witnesses before the Committee said government should act immediately to repeal section 67, and that no additional delay or even transition period should be countenanced in considering the basic extension of human rights protections. Others thought First Nations organizations would need a minimum of 36 months to prepare for the effects of repeal. At least one witness said repeal should be postponed indefinitely, on the basis that the CHRA should have no application at all on First Nations territory. But the observations of one elder at a conference of First Nations women this summer was particularly striking. She opined that, "If our communities were perfect, we would not need this protection. But they are not, and we do."

Together, on a new path

In almost all of the Commission's interactions with First Nations organizations, governments and individuals, it has become clear that, despite differences in vision—and differences of opinion on timing, implementation, and ways to balance individual and collective rights—there is a willingness to work together to improve the circumstances of, and access to human rights protections for, First Peoples.

5] PRINCIPLES FOR FIRST NATIONS HUMAN RIGHTS REDRESS

Building a First Nations human rights redress process is about much more than passing legislation. For human rights redress to be effective, First Nations, the Government of Canada and the Commission must work together to build a redress mechanism that will serve the unique needs and situation of First Nations and protect the rights of all citizens.

For its part, the Commission has continued to reflect on underlying principles it considers to be important to developing a successful redress process. In doing so, the Commission does not wish to be prescriptive. It is, as always, open to other perspectives.

In the Commission's view, an effective system must incorporate the following key principles:

- freedom from discrimination;
- respect for Aboriginal and treaty rights;
- respect for self-government;
- adequate resources;
- an adequate transition period; and
- discrimination prevention.

6] PRINCIPLE 1: FREEDOM FROM DISCRIMINATION

All human beings have the right to be free from discrimination. When discrimination occurs, they are entitled to redress. That is a cornerstone of any effective system of human rights redress.

The recently adopted *United Nations Declaration on the Rights of Indigenous Peoples* makes this clear in its opening articles:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. (Article 1)

Article 2 goes on to provide that:

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination...

In testimony before the Standing Committee on Aboriginal Affairs, the AFN emphasized that the long history of discrimination against First Nations people has led to a strong commitment to the protection of both individual and collective rights:

> From the residential school experiment to the White Paper, from the takeover of our land to the dishonour of treaty rights, from discrimination on the provision of basic services to discrimination in accessing housing, we have learned that our very existence as people depends on our commitment to the preservation and promotion of our rights. Consequently, human rights, *both individual and collective human right*s, are the very cornerstone of our beliefs and values.[10]

During debate on Bill C-44, arguments were raised that freedom from discrimination—being largely an individual right—is contrary to Aboriginal collective rights and interests. On the other side is the argument that, in all cases, the right of the individual must be pre-eminent.

In fact, human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either.

10 Standing Committee on Aboriginal Affairs and Northern Development, March 29, 2007. Emphasis added.

The right to be free from discrimination is a fundamental human right. Access to full human rights protection is a right that has been denied to First Nations people for too many years. As the Commission has noted previously, section 67 has yet to be challenged under the *Canadian Charter of Rights and Freedoms* (the Charter). However, given the history of disadvantage experienced by First Nations people, especially women and their children, arguably section 67 would not withstand Charter scrutiny. First Nations people, both those living on and off reserve, are the only Canadians denied full access to a means of addressing alleged discrimination.

Many people involved in the discussion of section 67 have called for a delay in the repeal to allow for consultations between the government and First Nations. After careful analysis, the Commission's conclusion is that further delay would not advance the interests of human rights. As the history of section 67 shows, there have been many commitments, pledges and promises to repeal section 67. Indeed, even at the beginning, in 1978, section 67 was seen as a temporary measure. No doubt the pledges to repeal section 67 were made in good faith, but events intervened and section 67 remains.

In urging immediate repeal, the Commission does not wish to diminish, in any respect, the legitimate concerns that have been raised and that must be discussed. These issues should be discussed in the ongoing process of implementing the repeal of section 67.

Recommendation:

The Commission recommends the immediate repeal of section 67.

7] PRINCIPLE 2: RESPECT FOR ABORIGINAL AND TREATY RIGHTS

Section 35(1) of the *Constitution Act, 1982* is the constitutional foundation of Aboriginal and treaty rights in Canada:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The importance of these rights is emphasized in section 25 of the Charter, which makes it clear that Charter rights:

> ...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...

Time and again, First Nations representatives have emphasized the importance of sections 35 and 25. They have done so with good reason. The Aboriginal and treaty rights granted by the Constitution are fundamental. As the courts have emphasized, the "honour of the Crown" rests on proper respect for the rights protected by section 35. The honour of the Crown is, of course, the honour of all Canadians. A successful human rights process cannot be built on the denial of the rights of others.

In the *Sparrow* case,[11] the Supreme Court held that section 35 should be given "a generous and liberal interpretation." The Court also noted that:

> The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of section 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples.

Decisions of the Canadian Human Rights Commission or the Canadian Human Rights Tribunal are subject to judicial review by the Federal Court of Canada. This provision includes, of course, decisions on questions of infringement of existing Aboriginal and treaty rights or the Charter. Repealing section 67 will not limit the ability of First Nations to challenge the decisions of the Commission or the Tribunal on the grounds of section 25 or 35.

Some have argued that the very existence of section 35 means that the *Canadian Human Rights Act* cannot and should not apply to First Nations. The Commission does not agree with this viewpoint.

The Commission sees no fundamental conflict between the rights protected under section 35 and the provisions of the CHRA. In fact, almost all the comments and evidence reviewed indicate that most people who have studied this issue believe that the right to be free from discrimination is complementary to, and not in conflict with, section 35. To the extent that conflicts may exist, they can and should be resolved by tribunals and courts.

11 R v. *Sparrow*, [1990] 1 S.C.R. 1075.

Human rights are called "human" because they apply to all human beings by virtue of our common humanity. The need for equality, dignity and respect is a common value of all the peoples of the world.

There is not, nor should there be, any hierarchy of rights. This notion was articulated in the UN's 1993 *Vienna Declaration on Human Rights*:

> 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. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.[12]

An interpretive clause

An interpretive clause is a section in legislation that provides direction to administrative or judicial bodies in interpreting and applying a statute. The inclusion of an interpretive clause in the CHRA, in conjunction with the repeal of section 67, would help to ensure that First Nations collective rights and interests are appropriately balanced with the right of individuals to be free from discrimination.

The use of interpretive clauses is well established in constitutional and human rights law. There are many such provisions in the *Canadian Charter of Rights and Freedoms.* For example, the Charter must be interpreted in a manner that is "consistent with the preservation and enhancement of the multicultural heritage of Canadians" (section 27); that respects gender equality (section 28); and that does not abrogate the right to denominational schools (section 29).

Likewise, sections 15 and 16 of the CHRA allow allegations of discrimination to be adjudicated in light of other legitimate demands, such as the effective operation of a business. The Commission and the Tribunal have extensive experience in balancing competing interests while resolving human rights claims.

In testimony before the Standing Committee, the Commission recommended the following legislative wording for an interpretive clause:

> In relation to a complaint made under the *Canadian Human Rights Act* against an Aboriginal authority, the Act is to be interpreted and applied in a manner that balances individual rights and interests with collective rights and interests.[13]

Bill C-21 does not include an interpretive clause. The Standing Committee considered adding an interpretive clause to Bill C-21 during clause-by-clause consideration of the legislation in December 2007. However, the Chair of the Committee ruled that the proposed amendment went beyond the original purpose of the legislation, which was simply to repeal section 67. The proposed amendment was withdrawn.

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12 *Vienna Declaration and Program of Action*, World Conference on Human Rights, Vienna, June 14–25, 1993, A/Conf.157/23.
See: *www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En*

13 Statement by Chief Commissioner, Jennifer Lynch, Q.C., before the Standing Committee on Aboriginal Affairs and Northern Development on Bill C-44, *An Act to Amend the Canadian Human Rights Act*, June 7, 2007.
See: *www.chrc-ccdp.ca/media_room/speeches-en.asp?id=427&content_type=2*

There is an alternative to a statutory interpretive clause. The Commission has the power to make guidelines and issue policies on how the Act is to be interpreted and applied. Such guidelines and policies may possibly be used in place of a statutory provision to ensure the appropriate balancing of interests. In any case, the Commission is committed to working closely with First Nations and other stakeholders on an ongoing basis to develop the required policies and guidelines.

Non-derogation clause

During the discussion on repealing section 67, many interveners favoured including a clause in the legislation making it clear that the CHRA must be interpreted and applied in a manner that does not derogate from section 35.

As previously noted, the application of section 35 is not in question. All laws of Canada, including the CHRA, are subject to section 35. That will not change with repeal. Indeed, it could only be changed by amending the Constitution.

Previous laws passed by Parliament have included non-derogation clauses relating to Aboriginal and treaty rights. However, the use of such clauses has not been without controversy. Legal scholars and parliamentarians have raised concerns about the consistency between the various formulations used and their implications. As a result, the Senate Standing Committee on Legal and Constitutional Affairs undertook a lengthy and detailed study of this issue.

In its December 2007 report, *Taking Section 35 Rights Seriously*: *Non-derogation Clauses relating to Aboriginal and treaty rights*,[14] the Committee recommended that all such non-derogation clauses included in federal legislation enacted since 1982 be repealed and replaced with a single non-derogation clause in the *Interpretation Act*. *The Interpretation Act* is the law that stipulates how all federal legislation is to be read. The proposed new provision in the *Interpretation Act* would read as follows:

> Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act*, 1982, and not to abrogate or derogate from them.

On the day before the Senate Committee issued its report, the Standing Committee on Aboriginal Affairs passed an amendment to Bill C-21 adding a non-derogation clause to the Bill:

> 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.

14 Canada Standing Senate Committee on Legal and Constitutional Affairs, "Fifth Report," 2nd Sess., 39th Parl., December 13, 2007,. See: *www.parl.gc.ca/39/2/parlbus/commbus/senate/com-e/lega-e/rep-e/rep05dec07-e.htm*

The Commission is concerned that this amendment could in practice prevent the achievement of equality. The Commission notes in particular sub-paragraph (c), which refers to the customary laws and traditions of the First Nations. The scope of these concepts, unlike Aboriginal or treaty rights, has not yet been explored by the courts.

The Commission acknowledges and respects the customary laws and traditions of First Nations. Indeed, as detailed below, the Commission believes that the development of First Nations-created human rights institutions consistent with these laws and traditions should be welcomed and nurtured. The Commission is, however, concerned that sub-paragraph (c) might have the unintended consequence of shielding First Nations, in whole or in part, from legitimate equality claims, thus re-instituting section 67 in another form.

The determination of how customary laws and traditions should be applied with regard to equality claims from First Nations citizens will depend on the particulars of each claim and the history, traditions and practices of the particular First Nation involved. As such, it is the Commission's view that such matters would be better dealt with by the Commission and the Tribunal on a case-by-case basis rather than by the application of a blanket provision in the CHRA.

The Senate report identified problems regarding the lack of consistency between the various versions of non-derogation clauses related to Aboriginal and treaty rights that are currently found in federal legislation—problems that the proposed non-derogation clause in Bill C-21 would only exacerbate. In view of those problems, the Commission agrees with the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs that a non-derogation clause should be added to the *Interpretation Act* that would apply to all federal legislation, including the CHRA.

Recommendations:

The Commission does not favour the inclusion of a non-derogation clause in the repeal legislation.

The Commission encourages the government to consider the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs to include a non-derogation clause in the *Interpretation Act*.

8] PRINCIPLE 3: RESPECT FOR SELF-GOVERNMENT

The inherent right to self-government

First Nations have an inherent right to self-government. This fact has long been recognized by the Government of Canada and has the Commission's full support.

Some First Nations leaders have argued that the right to self-government automatically means that the CHRA should not apply to First Nations in any circumstance. They argue that First Nations should be allowed to implement their own human rights systems as they see fit, in a manner consistent with their customs and traditions.

The first thing that must be emphasized is that the Commission encourages all organizations it deals with to prevent and resolve human rights issues without recourse to the formal mechanisms and statutory provisions of the CHRA. In the context of the Commission's usual work, that means resolving issues through informal workplace processes such as alternative dispute resolution or internal conflict management systems.

The need for First Nations to develop their own human rights systems is, of course, even more compelling—in fact, essential—given the inherent right to self-government. Human rights protection is an important function of government and, given the history of exclusion and discrimination suffered by First Nations and their citizens, must be part of any Aboriginal government system.

When repeal occurs, the Commission will work with First Nations so that they can develop their own systems for resolving human rights issues. To encourage development in this direction, the Commission issued a research study in 2007, *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review.*[15]

The Commission supports the inclusion of anti-discrimination provisions in comprehensive self-government agreements and legislation. Parliament, in consultation with First Nations, may also wish to consider the eventual adoption of a *First Nations Human Rights Act* that would apply to all or a group of First Nations.

Such developments would be similar to the process followed in the territories. In its early years, the CHRC had jurisdiction over human rights issues in the Northwest Territories and Yukon. However, as the territories, including the new territory of Nunavut, passed their own human rights codes, responsibility was transferred from the CHRC to its new territorial counterparts.

15 See: *www.chrc-ccdp.ca/research_program_recherche/adr_red/toc_tdm-en.asp*

This paper examines several common challenges in Aboriginal and Western paradigms, including issues of power, cultural differences, language barriers, and the effects and impacts of colonialism. It examines differing world views in relation to dispute settlement, and conceptualizes the Aboriginal paradigms and Western paradigms based on these differences. By so doing, this paper adds to the literature that distinguishes between Aboriginal paradigms of dispute resolution and the "indigenization" of Western paradigms.

The Commission is proud of the effectiveness and efficiency of its dispute resolution services. In recent years, a reorientation of its processes has placed greater emphasis on mediation and expedited complaints handling. As a result, most complaints are resolved quickly, often by means of a settlement between the parties. Few complaints require litigation.[16]

However, it is neither the purpose of the CHRA, nor the aim of the Commission, to impose one means of resolution for all human rights disputes. The purpose of the Act is to ensure that *all* Canadians can lead their lives without being discriminated against because of their age, sex, disability or any of the other prohibited grounds of discrimination. The statutory complaints process is a tool to ensure that citizens have a means to redress human rights complaints. However, other tools can also achieve that aim and should be used where appropriate.

Nevertheless, in most circumstances, First Nations citizens currently have no means of redressing human rights complaints through the Commission or through First Nations-specific resolution systems. That has been the case for 30 years. It is unacceptable and must be resolved urgently. Repealing section 67 will ensure that all First Nations citizens have a means of redressing human rights complaints.

16 For more information, see Canadian Human Rights Commission, "Innovative Change Management: an alternative to legislative change," online: Canadian Human Rights Commission, *www.chrc-ccdp.ca/about/icm_page1_gci-en.asp.*

9] PRINCIPLE 4: ADEQUATE FUNDING

Throughout the discussions of repeal, there has been a debate about how much funding will be required to adequately implement the legislation. No matter how good a human rights system may appear on paper, it will not be effective unless adequate funding is provided to implement it properly.

The Commission does not have the resources to address the new demands resulting from repeal. At the moment, very limited resources are dedicated to addressing Aboriginal issues currently within our mandate. Current resources would not allow the Commission to fulfil its commitment to work closely with First Nations communities to implement the repeal—especially with regard to providing expertise to aid development of First Nations-run dispute resolution processes and of an interpretive provision.

The Commission has discussed its potential resource needs with the Government of Canada. The government has indicated that when legislation is passed, it will consider the Commission's funding requirements.

The situation is also unclear with regard to the funding needs of First Nations. The government has acknowledged that additional funding will likely be required but has not been more specific. Given pressing social concerns, such as the need for adequate health services, housing, water and education, First Nations leaders are understandably concerned about finding the funding to deal with the impact of repealing section 67.

Until the final legislative scheme is clarified, the transition period confirmed and other implementation issues addressed, it will be difficult to assess the overall impact of repeal on First Nations or to determine the funds that will be required. Potential First Nations activities that may require funding include human rights training; measures to review policies or practices to gauge their compliance with human rights legislation; dialogue with the Commission on such issues as the balancing of collective and individual rights; and the development of internal human rights redress processes.

Another important issue is the potential impact of human rights settlements or Tribunal decisions. For example, if a First Nation is found to have discriminated against a person with a disability by not providing an accessible facility, where will the funds come from to make the facility accessible? These are all potential funding pressures that should be addressed.

Although the quantum of funding required cannot be ascertained at present, the Commission urges that the funding issue be kept in perspective. Repeal will require both the Commission and First Nations to expand their institutional capacities to ensure effective implementation. However, the overall cost of implementation, which will be spread over several years, should be relatively modest.

Recommendations:

The Commission recommends that the Government of Canada ensure that both the CHRC and First Nations have the resources necessary for effective and ongoing implementation of repeal.

10] PRINCIPLE 5: AN ADEQUATE TRANSITION PERIOD

An adequate transition period is imperative to ensure that both First Nations and the Commission have adequate time to prepare the groundwork for successful implementation of human rights redress in First Nations communities. As a result of section 67, the links between the Commission and First Nations citizens and their communities are not as strong as they should be. There is much to be learned from each other and collaborative work to be undertaken. As detailed in the next section, a transition period will allow for the implementation of culturally appropriate, community-level initiatives to prevent discrimination and, where it occurs, to ensure that complaints are resolved quickly and with a minimum of conflict.

Over the last two years, there has been much discussion about the time needed for transition. Some have argued for a minimum period of several years. To some extent, the calls for different lengths of transition period may be the result of differing perceptions of the potential impacts of repeal.

Given goodwill and adequate resources to enable meaningful engagement, the Commission is confident that implementation of repeal, and development of redress processes at the CHRC and within communities, can proceed relatively rapidly.

Recommendations:

The repeal legislation should include a transition period of 18 to 30 months before complaints can be filed against a First Nation or a related Aboriginal authority.

11] PRINCIPLE 6: DISCRIMINATION PREVENTION

Human rights legislation, by its nature, aims to promote and protect human rights. It is intended to be remedial, not punitive. That is why effective human rights systems include programs and measures to educate people about their rights and to prevent discrimination before it occurs. Recourse procedures to address human rights complaints, whether those mandated under the CHRA or mechanisms created by First Nations, will always be needed. However, they should be used only when other means of preventing and resolving human rights issues have been unsuccessful.

In recent years, the Commission has put added emphasis on human rights prevention and education. The Commission works actively with large employers to identify policies, processes, operational cultures and physical barriers that might result in unfair discrimination against employees. Through an open process of dialogue between the Commission and employers, and between employers and employees, the program aims to enhance equality and non-discrimination in the workplace over the long term.

Waiting for an influx of complaints is not the best way to resolve human rights issues. No matter how efficient the recourse processes, and how culturally sensitive they are to the unique situation of First Nations, processing complaints will still be relatively costly and time consuming. Moreover, formal complaints seldom encourage the kind of dialogue, consultation and joint problem-solving that is so essential to promoting an ethos of respect for equality and the human rights of all.

It is for these reasons that the Commission encourages all parties—First Nations, the government and the Commission—to work cooperatively to address potential issues of discrimination and resolve them before they develop into formal complaints. Within that ongoing process, the transition period will be an important phase for reviewing compliance and beginning to remove barriers to the full realization of the rights guaranteed by the CHRA. In this regard, the Commission welcomes suggestions for developing a joint work plan with the input of First Nations representatives, government and the Commission to support smooth and effective implementation of repeal.

Discrimination prevention activities to be carried out might include the following:

- developing the scope and nature of an interpretive provision, if one is not included in the legislation;
- providing human rights education and awareness programs to inform citizens and organizations about their rights and obligations under the CHRA;
- establishing or recognizing alternative means to resolve human rights issues before, or instead of, referral to the Commission; and
- drafting human resources and service delivery policies that incorporate principles of non-discrimination and the duty to accommodate.

The government should also review existing policies and legislation where potential conflicts with human rights instruments have already been identified. Of particular note is possible ongoing sex- and family-based discrimination arising from the application of Bill C-31.[17]

17 Bill C-31,: *An Act to Amend the Indian Act*, was passed in 1985. It repealed those sections of the *Indian Act* that discriminated against women with regard to registration as a status Indian. The Bill also provided for the reinstatement of women and their children who had lost or were denied status due to the repealed discriminatory provisions. Bill C-31 had a major impact on many First Nations communities, as a result of the registration and return of thousands of reinstated women and their children to their communities. Of most concern is the fact 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. These effects continue to be felt.

12] CONCLUSION

Repeal of section 67 will bring First Nations and their citizens closer to the full measure of equality to which they are entitled and which they have long been denied. That is why the Commission has called for repeal for 30 years.

As the Commission has stated in the past, the Aboriginal peoples of Canada are among the most disadvantaged of all Canadians. Despite some progress in recent years, numerous issues remain to be resolved. Canada as a nation has a long way to go before First Nations self-government is realized, land claims are fully settled, and social, economic and health conditions in First Nations communities equal those enjoyed by other Canadians, to name just a few of the most pressing issues. For its part, the Commission is committed to continuing its efforts, within its mandate and purview, to help resolve these issues. Repealing section 67 is an important step in that direction.