THE CANADIAN HUMAN RIGHTS ACT AND FIRST NATIONS COMMUNITIES

WHAT'S ALL THE BUZZ ABOUT THESE DAYS?

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If you are reading this article, chances are that you have heard rumblings in the news, at work or even in the community about recent changes to the *Canadian Human Rights Act* that are going to impact First Nations communities. These rumblings or "buzz" have to do with the fact that on June 19, 2011, the law that repealed Section 67 of the *Canadian Human Rights Act* comes into full effect for First Nation communities.

Perhaps this buzz has got you nervous, uncertain, or even angry? What I can tell you as a lawyer who gives advice on this topic is that a lot of the buzz is exaggerated and even misleading: the sky is not falling. In this short article, I try to clarify and demystify many of the issues surrounding this subject and to show why this change in the law is not only manageable for First Nations, but presents many positive opportunities for First Nations.

What is the Canadian Human Rights Act?

The *Canadian Human Rights Act* (the "CHRA") is a law that was passed by the federal government in 1977. It applies to laws passed by and the actions of the federal government, and any entity under its jurisdiction, which includes First Nation governments ("FNGs").

The CHRA provides people with access to human rights protection by allowing them to file complaints of discrimination in areas such as employment, access to services and housing, on grounds such as race, national or ethnic origin, sex, sexual orientation, age, disability, religion, family and marital status.

Complaints are investigated by the Canadian Human Rights Commission, and if the complaint is found to have merit, and the Commission cannot facilitate a settlement between the parties, then the complaint is heard by the Canadian Human Rights Tribunal. If the complaint is successful, the Tribunal can order different kinds award, depending on the circumstances, such as compensation, reinstatement, human rights training, etc. Decisions of the Tribunal can be appealed to the Federal Court, sometimes right up to the Supreme Court of Canada.

What is Section 67 of the CHRA?

Although the CHRA was meant to protect human rights in Canada, it was subject to one exception for over 30 years, contained in Section 67. Section 67 stated:

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

Why was Section 67 passed?

At the time the CHRA was created in 1977, the federal government was well aware that there were several discriminatory laws in the *Indian Act*. This included the laws that banned First Nations people from drinking in public, laws that removed Indian status from Indian women (and their children) who married non-status men, laws denying off-reserve members from participating in elections on reserve, laws on the holding of land on reserve, and many others.

In the 1970's, these discriminatory laws were challenged in court by First Nations people under the *Canadian Bill of Rights* and under international law. As a result, the federal government made a commitment to make major reforms to the *Indian Act* and to do so in consultation with Aboriginal groups. The federal government maintained that Section 67 was included in the CHRA to facilitate this consultation and reform process and promised that Section 67 would only be in place for a short time. Despite this, Section 67 stayed in place for over three decades.

How was Section 67 applied?

Despite the longevity of Section 67, the Canadian Human Rights Tribunal and the courts interpreted Section 67 narrowly , in part because of the court's view that human rights law are "almost constitutional" in nature and deserve broad interpretation. By contrast, any exception to the application of the human rights legislation, such as Section 67, should be interpreted in a strict and narrow way.

As a result, , Section 67 was interpreted to only shield decisions made by Canada or a FNG that could be directly connected to a section of the *Indian Act* or regulations made under the *Indian Act*. The charts below illustrate the areas where Canada and FNGs were shielded and not shielded from:

CANADA

SHIELDED

- Primary and secondary education decisions under s. 114-118 of the *Indian Act*
- Registration provisions under s. 6 of *Indian Act*
- Election provisions under s. 74-80 of *Indian Act*
- Land allocations under s. 20 of the *Indian Act*
- Wills and estates under the *Indian Act* and the *Indian Estates Regulations*
- Mental incompetency / guardianship decisions under *Indian Act*

NOT SHIELDED

- Post-secondary funding decisions
- Child welfare spending
- Social assistance spending
- Health spending

FIRST NATION GOVERNMENTS

SHIELDED

- Land allocations under s. 20 of the *Indian Act*
- Election codes approved under the *Indian Act*
- Membership codes approved under the *Indian Act*
- Decisions based on section 81 by-laws under the *Indian Act*

NOT SHIELDED

- Employment / staffing decisions
  - Band administrators
  - Health workers
  - Teachers
- Spending decisions
- Membership rules, codes and moratoriums not approved under *Indian Act*
- Administration of social assistance on reserve
- Administration of education on reserve

To the average person, this approach to Section 67 no doubt seemed confusing and arbitrary. For example, a person could bring a human rights complaint against their First Nation for discrimination in employment or in the provision of welfare services, but not against membership or election codes, or against Canada for the registration (i.e., "status") provisions in the *Indian Act*. Because of this, some First Nations people mistakenly believed they had no human rights.

This inconsistency would have been equally confusing for those in the administration of FNGs. Without legal advice, it would be very difficult for well-meaning employees and Band Council members to advise their First Nations about when the FNG might be vulnerable to a human rights challenge.

Why was Section 67 repealed?

The confusion, inconsistency, and lack of full protection for First Nations human rights eventually led to Section 67 being repealed by Canada in June 2008. This came after several failed attempts to get rid of the law and mounting pressure from First Nations organizations, the Canadian Human Rights Commission, international human rights observers to address the issue.

Interventions by First Nations organizations and their supporters led to important safeguards included in the repeal legislation. This included: 1) a three-year transition period to allow First Nations to prepare for the impacts of the repeal (June 18, 2008 to June 18, 2011); 2) rules about how discrimination complaints against First Nations should not impact Aboriginal and Treaty rights; 3) rules about how discrimination complaints should take into account First Nations' collective rights, traditions and customs; and 4) requirements for the government to study resource and capacity needs of First Nations in dealing with the change.

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What does the repeal of Section 67 of the Canadian Human Rights Act mean for your community?

The bottom line is that FNGs are now more vulnerable to potential human rights challenges than before. However, the impact of this should not be exaggerated. This is because:

- Section 67 never entirely barred First Nations people from bringing complaints to the Canadian Human Rights Commission. FNGs have been subject to complaint under the CHRA for some time in many areas, including in employment, spending decisions, administration of social assistance and education. (The new areas in which a FNG could receive complaints are those that were previously SHIELDED – see chart above.)
- In addition, FNG by-laws, codes and regulations have also been vulnerable to challenge under the *Canadian Charter of Rights and Freedoms* since 1985.
- Those First Nations that have self-government or comprehensive claim agreements have always been subject to full human rights review.
- <u>The experiences and knowledge gained through exposure to human rights laws already can now be harnessed by First Nations in this new chapter.</u>

Next, the protection that Section 67 offered First Nations in the past should not be romanticized. Section 67 was primarily intended to shield Canada and the Department of Indian Affairs from discrimination complaints by First Nations people – the protection for FNGs was secondary. (Comparing the areas that Canada was SHIELDED against versus FNGs in the chart above clearly shows this.) Section 67 was part of the framework of colonialism. To put it in plain language: *it was a racist law put in place to protect a bunch of other racist and sexists laws*. For that reason alone, First Nations should be happy to see it gone.

It is also important to remember that some of the kinds of discrimination complaints FNGs were protected from by Section 67 was largely made possible and encouraged by Canada. A good example of this is membership codes. The right of First Nations to pass membership codes came at the same time that Bill C-31 was returning Indian status to over 100,000 women and their children who had lost their status over the years through the discriminatory *Indian Act* registration rules. Many FNGs were understandably quite concerned about the impact this would have on their lands and resources (in some cases insufficient to even meet existing needs) and complained publicly. Canada's response was not to provide additional lands or moneys, but to amend the *Indian Act* to allow FNGs to adopt memberships codes in which they could choose to restrict membership to some of those people being reinstated. While Canada touted the new membership rules as giving some (limited) powers of self-government to First Nations, in reality, it was passing off to FNGs – some of whom felt they had no choice – the ability to discriminate. Canada even sent letters to each First Nation explaining how they could pass codes that would exclude the children of Bill C-31 women from membership! Not all First Nations adopted such codes, but some (about 90) did.

The repeal of Section 67 is going to force issues like this to light. But instead of seeing this as a negative, this can be seen as an opportunity for FNGs to revisit and reconsider decisions that were made in the past that, in hindsight, may not have been the best decision for our Nations in the long-run. It is also an opportunity to hold Canada accountable for the role it played in such events.

What steps should your community be taking to deal with impact of the repeal of Section 67?

It will be important to create a culture of respect and recognition of human rights within your FNG. That does not just mean learning and following the CHRA – a Canadian law – within your FNG. First Nations have a rich history of respect of human rights within their customs and traditions. Dealing with the repeal of Section 67 also provides the opportunity for First Nations to explore and re-discover their own traditions on respecting human rights and to incorporate this into the process.

For example, a First Nation could develop its own internal dispute resolution process for handling human rights complaints. This could be a council of elders hearing complaints, or it could take many other forms. Under the CHRA, the Commission will hold off in dealing with a complaint if there is another redress process for dealing with the complaint, so long as that other process meets certain minimum requirements.

While this is not a complete list, there are a number of steps your FNG can be taking now – before a human rights complaint arises – to deal with the repeal of Section 67:

- Conduct human rights training with FNG leadership, managers and staff.
- Undertake a policy, program and infrastructure review within your community to assess potential areas of vulnerability and institute an action plan to deal with these before a complaint arises.
- Review and develop policies, programs not only to prevent discrimination, but also to make them more culturally-relevant to your community.
- Educate staff and residents of your community on your FNG's efforts to respect human rights and prevent discrimination complaints.
- Use community / staff training sessions not just to learn about the CHRA and what it defines as discrimination, but also to explore what respecting human rights means within your First Nations' culture.
- Design an internal dispute resolution process that incorporates your community or Nation's values, customs and traditions.

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What resources and tools are available to help?

At the time of writing, it is not clear whether or not Canada will be making funds available to First Nations for training, and policy, program and infrastructure review and development in light of the repeal of Section 67. By June 2011, the government is required to table a report in Parliament recommending resources needed by First Nations in order to respond to the repeal. In light of Canada's role in keeping Section 67 in place for so long, and its role in encouraging some of the potential discrimination complaints FNGs will have to address in the aftermath of Section 67's repeal, there is a strong argument that Canada should be committing financial resources to assist FNGs in responding to the repeal.

In addition to financial resources, there are also other tools and resources available (this is not a complete list):

- The Canadian Human Rights Commission has developed a *First Nations Managers Guide* which provides a number of helpful checklists, information, resources and tips to help persons within FNGs understand the CHRA and the repeal of Section 67. This should be available on the Commission's website.
- The Commission website also has a number of model policies, such as model anti-discrimination and anti-harassment policies, that can adapted to create policies within your community.
- The Commission can be contacted for general advice and information about human rights training and capacity-building opportunities.
- Although provincial human right commissions do not have jurisdiction over matters relating to the repeal of Section 67, they can provide valuable information, training and building on human rights protection, employment policies, and harassment and discrimination prevention policies.
- Different First Nations communities, tribal councils, or organizations, may want to work together to develop different model policies and by-laws that can be adapted by FNGs according to their needs.

Conclusion

My hope is that this article has been able to show that while the repeal of Section 67 does mean that FNGs will now be vulnerable to more types of human rights complaints than in the past, the repeal also presents many opportunities. There are opportunities to see Section 67 as part of Canada's framework of colonialism; to review and reexamine previous decisions in that light and determine whether changes should be made; opportunities to hold Canada accountable for its role in encouraging some discrimination that has occurred in FNGs; opportunities to rediscover our own traditions, customs and laws for protecting human rights and incorporating them into the human rights process; and the opportunity to develop our own human rights systems. Embracing these opportunities will make our communities stronger.