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Submission on Bill C-44
Canadian Human Rights Act amendments
(application to *Indian Act*)

NATIONAL ABORIGINAL LAW SECTION

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TABLE OF CONTENTS

Submission on Bill C-44
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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Aboriginal Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to provide its views to the Standing Committee on Aboriginal Affairs and Northern Development (Commons Committee) during its consideration of Bill C-44, amending the *Canadian Human Rights Act* (CHRA).

The *Canadian Human Rights Act*[1] prohibits certain discriminatory practices. It was enacted in 1977 with a provision, section 67 (then section 63(2)), that exempted the "*Indian Act* or any provision made under or pursuant to that Act" from the application of the CHRA. While there is evidence that this measure was meant to be temporary[2], there is no explicit provision to that effect within the CHRA. Thirty years later, and after numerous attempts to remove the section[3], it remains a controversial element of the Act.

Bill C-44 contains three important sections that would provide for:

1. the repeal of section 67 of the CHRA[4];
2. a comprehensive review by a Parliamentary Committee five years after the effective date of Bill C-44 on the effects of the repeal of section 67 and a report one year after the review; and,
3. a delay to the effect of the repeal, in relation to aboriginal authorities only, for six months.

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1 R.S.C. 1985, c. H-6.

2 Then Minister of Justice Ron Basford suggested that "Parliament is not going to look very favourably on continuing this exemption forever or very long." See, House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 15:45, 25 May 1977.

3 In particular see, Bill C-108, *An Act to amend the Canadian Human Rights Act* (1992), Bill C-7, *The First Nations Governance Act* (2003). See also Mary C. Hurley, Law and Government Division, "Legislative Summary, Bill C-44, *An Act to amend the Canadian Human Rights Act"* (Ottawa: LEGISinfo, 39th Parliament – 1st Session, 16 January 2007) at 3-6.

4 Section 67 of the *Canadian Human Rights Act* states that "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

II. GENERAL COMMENTS

Bill C-44 would expose the actions and omissions of both the federal government and Indian governments operating pursuant to the *Indian Act* [5] to CHRA scrutiny. The CBA Section agrees in principle that section 67 should be repealed. However, we believe that Bill C-44 inadequately provides for:

1. sufficient consultation and consideration with First Nations peoples and governments about the actual impact of repealing section 67 of the CHRA;
2. capacity for First Nations peoples and governments to promote and ensure effective implementation of the CHRA in the First Nations context; and
3. a coherent human rights regime for First Nations peoples and governments that properly and appropriately balances the human rights needs of First Nations peoples and the requirement to safeguard other First Nations rights and interests.

The Bill also has the potential to shift focus from other ameliorative projects, such as those concerning treaty or land claim negotiations. In a CBC interview on Tuesday, January 2, 2007, Chief Joseph of the Federation of Saskatchewan Indian Nations said that this is a "smoke screen" initiative intended to divert attention away from the real problems in First Nation communities, such as poverty[6]. Once the CHRA allows challenges to the Indian bands, the bands may become the primary subject of scrutiny, rather than the fiduciary duties and responsibilities of the federal government. This raises the potential for further disadvantaging the already disadvantaged if the cost falls on bands to deal with the policy implications of the amendment without adequate resources from the federal government to deal with those changes.

Bill C-44 suggests a six month delay between the act coming into force and its application to bands — significantly less time than called for by First Nations groups or the Canadian Human Rights Commission (CHRC)[7]. We agree that a period of 18 – 30 months would be more appropriate.

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5 R.S.C. 1985, c. I-5.

6 CBC News, "Rights legislation a smoke screen: First Nations leader", Tuesday, January 2, 2007: http://www.cbc.ca/canada/story/2007/01/02/joseph-rights.html

7 Hurley, *supra*, note 3 at 7.

In our view, a coherent and balanced human rights regime requires that Bill C-44 include an interpretive clause to guide the CHRA in its application to the actions and omissions of both the federal and First Nations governments, and to the *Indian Act* itself. First Nations across the country are organized according to different levels and types of power and authority, and many have their own means of dealing with human rights issues. Amendments should not abrogate or derogate from existing rights. Aboriginal rights have many sources, and some are quite vulnerable. This reality can be recognized through an interpretive provision that respects collective rights as well as individual rights in analyzing challenges.

The CHRC has recommended that the "proper formulation of an interpretive provision is an important matter, which must be carefully considered through a consultative process with First Nations."[8] We support this recommendation, as well as that made by the Native Women's Association of Canada (NWAC) to the CHRA Review Panel, which begins as follows:

- Section 67 of the CHRA should be repealed.
- To protect traditional Aboriginal rights from the impact of a CHRA without section 67, include in the Act a provision similar to s. 25 of the Charter; the guarantee in this Act of certain rights shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other right that pertains to Aboriginal peoples in Canada.
- However, it should be recognized that some of Canada's most prominent foes of the rights of Aboriginal women have argued that the right to discriminate against and exclude women in part of the traditional heritage of Aboriginal peoples… any provision drafted pursuant to recommendation 2 should include a safeguard to the same effect as subsection 35(4) of the *Constitution Act, 1982*, that aboriginal and treaty rights are extended equally to men and women. . .[9]

In addition to these particular concerns about Bill C-44, we have an overriding concern that this repeal could indirectly expose the *Indian Act* itself to challenge. It brings with it the potential to amend the *Indian Act* in a piecemeal and haphazard way, without Parliament and First Nations first addressing a comprehensive framework to replace it. This would have detrimental results for First Nations, socially, politically and economically.

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8 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* (Ottawa: C.H.R.C., October 2005) at 16.

9 Mary Eberts, *Aboriginal Women's Rights are Human Rights* (Ottawa: N.W.A.C., 2005): http://www.justice.gc.ca/chra/en/eberts.html

The *Indian Act* is unique in the catalogue of Canadian legislation ─ no other statute resembles it. Rooted in the particular relationship that Canada has with the First Nations peoples of Canada, the *Act* has had a very complicated political and jurisprudential history. Its basic framework was established in 1876, when it was first enacted, and it remains to this day much as it was then. In spite of the colonial history of the *Indian Act*, it provides the only statutory protection to what remains of the original Indian lands in Canada by controlling land allocation and ownership. It was significantly amended in 1951 and 1985, the latter amendments[10] eliminating some of the discriminatory elements of the *Indian Act*.

While the Act is far less than perfect in many respects, it does provide the operational framework used by many First Nations. Given the potential far-reaching consequences, careful consideration of Bill C-44 is required to ensure that its proposed amendments fall within the intention of Parliament and most important, meet the needs of First Nations.

III. CBA SUBMISSION ON BILL C-25, 1977

In its March 1977 submission on Bill C-25, (the Bill which introduced the CHRA), the CBA said this in relation to section 67 (then section 63 (2)):

> Section 63(2) provides that the Act does not effect any provision made under or pursuant to the Indian Act. This section may have been drafted as a result of the restrictions placed on the Bill of Rights in the Lavell and Bedard cases. It is difficult to understand why the Act has failed to deal with Section 12(1)(b) of the Indian Act where the injustices that it may bring upon Indian women have become so abundantly clear. We recommend the exemption in section 63(2) could be modified to limit the exemption to any provision made under or pursuant to that Act that constitutes a preference or advantage to Indian people and is not discriminatory in any other respect.[11]

Thirty years later, the CBA Section continues to be concerned with the balancing of interests referred to in the final sentence of our Association's earlier submission.

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10 Bill C-31, *An Act to Amend the Indian Act*, now S.C. 1985, c.27.

11 The Canadian Bar Association, "Comments on the *Canadian Human Rights Act* - Bill C-25" (Ottawa: CBA 29 March 1977).

IV. SUMMARY OF *CANADIAN HUMAN RIGHTS ACT* REGIME

The CHRA is the statutory basis of an anti-discrimination scheme that prohibits discriminatory practices on specified grounds. The CHRA creates two institutions, the Canadian Human Rights Commission and the Canadian Human Rights Tribunal, to administer the act and adjudicate complaints under it. The stated purpose of the CHRA as set out in section 2 reads:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to 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.[12]

The discriminatory practices prohibited are set out in sections 5-14. They include:

s 5. Denial of good, service, facility or accommodation

s 6. Denial of commercial premises or residential accommodation

s 7. Employment

s 8. Employment applications, advertisements

s 10. Discriminatory policy or practice

s 11. Wages

s 12. Publication of discriminatory notices, etc

Two specific exceptions are relevant to our submission. Section 15(1)(g) provides that it is not a discriminatory practice if:

> in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.

Section 16 deals with special programs:

> It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

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[12] *Supra*, note 1, s. 2.

V. SCOPE OF SECTION 67 EXEMPTION

For an action or omission to fall within the exemption under section 67 of the CHRA, it must have been made pursuant to or under the *Indian Act*. Because the CHRA has been considered by the courts to be quasi-constitutional in status, its provisions have been purposively and broadly interpreted and any limits to the rights it expresses have been narrowly interpreted.

Sharlow J.A. of the Federal Court of Appeal discussed these issues as follows:

> The authority of the *Zurich Insurance* case establishes the requirement to give a narrow interpretation to exceptions to human rights legislation. At the same time, Parliament's enactment of the exception in s. 67 of the *Canadian Human Rights Act* must be respected. Section 67 must be allowed to operate within its proper sphere.
>
> I agree with the Tribunal that the decision of this Court in *Desjarlais* … correctly establishes that s. 67 of the *Canadian Human Rights Act* applies to decisions that, by virtue of their subject matter, are within the authority expressly granted by a provision of the *Indian Act*.[13]

In its special report on section 67, the CHRC noted that the exemption extends to a range of matters that presently cannot be challenged in their substance or their application. This broad range of issues includes:

- registration or non-registration of someone as a First Nation member;
- use of reserve lands;
- occupation of reserve lands;
- wills and estates;
- education;
- housing;
- ministerial decisions with regard to incompetent individuals and guardianship; and
- enactment of by-laws.[14]

Accordingly, we envision a broad range of potential human rights challenges if Bill C-44 were to be enacted. For example, registration of a person as a Indian is based, to a large extent, on blood-quantum requirements rather than cultural, linguistic or other indicators of community. Some bands with property tax bylaws levy property taxes on commercial and non-member

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13 *Canada (Human Rights Commission) v. Gordon Band Council*, 190 D.L.R. (4th) 418, 257 N.R. 254, [2001] 1 F.C. 124, 184 F.T.R. 320 (note), 27 Admin. L.R. (3d) 286, [2001] 1 C.N.L.R. 1 at paras. 22 and 26.

14 *Supra*, note 8.

residents, but exempt resident members from paying property tax. In the context of wills and estates, the *Indian Act* prevents heirs not entitled to live on reserve from inheriting rights to possession on reserve. The *Indian Act* provides significant rights (for example, exemption from taxation and protection from seizure of personal property on reserve) but only to people who meet the requirements to be registered as status Indians. These are only a few examples to illustrate that the repeal of section 67 has the potential to unlock a host of complex issues, requiring careful consideration.

VI. EFFECT OF BILL C-44 ON FIRST NATIONS INDIVIDUALS

It is widely agreed that the *Indian Act* has discriminatory provisions that should be subject to human rights challenge, and the Assembly of First Nations (AFN) and NWAC, as well as the CBA, have supported repeal of section 67. The CHRA Review Panel found that "all the groups representing Aboriginal women asked for the repeal of [the section 67] exception."[15]

Bill C-44 would give First Nations individuals formal statutory access to the CHRA's complaint procedures and adjudication mechanisms. However, without proper consultation and capacity building with First Nations individuals in relation to the application of the CHRA, the Bill is unlikely to amount to effective access in many First Nations across the country, particularly in geographically remote regions.

VII. EFFECT OF BILL C-44 ON FIRST NATIONS GOVERNMENTS

First Nations governments already operate in complex legal environments. Bill C-44 would significantly add to that complexity. As with First Nations individuals, consultation and capacity building with First Nations governments are prerequisites to the successful application of the CHRA by those governments.

Every day, First Nations governments make important allocation decisions in relation to scarce housing, education funds, employment opportunities and Indian Reserve lands. Adding an

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15 Canadian Human Rights Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 129.

appropriate and effective "CHRA-lens" to these decision-making processes will take time and careful consideration of those governments' legal obligations to their constituents.

In many First Nations communities, allocation decisions, such as those in respect of the use and occupation of Indian Reserve land, are not made under the *Indian Act* provisions, but under the traditional legal systems of the First Nation. Indigenous legal systems are recognized by the courts.[16] The interplay between these legal systems and the CHRA is difficult to imagine with any precision at this time, without further consideration and deliberation.

VIII. EFFECT OF BILL C-44 ON *INDIAN ACT*

Over the years, there has been discussion in various contexts about repealing section 67 and its general impact on First Nations peoples and governments. However, we are unaware of significant debate or consideration being given to the impact of that repeal on the provisions of the *Indian Act* itself. There is a pressing need for full consultation and debate with First Nations about the public policy ramifications of Bill C-44, but particularly its anticipated impact on the *Indian Act*. There are major policy implications for bands, and preparation is required to deal with these implications before the change is made.

Justice Muldoon of the Federal Court of Canada has speculated on the possible consequences of repealing section 67 in relation to the *Indian Act* as a whole. He stated "if it were not for section 67 of the CHRA, human rights tribunals would be obliged to tear apart the *Indian Act*, in the name and spirit of equality of human rights in Canada."[17] He further said that "over time if all the incorrect or illegal administration of the *Indian Act* were corrected by human rights tribunals that Act would be so permeated by human rights precepts that it would be ultimately destroyed."[18]

These provisions as currently enacted, colonial in origin though they may be, represent the only statutory protection to what remains of the original Indian lands in Canada. To put this

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16 *Connolly v. Woolrich* (1867), 11 L.C.J. 197 (C.S. Qué.); *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524 (S.C.); *Casimel v. Insurance Corp. of British Columbia*, [1993] B.C.J. No. 1834 (C.A.).

17 *Canada (Human Rights Commission) v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 3 C.N.L.R. 28, 89 F.T.R. 249, 25 C.H.R.R. D/386 at para. 23.

18 *Ibid*., at para. 24.

historical and legal reality at risk by application of the CHRA is an enormous policy and legal issue that requires careful consideration and full consultation with First Nations. The CBA Section believes that if the *Indian Act* is to be reformed, it should be done directly by Parliament, with full and open consideration of all interrelated policy issues, rather than indirectly by the Canadian Human Rights Tribunal on a case by case basis.

IX. CONCLUSION

The CBA Section supports repeal of section 67. However, Bill C-44 must be amended to ensure the necessary preliminary steps are taken. These include full consultation with First Nations, the introduction of an interpretive clause and adequate time and resources for bands to prepare for the scope and number of changes and challenges that may follow.

Much in the *Indian Act* requires human rights scrutiny. Review or repeal of the *Indian Act* may well be overdue. In our view, if the underlying intention or even the likely result of Bill C-44 would be to gradually erode the *Indian Act* through piecemeal amendments, the better approach would be to meet that challenge directly and comprehensively, with appropriate attention and a full public policy debate of the myriad of important and complex issues involved.