



**FEMMES AUTOCHTONES DU QUÉBEC INC.**  
**QUEBEC NATIVE WOMEN INC.**

## **POSITION PAPER**

*BILL C-44: AN ACT TO AMEND THE  
CANADIAN HUMAN RIGHTS ACT*

Presented to:  
Standing Committee on Aboriginal Affairs,  
Northern Development and Natural Resources

**April 17, 2007**



## QUEBEC NATIVE WOMEN

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Who are we ?

*Quebec Native Women* is a non-profit association that began as a community initiative in 1974. It is the only organization in Quebec that works on behalf of all Aboriginal women in the province.

The women in every Aboriginal nation desire recognition of their needs, their rights and their priorities. In their exchanges with each other, they have seen that the nations share similar problems and concerns. They also know that *Quebec Native Women* serves as a focal point permitting the development and transfer of local knowledge and capabilities, thereby helping them to break through their isolation.

*Quebec Native Women* thus has for its mission to support and promote local initiatives for improving the living conditions of Aboriginal women and families. It has accordingly become an organization for education, awareness building and research, by providing a structure allowing women to be active in their communities and by serving as a forum for discussion among the nations. As the voice of Aboriginal women, it makes known the needs and priorities of its members to policy and decision makers concerning all of the files that it coordinates, which are: health; youth; justice and public security; and women's shelters and promotion of non-violence. It is also actively involved in the coordination of special projects at the international level.

The association has enjoyed unprecedented growth in the past several years, as seen in the ever-increasing quantity and quality of its work on the files that it oversees, accompanied by impressive achievements. Backed by a solid organizational structure and invaluable experience acquired over the years, *Quebec Native Women* has earned a strong reputation for its proactive involvement in many different areas.

## INTRODUCTION

Given Québec Native Women's (QNW) mission to support Aboriginal women in their efforts to better their living conditions through the promotion of non-violence, justice, health and equality; to empower women in their commitment to their communities; and to work for the recognition of equal rights for all Aboriginal women in this country,<sup>1</sup> QNW feels compelled to lobby the Canadian government regarding the pending repeal of section 67 of the *Canadian Human Rights Act*.<sup>2</sup>

## QNW ANALYSIS

Although Quebec Native Women strongly believes that discrimination on reserves needs to be prevented, Bill C-44, *An Act to amend the Canadian Human Rights Act*,<sup>3</sup> may have unintended repercussions on the lives of those it is purporting to help: Aboriginal women. As an organisation, we appreciate the Canadian government's initiative to repeal section 67, in light of heavy criticism by the United Nations;<sup>4</sup> however, we have several reasons for concern regarding the repeal of section 67, under the proposed Bill C-44, particularly on Aboriginal women and children.

Section 67 of the *CHRA* shielded both the Federal government and Band Councils from complaints with respect to the application of any provision of the *Indian Act*. This section has

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<sup>1</sup> [http://www.faq-qnw.org/english\\_main.htm](http://www.faq-qnw.org/english_main.htm)

<sup>2</sup> R.S.C. 1985, c. H-6 (*CHRA*).

<sup>3</sup> See Hurley, Mary C. Parliamentary Information and Research Service, Legislative Summary, LS-546E, *Bill C-44: An Act to Amend the Canadian Human Rights Act*, Law and Government Division, 16 January, 2007 at pg.1-6 for background information on section 67. (Legislative Summary)

<sup>4</sup> United Nations, Economic and Social Council, Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Mission of Canada*, E/CB.4/2005/88/Add.3, 2004, p.24, <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.88.Add.3.pdf>.

been the target of much criticism and consequently various actors, both at the national and international level have called for its repeal. It reads as follows:

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

67. La présente loi est sans effet sur la *Loi sur les Indiens* et sur les dispositions prises en vertu de cette loi.

First, while the repeal of section 67 was indeed one of the recommendations put forth by the United Nations, particularly, the Human Rights Committee<sup>5</sup> and the Committee on Economic, Social and Cultural Rights; it was not recommended in isolation. In 2006, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights not only called for the State party (Canada) to repeal section 67 of the *CHRA*, but to do so in consultation with First Nations, including Aboriginal women's groups.<sup>6</sup>

While the Minister and his representatives have met and consulted with several interest groups, who have provided expertise and convincing policy analyses, QNW fears the failure to implement all of the recommendations in the drafting of Bill C-44, in addition to the inadequate consultation with First Nations, will adversely affect Aboriginal women in the aftermath of the repeal.

QNW acknowledges that several attempts have been made to repeal section 67 since its inception in 1977. We also recognizes the efforts of Native Women's Association of Canada (NWAC) in lobbying for the repeal of section 67 both on the national and the international stages,

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<sup>5</sup> United Nations, Human Rights Council, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding observation of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, par.22, [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c125a450044f331/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c125a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf).

<sup>6</sup> United Nations, Committee Economic and Social Council, *Consideration of Reports Submitted by States Parties under Article 16 and 17 of the Covenant – Concluding observation of the Committee on Economic, Social, and Cultural Rights: Canada*, E/C.12/CAN/CO/5, par. 17, 45, [http://www.unhchr.ch/tbs/doc.nsf/0/87793634eae60c00c12571ca003712162/\\$FILE/G0642783.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/87793634eae60c00c12571ca003712162/$FILE/G0642783.pdf).

as well we support NWAC's position paper regarding the repeal of section 67.<sup>7</sup> As a result of these pressures, since 1992 the Canadian government has proposed amending the *CHRA*,<sup>8</sup> although unsuccessful.

The Federal government has also funded initiatives such as *Promoting Equality: A New Vision* (2000),<sup>9</sup> which appointed the Canadian Human Rights Review Panel (CHRRP) to conduct a comprehensive review of the *CHRA* and the effects of repealing section 67 on Aboriginal people. This report not only emphasised consultation with First Nations, but also stressed the importance of an interpretive measure "to balance the interests of Aboriginal individuals seeking equality without discrimination with important Aboriginal community interests."<sup>10</sup>

In 2005, the CHRC presented the special report on the repeal of section 67.<sup>11</sup> The Commission reaffirmed the recommendations and assertions made by the CHRRP in 2000, particularly that an interpretive clause be included in the amendment of the *CHRA* in the view that "individual claims to be free from discrimination are consider in light of legitimate collective rights."<sup>12</sup> Further, the report emphasised that both the inclusion of an interpretive clause and the transitional period of the repeal legislation be conducted in consultation with First Nations and related institutions.<sup>13</sup> Likewise it stressed that the process of repealing section 67 ensure that First

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<sup>7</sup> Native Women's Association of Canada. *Access to Justice and Indigenous Legal Traditions: Proposal to support the Immediate Repeal of Section 67 of the Canadian Human Rights Act*, 2006, p.3, [http://www.nwac-hc.org/\\_includes/pdf.php?press\\_id=29](http://www.nwac-hc.org/_includes/pdf.php?press_id=29).

<sup>8</sup> Bill C-108, An Act to amend the Canadian Human Rights Act and other acts in consequence thereof (1992) and Bill C-7, the First Nations Governance Act (2003).

<sup>9</sup> Canadian Human Rights Review Panel, *Promoting Equality: A New Vision*, Department of Justice, Ottawa, 2000, <http://www.justice.gc.ca/chra/en/toc.html>.

<sup>10</sup> *Ibid.* at p.130.

<sup>11</sup> 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. [http://www.chrc-ccdp.ca/pdf/Report\\_A\\_Matter\\_Of\\_Rights\\_en.pdf](http://www.chrc-ccdp.ca/pdf/Report_A_Matter_Of_Rights_en.pdf).

<sup>12</sup> *Ibid.* at p. 14.

<sup>13</sup> *Ibid.* at p. 24.

Nation community have the necessary resources to design and implement viable human rights mechanisms to meet the diverse and special nature of the various Nations.<sup>14</sup>

The current version of Bill C-44, which has recently passed its second reading in the House of Commons, does indeed seek to repeal section 67. Unfortunately, it fails to incorporate other pivotal recommendations to the dismay of QNW, in particular the inclusion of an interpretive clause and the full term recommended for the transitional period. Our organisation believes it is unreasonable that neither of these recommendations were incorporated in Bill C-44, primarily given that these holdings were not only reiterated by the CHRC, an expert in Human Rights, and NWAC, a respected advocate of Aboriginal women throughout Canada. Lastly, the drafting of Bill C-44 has thus far, been minimally influenced by meaningful consultation with First Nations. Bill C-44 reads as follows:

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<sup>14</sup> *Ibid.* at p. 18.

## **BILL C-44**

An Act to amend the Canadian Human Rights Act Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

### CANADIAN HUMAN RIGHTS ACT

1. Section 67 of the *Canadian Human Rights Act* is repealed.

### REVIEW AND REPORT

2. (1) Within five years after the day on which this Act receives royal assent, a comprehensive review of the effects of the repeal of section 67 of the *Canadian Human Rights Act* shall be undertaken by any committee of the Senate, the House of Commons or both Houses of Parliament that may be designated or established for that purpose.

(2) The committee shall, within a year after a **review** is undertaken under **that subsection**, or within any further time that may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to that House or both Houses.

### TRANSITIONAL PROVISION

3. Despite section 1, an act or omission by an aboriginal authority that was made in the exercise of powers or the performance of duties and functions conferred or imposed by or under the *Indian Act* shall not constitute the basis for a complaint under Part III of the *Canadian Human Rights Act* if it occurs within six months after the day on which this Act receives royal assent.

[emphasis added]

## ***Analysis of Bill C-44***

Bill C-44 consists of three clauses. The first clause repeals section 67 of the *CHRA*. The second clause institutes a review and report mechanism. This provision is said to be the government's recognition that there may be adverse repercussions on Aboriginal communities.

## **PROJET DE LOI C-44**

Loi modifiant la Loi canadienne sur les droits de la personne Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

### LOI CANADIENNE SUR LES DROITS DE LA PERSONNE

1. L'article 67 de la *Loi canadienne sur les droits de la personne* est abrogé.

### EXAMEN ET RAPPORT

2. (1) Dans les cinq ans qui suivent la date de sanction de la présente loi, un **examen** approfondi des effets de l'abrogation de l'article 67 de la *Loi canadienne sur les droits de la personne* doit être entrepris par le comité soit du Sénat, soit de la Chambre des communes, soit mixte, désigné ou constitué à cette fin.

(2) Le comité présente son rapport soit au Sénat, soit à la Chambre des communes, soit aux deux chambres du Parlement, selon le cas, dans l'année suivant le début de ses **travaux** ou dans le délai supérieur autorisé par le ou les destinataires.

### DISPOSITION TRANSITOIRE

3. Malgré l'article 1, les actes ou omissions de toute autorité autochtone qui sont accomplis dans l'exercice des attributions prévues par la *Loi sur les Indiens* ou sous son régime ne peuvent servir de fondement à une plainte déposée au titre de la partie III de la *Loi canadienne sur les droits de la personne* s'ils sont accomplis dans les six mois suivant la date de sanction de la présente loi.

Subsection 2(1) legislates a review and report to be undertaken by either a Senate committee, the House of Commons or both to determine the effect of the repeal of section 67. This review is to take place 5 years after the day on which the Act receives royal ascent. The report is to be submitted within one year after a review is undertaken or subject to a differing time frame, pursuant to subsection 2(2).

There are several problems with these two paragraphs. First, from a purely legislative drafting perspective, there seems to be an ambiguity as to which review is being referred to. It would be advisable to change the word “a” to “the” review in paragraph 2(2) for greater certainty. Furthermore, reference to “that subsection” could be better articulated by directly stating “subsection 2(1) of this Act.” The French version of subsection 2(2) of Bill C-44 does not even make a reference to subsection 2(1). The use of the word “examen” used in subsection 2(1) is not comparable to the word “travaux” and as a result could be clearer. QNW strongly encourages that the drafting of the amendment be reworked to address these subtle, yet critical ambiguities.

With regard to substantive concerns held by QNW, the notion of “a comprehensive review” is troubling. While this term presumably includes the effects of section 67 on First Nation communities: clause 2 is designed to institute a review of the effects of the repeal of section 67, period. It is feared that this choice of wording may skew the focus of the review primarily on the increased volume that the CHRC will face as a result of the repeal of section 67. Despite the legitimacy of reviewing the CHRC’s ability to address increases in complaints and viable mechanisms to appropriately deal with complaints arising out of the repeal of section 67, it is feared that the “comprehensive review” may fail to properly address the instability that may manifest itself within Aboriginal communities given it is beyond the view of the subsection 2(1) committee. Furthermore, subtleties in terms of shifting resources within Aboriginal communities

may be overlooked given the vague mandate set out in subsection 2(1). There is concern in the communities of the possibility that funding for accommodations, education and health care may be funnelled to support the communities' efforts to bring actions under the amended *CHRA*. A subsequent concern is the drain on community resources if they implement human rights mechanisms to be used in conjunction with the CHRC. These sources of economic and human resource capital will inevitably compound already existing systemic problems of poverty that face our Aboriginal communities, particularly Aboriginal women.

The third clause provides for a six-month transitional period. The Legislative Summary confirms the belief that the implication of repealing section 67 will be significant. First, there are anticipated high volumes of claims to the Canadian Human Rights Commission (CHRC). Second, there are likely to be strains on resources, both financial and in terms of human capital, in Aboriginal communities as well as on the CHRC. Notwithstanding the inclusion of a transitional period, the CHRC special report, which was endorsed by NWAC, suggested a suitable transitional period would range from 18 to 30 months. Therefore, the six-month transitional period is a far cry from the time recommended by both the Commission itself and NWAC.

The Legislative Summary provides some explanations as to why certain measures were chosen in drafting Bill C-44. One explanation justifying the shorter transitional period was the absence of an interpretive provision, which needed less time for transition because there was no time required to integrate the interpretive provision. Additionally, the Legislation Summary attributes the six month transitional period to the fact that the *CHRA* has existing statutory provisions which justify "*bone fide*" defences, which may be used to balance collective and individual rights. Paragraph 15(1)(g) of the *CHRA* is viewed as mechanism that could be used to

justify discrimination by First Nation governments who are justified in promoting collective rights. This paragraph states:

**15. (1) It is not a discriminatory practice if**

[...]

**(g) 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.**

**15. (1) Ne constituent pas des actes discriminatoires :**

**g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.**

Regardless of these justifications, QNW is adamant that the transitional period be extended irrespective that the interpretive provision has not been incorporated into the Bill. We believe that the transitional period would be a useful buffer period for Aboriginal governments to implement their own human rights mechanisms, as well as to prepare themselves against prospective complaints. While we highly recommend that the 18-30 month period be incorporated into Bill C-44, we would welcome any extension on this transitional period.

## **CONCLUSION**

If passed into law, Bill C-44 would change the ways in which decisions are made in our communities. While human rights protection is an issue that deserves immediate attention, a solution must be developed that takes into consideration the unique reality of Aboriginal peoples. Moreover, our customs and traditions must be taken into account, as well as our Aboriginal and treaty rights. We, at QNW, believe that the repeal of section 67 should be resolved with the participation of Aboriginal governments, organizations and citizens.

The experience of Bill C-31 is yet another example of how well-intended legislation can have serious consequences for Aboriginal peoples and our futures. In addition, QNW is vehement

that Aboriginal peoples can no longer accept the unilateral imposition of non-Aboriginal laws, which may be incompatible with our cultural values. Furthermore, not only should research regarding the effects of the legislation be undertaken before it is passed into law; its findings ought to be incorporated into the solution. The special report conducted by the CHRC and the CHRPR are prime examples of how despite expert research, valid recommendations are being deliberately overlooked. QNW is extremely dismayed that the suggestions brought to the Standing Committee on Aboriginal Affairs and Northern Development, have disregarded many of the recommendations put forth by CHRPR and NWAC. Reliance on reviews and research conducted five years after the proposed repeal comes into effect, as prescribed by the section 2 of Bill C-44, may lead to problems which may be irreversible or simply ignored in five years, as a result of the isolated repeal of section 67. After all, we have understood for some time now the negative impacts of Bill C-31, yet sadly nothing has been done to rectify this injustice.

We believe that only through the involvement of Aboriginal people can a viable solution to this issue be attained. We therefore request that the government of Canada, in its objective to repeal section 67, also consult Aboriginal peoples in a meaningful way in order to find a solution that reflects the needs and desires of our peoples.

## **Recommendations**

Extend the transition period from six month to 18 – 30 months in order to ensure:

- Consultation with Aboriginal peoples and their communities regarding Bill C-44 as recommended by the Standing Committee;
- Preparation and education of Aboriginal peoples in order to implement effective mechanisms to resolve complaints;
- Training of competent personnel in Aboriginal communities to inform citizens of their rights and recourse.

Create an Aboriginal ombudsperson position to ensure that the anticipated measures of Bill C-44 are fair and equitable.

Providing financial and human resources necessary to develop implement and operate Human Rights mechanisms to protect Aboriginal peoples in Aboriginal communities.

Ensure that Human Rights protection be included in all Self Government agreements and/or land claims.

Include an interpretative clause to enable the CHRC to adequately balance collective rights and individual rights, whereby the CHRC could rely on an exemption that would explicitly allow discrimination where a preference or advantage is granted to Aboriginal people and it not discriminatory in any other respect.<sup>15</sup>

Consult Aboriginal peoples throughout the process of drafting, passing into law and executing Bill C-44.

Provisions be created that do not harm Aboriginal and treaty rights.

Must apply to the discriminatory decisions made by band councils regarding membership codes.

Must apply to decisions made by the Federal Government under the Indian Act.

The Indian Act should be amended to eliminate all forms of discrimination against Aboriginal women and their children, in particular, the second-generation cut-off stipulated by Sect. 6.2 of the Act.

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<sup>15</sup> *Supra* note 3 at pg. 3. Suggestion proposed by the Canadian Bar Association as part of House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, Issue 7A:61, 29 March 1977.