

A Double Standard: Indians are not Protected Against Political Discrimination

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Imagine, if you will, that you are an Aboriginal woman living on a reserve in Manitoba. You have three children, ages six, nine, and twelve. Your abusive husband has left the reserve, as you have a restraining order against him, and the courts have denied his requests for visitation rights with your children. Recently, the Chief has fired you from your position as Band Manager. You suspect that this is related to your troubles with your husband, as he and the Chief are brothers. In response to being fired, you circulate a petition that urges the Chief to resign and asks that an election be called. Your petition gains the support of not only your family, but also that of other community members. The Chief retaliates by firing your family members from their jobs at the band gas bar. Next, your family members are denied social assistance, are discriminated against in the allocation of housing and educational supports for their children, and are asked to leave the reserve. You and your family members are suffering because you dared to challenge the authority of the Chief.¹

The situation is clearly unfair and unjust. You think that your human rights have been violated and that you should have a legal remedy to enforce those rights. Sadly, you do not. Various laws combine such that you cannot bring a claim of political discrimination against the Chief. Despite the provisions of international law, there is no tribunal which can address this claim, because you are an "Indian" as defined by the Indian Act.² I was the Minister of Northern Affairs responsible for Native Affairs amongst other portfolios concurrently from January 1997 to October 1999. As a lawyer since then I have represented vulnerable

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¹ David G. Newman, Q.C. "Women and First Nations' Governance" (Lecture, Provincial Council of Women of Manitoba, Inc. 53rd Annual General Meeting and Luncheon, 27 April 2002).

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I. AN INTRODUCTION TO THE CANADIAN HUMAN RIGHTS STATUTORY REGIME

In Canada, human rights are protected by both federal and provincial laws. As the distribution of powers under the *Constitution Act, 1867*³ does not grant exclusive jurisdiction over human rights to either the federal or the provincial governments, both levels of government have enacted legislation addressing the issue. Furthermore, violations of human rights may occur in areas that are specifically addressed in the distribution of powers under the Constitution. In such a scenario, it is necessary to seek a remedy for the violation in a system governed by the level of government which holds legislative power in the area where the violation occurred. These factors have combined to create the current system where human rights are protected by both federal and provincial legislation.

The federal and provincial statutes collectively guarantee certain human rights as against both governmental and non-governmental actors. At the federal level, the *Canadian Charter of Rights and Freedoms*⁴ and the *Canadian Human Rights Act*⁵ protect human rights in areas that are under federal jurisdiction. The *Charter* is perhaps the narrowest in its application, as it applies only to "government", be

² *Indian Act*, R.S.C. 1985, c. I5, s. 2. Throughout this paper, the term "Indian" is used to reflect this meaning. As discussed herein, s. 67 of the *Canadian Human Rights Act* states, "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." The issue of whether or not the concept of human rights should be "imposed" upon First Nations is a topic too vast for inclusion in this short paper, as it is tied to issues of self-determination and self-government, among others. There is already a great deal of literature on this subject: e.g. Menno Boldt and J. Anthony Long, "Tribal Philosophies and the *Canadian Charter of Rights and Freedoms*" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985); Kerry Wilkins, "But We Need the Eggs: The Royal Commission, the *Charter of Rights and the Inherent Right of Aboriginal Self-Government*" (Winter, 1999) 49 U.T.L.J. 53; James W. Zion, "North American Indian Perspectives of Human Rights" (Prepared for the International Conference on Human Rights in Cross-Cultural Perspectives, University of Saskatchewan, October 1989).

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

⁵ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA].

it federal or provincial.⁶ The CHRA is broader in its application,⁷ applying to the federal government and matters which are under federal jurisdiction. Such matters include private businesses that fall under the legislative power of the federal government, and—most importantly, for the purposes of this paper—Indians and lands reserved for Indians (by virtue of subsection 91(24) of the *Constitution Act, 1867*).⁸

Each province has enacted human rights legislation to address matters that are within provincial jurisdiction. These areas include property and civil rights⁹ and “generally all matters of a merely local or private nature.”¹⁰ Provincial human rights codes have the widest application. They apply to all organizations, governments and agencies under the legislative power of each province.¹¹

II. THE ROLE OF THE CHARTER

1. Application to Chiefs and Band Councils

Whether the *Charter* applies to the actions of Indian bands is a complex question. As summarized by B.W. Morse in his paper, “Twenty Years of *Charter* Protection: The Status of Aboriginal Peoples under the *Canadian Charter of Rights and Freedoms*”:

Whereas there is sufficient litigation to conclude that the *Charter* applies to the *Indian Act* and to First Nations when they are carrying out functions under the *Indian Act* or a federal program, it remains uncertain whether this section renders the *Charter* applicable to First Nations when they exercise inherent and section 35 rights. It further remains to be seen whether section 32 signifies that the *Charter* applies to self-government agreements that are silent on this point but ratified by federal and provincial/territorial im-

⁶ *Supra* note 4, s. 32(1), which states:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

⁷ *Supra* note 5, s. 66.

⁸ *Supra* note 3, s. 91(24).

⁹ *Ibid.* s. 92(13).

¹⁰ *Ibid.* s. 92(16).

¹¹ The Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 5.

plementing legislation. The interrelationship between sections 25 and 32 is also unknown.¹²

The Royal Commission on Aboriginal Peoples was of the view that the *Charter* applied to Aboriginal governments and their relationship with individuals within their jurisdiction, subject to a flexible interpretation of s. 25.¹³ However, this approach was not reflected in early case law. As Morse noted:

The lack of success which band members have had in utilizing the *Charter* to challenge First Nation laws from within could become troubling if it implies an unwillingness on the part of the Canadian judiciary to scrutinize First Nations' policies and legislation at all, particularly in the absence of an alternative fora in which to do so, rather than emanating from an appropriate policy of deference to local decision-making.¹⁴

However, recent case law suggests that this restrictive interpretation of the *Charter*'s sphere of influence is changing. For instance, in a recent decision of the Alberta Court of Queen's Bench, the Court held that "[t]he *Charter* should apply to any decision or by-law or action the Band Council or the Band makes under the authority of the *Indian Act* because the Band is using its statutory authority to regulate the life of its members."¹⁵ The continued development of *Charter* jurisprudence in this direction may assist with the protection of human rights on reserves. However, there remains a need in the meantime to amend the *CHRA* so no obstacles prevent Indians from objecting to human rights violations before a human rights tribunal, in the same manner as all Canadians.

2. Political Belief as an Analogous Ground of Discrimination Under the *Charter*

The phrase "analogous grounds" is used in relation to s. 15 of the *Charter*, which enumerates a number of prohibited grounds of discrimination. "Political belief" is not one of the grounds enumerated in s. 15. However, since the Supreme Court of Canada's decision in the *Andrews* case, it has been accepted that the

¹² Bradford W. Morse, "Twenty Years of *Charter* Protection: The Status of Aboriginal Peoples Under the *Canadian Charter of Rights and Freedoms*" (2002) 21 Windsor Y.B. Access Just. 385 at 422.

¹³ Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 234.

¹⁴ *Supra* note 12 at 429.

¹⁵ *Horse Lake First Nation v. Horseman* (2003), 223 D.L.R. (4th) 184 at para. 29 (Alta. Q.B.). Other cases which have addressed the issue of the *Charter*'s application to Chiefs and Band Councils include *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 F.C. 513 (T.D.) and *Canada (Human Rights Commission) v. Gordon Band Council* (2000), 190 D.L.R. (4th) 418 (F.C.A.).

grounds listed are not exhaustive, and grounds analogous to those enumerated may be considered as potential bases for discrimination.¹⁶

It might be suggested that if political belief was accepted as an analogous ground under the *Charter*, then, by logical extension, it should be considered an analogous ground under the *CHRA*. While the simplicity of this argument is attractive (in that it would not require a legislative amendment in order to achieve the end goal of Indian equality), it is uncertain whether it would truly be effective.

The first issue to address is whether or not political belief is accepted by the courts as an analogous ground under the *Charter*. In the recent case of *Condon v. Prince Edward Island*, the court accepted that political belief should be recognized as an analogous ground, as it was directly related to other *Charter*-protected values.¹⁷ However, the binding and persuasive effects of this judgment may be limited, given that it is only a trial court decision. For the purposes of s. 15 of the *Charter*, the issue of whether political belief constitutes an analogous ground for discriminatory conduct remains unclear.¹⁸

The next issue to be addressed is whether or not the principle of “analogous grounds” applies to the grounds of discrimination enumerated in the *CHRA*. Based on a review of the jurisprudence, it would appear that the courts are willing to read analogous grounds into the *CHRA* in certain circumstances.¹⁹ However, this willingness must be examined in light of the Supreme Court of Canada’s comments in *Mossop*, wherein the Court found that Parliament had not included sexual orientation in its amendments to the *CHRA* and, accordingly, Parliament’s clear intention was not to extend protection from discrimination on that basis. As Chief Justice Lamer opined,

[A]bsent a *Charter* challenge, the *Charter* cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have.²⁰

¹⁶ *Law Society British Columbia v Andrews*, [1989] 1 S.C.R. 143.

¹⁷ [2002] P.E.I.J. No. 56 (S.C.T.D.) [*Condon*].

¹⁸ For instance, the case of *Jazairi v. Ontario (Human Rights Commission)* (1999), 175 D.L.R. (4th) 302 (Ont. C.A.) may be read as standing for the proposition that the omission of political belief from human rights legislation does not constitute discrimination under s. 15 of the *Charter*. However, this view of the case was rejected in *Condon*, *ibid*.

¹⁹ For instance, in the case of *Arnold v. Canada (Human Rights Commission)*, [1997] 1 F.C. 582 (T.D.), the Court found that learning disabilities were analogous to the enumerated ground of “disability” under the *CHRA*.

²⁰ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 582.

However, as held by the Ontario Court of Appeal in the *Haig* case, if a human rights statute does not protect against discrimination on an analogous *Charter* ground, it may be found to be unconstitutional.²¹

This conflicting jurisprudence makes it doubtful that if political belief is accepted as an analogous ground under the *Charter*, it will also be an analogous ground under the *CHRA*. Again, one comes to the conclusion that the only certain and timely course for remedying the present injustice facing Indians in Canada is formally amending the *CHRA*.

3. Effect of Section 25 of the *Charter*

As stated by Professor Hogg, s. 25 "is an interpretive provision, included to make clear that the Charter is not to be construed as derogating from 'any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.'"²² Professor Hogg's view of s. 25 as a shield is virtually universally accepted by Canadian courts.²³ As noted by B. Morse, despite this nearly blanket recognition of the nature of s. 25, the jurisprudence surrounding s. 25 has been fairly limited.²⁴ He states:

Many cases have tried to utilize section 25 as a source of a substantive right or to invoke it where no *Charter* scrutiny was being contemplated; however, despite the paucity of cases which have undertaken to consider its purpose, we know that this is not the proper use of section 25.²⁵

It is notable, however, that because s. 25 shields Aboriginal rights from being adversely affected by other *Charter* rights, it can only be invoked as a defence if a *Charter* violation is found. The section cannot be used as a shield from contraventions of other laws, such as the *CHRA*.²⁶ The section should therefore not be construed as giving decisions of Chiefs and Band Councils general immunity from human rights review.

²¹ *Haig v. Canada* (1992), 9 O.R. (3d) 495.

²² Peter W. Hogg, *Constitutional Law of Canada*, Student Edition (Scarborough: Carswell, 2005) at 650.

²³ See, for instance, *R. v. Steinhauer* (1985), 63 A.R. 381 (Q.B.); *R. v. Augustine and Augustine* (1986), 35 D.L.R. (4th) 237 (N.B.C.A.); *R. v. Nicholas* (1988), 91 N.B.R. (2d) 284 (Q.B.); *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (1997), 154 D.L.R. (4th) 344 (F.C.T.D.) [*Shubenacadie*]. In *Campbell v. British Columbia (Attorney General)* (2000), 98 A.C.W.S. (3d) 252 (B.C.S.C.), it was held that the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from erosion or undermining by other provisions of the *Charter*.

²⁴ *Supra* note 12.

²⁵ *Ibid.* at 421.

²⁶ *Shubenacadie*, *supra* note 23 at para. 44.

III. HUMAN RIGHTS GUARANTEED BY INTERNATIONAL LAW

The *United Nations Universal Declaration of Human Rights (UN UDHR)* provides that everyone is entitled to certain fundamental human rights without distinction on any ground, including political opinion.²⁷ Article 7 of the *UN UDHR* provides that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.²⁸

Article 8 ensures that everyone “has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”²⁹

While the *UN UDHR* has not formally been imported into Canadian domestic law, it has been accepted as an aid to interpretation of Canadian human rights legislation on numerous occasions.³⁰ As noted by the Supreme Court of Canada, “[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”³¹

IV. INCONGRUITY BETWEEN INTERNATIONAL AND CANADIAN HUMAN RIGHTS PROTECTIONS

Although the *UN UDHR* guarantees certain fundamental rights without distinction on the basis of political opinion, the *CHRA* does not include political opinion or political belief as a prohibited ground of discrimination.³² This paper will

²⁷ *Universal Declaration of Human Rights*, GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*UN UDHR*]. Article 2 of the *UN UDHR* provides in part, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, language, religion, political or other opinion, national or social status, property, birth or other status.”

²⁸ *Ibid.* at Article 7.

²⁹ *Ibid.* at Article 8.

³⁰ William A. Schabas, “Canada and the Adoption of the Universal Declaration of Human Rights” (1998) 43 McGill L.J. 403. The author notes, in para. 2, that the *UN UDHR* has been cited by Canadian courts “in no fewer than 135 reported judicial decisions” and by the Supreme Court of Canada on at least 16 occasions.

³¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70. These sentiments have been echoed by the Supreme Court of Canada in the recent cases of *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 175–78 and *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 at paras. 12–14.

³² *Supra* note 5, s. 3(1), which states:

suggest that political opinion and political belief should be included as a prohibited ground of discrimination in the *CHRA*. In making this suggestion, this paper will examine how the absence of political discrimination as a prohibited ground of discrimination under the *CHRA* combines with s. 67 of the *CHRA* to deny Indians the rights held by non-Indians. The historical context surrounding the omission of political belief from the prohibited grounds of discrimination contained in the *CHRA* will also be examined. Finally, it will be suggested that the policy reasons behind this omission may still be met if political opinion or political belief is included as a prohibited ground of discrimination under the Act.

V. A COMPARISON WITH PROVINCIAL HUMAN RIGHTS CODES

The omission of political discrimination as a prohibited ground of discrimination in the *CHRA* is in contrast with the majority of the provincial human rights codes. The codes of seven provinces and two territories include political discrimination as a prohibited form of discrimination.³³ These statutes do not provide definitions of the terms "political belief", "political association", "political affiliation", "political convictions", or "political activity", with the exception of the *Human Rights Act* (Prince Edward Island), which defines "political belief" to mean belief in the tenets of a political party as evidenced by membership, contribution or open and active participation in the party.³⁴

Disparities between the prohibited grounds of discrimination of provincial human rights codes and the *CHRA* deny Indians rights that are held by non-Indians. For example, if a person in Manitoba who is not an Indian is discriminated against on the basis of political activity in the provision of social assistance, he or she would be able to file a complaint under the *Human Rights Code* (Mani-

For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

³³ Of the provincial human rights codes, "political belief" is protected under the *Human Rights Code*, R.S.B.C. 1996, c. 210 at ss. 11, 13 and 14 and the *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d). "Political belief" and "political association" are protected under the *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 5. "Political belief, affiliation or activity" are protected under the *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5(1)(u). "Political belief", "political association" and "political activity" are protected under the *Human Rights Code*, S.M. 1987-88, c. 45, s. 9(2)(k), and the *Human Rights Act*, R.S.Y. 2002, c. 116, s. 7(j). "Political belief or activity" are protected under the *Human Rights Act*, R.S.N.B. 1973, c. H-11 at ss. 3-7. "Political convictions" are protected under the *Quebec Charter of Rights and Freedoms*, R.S.Q., c. 12, s. 10, and "political opinion" is protected under the *Human Rights Code*, R.S.N.L. 1990, c. H-14 at ss. 6-9, 12 and 14.

³⁴ *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(m).

toba).³⁵ However, a complaint could not be filed under the *Human Rights Code* (Manitoba), by an Indian who has been denied social assistance by their Band Council because of discrimination on the basis of political activity. Instead, the CHRA would be the applicable legislation. The actions of the Band Council would be exempt from the provisions of the CHRA insofar as they occurred under the *Indian Act*.

Even if the actions did not fall under the *Indian Act*, or if the *Indian Act* becomes subject to the provisions of the CHRA,³⁶ a remedy under the Act would not be available, as political discrimination is not one of the enumerated grounds under the Act. Accordingly, the provisions of the *Constitution Act, 1867* and the CHRA combine so that in the above example, an Indian would not have the same rights and remedies as a non-Indian. This is inconsistent with Article 8 of the *UN UDHR*, which provides that everyone is entitled to an effective remedy for violations of fundamental human rights. Furthermore, it conflicts with the principles of equality which Canadian human rights legislation attempts to uphold.

VI. A BRIEF HISTORICAL REVIEW

In 1999, the CHRA Review Panel (the Panel) considered whether the CHRA should be amended to include protection for political discrimination. The Panel was established with a mandate to complete the first comprehensive review of the Act since it was passed in 1977.³⁷ The Panel was to review the Act to ensure that it “kept current with human rights and equality principles”.³⁸ Public consultation was part of the review process, as the Panel participated in round table discussions and meetings with employers, service providers, labour organizations, human rights groups, non-governmental organizations and members of the public.³⁹

In its report, the Panel concluded that it was not necessary for the CHRA to be amended to prohibit discrimination on the basis of “political belief” or “po-

³⁵ *Human Rights Code*, S.M. 1987-88, c. 45.

³⁶ Bill C-7, *First Nations Governance Act*, 2d. Sess., 37th Parl., 2002, proposed the removal of the exemption contained in s. 67 of the CHRA. This proposed repeal of s. 67 was abandoned in January 2002 when the Federal Government, under a new Prime Minister, chose to withdraw the Bill. The opportunity to repeal s. 67 and add the ground of political discrimination therefore remains open.

³⁷ *Supra* note 11 at 3.

³⁸ *Ibid.*

³⁹ *Ibid.* A summary of the discussions relating to the repeal of s. 67 of the CHRA and the extension of the CHRA to address political discrimination are provided as an appendix to this paper.

litical opinion". The Panel found that discrimination on the basis of political belief or political opinion was not widespread, and that the few cases that were advanced on this ground under the provincial legislation primarily addressed the issue of political patronage.⁴⁰

The Panel's finding that political discrimination was not widespread seems to be at odds with the comments recorded in the summaries of the round table discussions. While the Panel noted that the *UN UDHR* prohibits distinction on the basis of political opinion, the consultation process "did not reveal that there was widespread discrimination on this ground on the national scale".⁴¹ The Panel further found that its research and consultations "revealed no evidence that there is widespread systemic discrimination on the ground of political belief or that this ground is related to patterns of persistent disadvantage".⁴² This seems to conflict with the summaries of the round table discussions and the comments regarding the proposal to remove the exemption of the *Indian Act* from the provisions of the *CHRA*.⁴³

As part of its consultation process in 1999, the Panel heard submissions on whether the current exemption of the *Indian Act* from the provisions of the *CHRA* ought to be maintained. Section 67 of the *CHRA* provides that the provisions of the *CHRA* do not affect any provision of the *Indian Act* or any provision made under or pursuant to the *Indian Act*.⁴⁴ The summaries of the roundtable discussions contain comments that address the specific issue of the exemption of the *Indian Act*, in addition to demonstrating that widespread discrimination on the basis of political opinion or political belief is occurring in reserve communities. Participants expressed that "there are many injustices on reserves regarding band elections, housing and financial assistance",⁴⁵ and that "aboriginal women are worried that their human rights might be violated by aboriginal governments".⁴⁶ Participants stated that "Band Councils are seen as not taking human

⁴⁰ *Ibid.* at 102.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Summaries of the roundtable discussions were obtained online: <<http://www.canada.justice.gc.ca/chra/en/summary.html>>.

⁴⁴ *Supra* note 5, s. 67.

⁴⁵ Department of Justice, "Summary of Non-Governmental Organizations Roundtable held at Edmonton, Alberta, October 27 and 28, 1999". Summary online: <<http://www.canada.justice.gc.ca/chra/en/ngort1.html>>.

⁴⁶ Department of Justice, "Summary of Non-Governmental Organizations Roundtable held at Montreal, Quebec, September 30 and October 1, 1999". Summary online: <<http://www.canada.justice.gc.ca/chra/en/ngort3.html>>.

rights into account”⁴⁷ and that “Aboriginal communities are not given the same opportunity as other Canadians in general to get to the same level with regards to human rights issues”.⁴⁸ Concern was also expressed for off-reserve Aboriginal women and their children, as a comment was made that “if they fall under [the] *Indian Act* then [they have] no human rights protection”.⁴⁹

In the Report, the Panel neglected to comment on these issues in their discussion of the proposed inclusion of political opinion or political belief.⁵⁰ At the public consultations, members of Aboriginal communities spoke about human rights violations committed by their governments and their lack of a remedy for these violations under the *CHRA*. The comments demonstrated that the distribution of legislative authority provided by the *Constitution Act, 1867*, the exemption of the *Indian Act* from the provisions of the *CHRA*, and the omission of political discrimination as a prohibited ground of discrimination under the Act have combined to deny Indians the same rights as those that are held by non-Indians. Under the *Constitution Act, 1867*, the federal government has legislative authority over “Indians and Lands reserved for Indians”.⁵¹ The provincial governments have legislative authority over property and civil rights, matters of a merely local or private nature, and education.⁵² The protections offered by the *CHRA* are not available where the *Indian Act* applies. The result of these provisions is that non-Indians have rights and are offered remedies not extended to Indians.

The drafters of the *CHRA* did not foresee how the Act might create a mechanism through which Indians could hold their governments accountable for the provision of services. In 1966, the federal government published *A Survey of the*

⁴⁷ Department of Justice, “Summary on the Federal Government Departments Roundtable held at Ottawa, Ontario on November 24, 1999”. Summary online: <<http://www.canada.justice.gc.ca/chra/en/rtnov24.html>>.

⁴⁸ *Ibid.*

⁴⁹ Department of Justice, “Summary of the Non-Governmental Organizations Roundtable held at Halifax, Nova Scotia on September 28 and 29, 1999”. Summary online: <<http://www.justice.gc.ca/chra/en/ngort2.html>>.

⁵⁰ The Panel did, however, recommend that s. 67 be repealed, and a special interpretative provision be incorporated in the *CHRA*. This would ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the *CHRA*, especially in cases involving employment and services provided by Aboriginal governmental organizations: “Such a provision would ensure an appropriate balance between individual rights and Aboriginal community interests.” *Supra* note 11 at 132.

⁵¹ *Supra* note 3, s. 91(24).

⁵² *Supra* note 3, ss. 92(13), 92(16) and 93.

*Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies.*⁵³ In this report, the federal government described the challenges faced by Band Councils in the provision of services, stating:

There will be the typical problem faced by all political systems of justifying a particular pattern of distribution of the benefits of public activity among reserve residents. This problem may, indeed, be exacerbated by the smallness of the community, the tight personal and kinship ties among its members, and the assumed equality of interest of all members in band assets, especially funds.⁵⁴

As the report noted, all governments face challenges in distributing public benefits. Implicitly, all citizens face the risk that government will distribute public benefits in a manner that infringes on their human rights. This risk is particularly great in reserve communities, where the Chief and Band Council hold tremendous power over residents. The Chief and Band Council supervise the provision of education, housing, health care and social assistance in reserve communities. Band governments and band businesses controlled by those governments have employees who may be discriminated against on political grounds. The denial of these benefits on the basis of any prohibited ground has a severe impact upon residents. The right to share in these benefits is an important one; however, these rights have only limited protections. Although Indians may be denied benefits on the basis of political belief, association or activity, they are unable to make a claim against their government under the *CHRA* on the basis of discrimination on this ground. Unfortunately, the drafters of the *CHRA* did not create a mechanism whereby Indians could hold their government or Indian employers accountable where such discrimination has occurred.

VII. A CRITICAL EXAMINATION OF THE HISTORICAL RECORD— NATIONAL SECURITY CONCERNS

It is superficial to suggest that the drafters of the *CHRA* failed to include political belief and political opinion as a prohibited ground of discrimination simply as an omission. Instead, it is important to look at the historical context in which the Act was drafted. In doing so, we can examine whether the policy reasons for not including political discrimination still exist, and if they do, determine if there are any ways in which these concerns could be met while including political discrimination as a prohibited ground.

The historical record suggests that political discrimination was not included in the *CHRA* for reasons of national security. When the *CHRA* was before the

⁵³ H.B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* (Ottawa: Indian Affairs Branch, 1967). Online summary: <http://www.ainc-inac.gc.ca/pr/pub/srvy/sci_e.html>.

⁵⁴ *Ibid.* vol. 1 at 274.

Standing Committee on Justice and Legal Affairs, there was some discussion of whether “political affiliation” should be included as a prohibited ground of discrimination under the Act. At the Committee level, Minister of Justice Ron Basford convinced several members that “including ‘political affiliation’ would override policy regarding the right of public servants to participate in the political process as expressed in the *Public Service Staff Relations Act* and could override federal national security policy”.⁵⁵ Furthermore, in a letter to the British Columbia Civil Liberties Association dated 31 August 1977, Basford wrote:

Including political belief would also raise security problems when applied to employment within the public service. It is my view that this question should be dealt with in the context of security considerations and legislation before action is taken to include it as a ground in an anti-discrimination code.⁵⁶

These comments demonstrate that although the federal government considered including political affiliation and political belief as prohibited grounds under the CHRA, concerns over security prevented the inclusion of these grounds.

Concerns over national security need not prevent the inclusion of political opinion or political belief as a prohibited ground of discrimination under the CHRA. Indeed, the Act contains provisions that would allow national security concerns to be met despite the inclusion of political opinion or belief as a prohibited ground of discrimination. In paragraph 15(1)(a), the Act provides an exception where a “refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment” is not a discriminatory practice if such treatment is a *bona fide* occupational requirement.⁵⁷ While the phrase “*bona fide* occupational requirement” is not defined in the Act, case law has determined that the treatment in question is not a discriminatory practice where it is reasonably necessary and *bona fide* in the circumstances.⁵⁸ National security concerns could therefore be met by occupational requirements that are necessary and *bona fide*. In its present form, the Act supposedly addresses this policy concern while also denying Indians the right to advance claims of political discrimination against their governments. This unintended effect need not continue, as the Act provides mechanisms by which national security concerns may be met despite the inclusion of political opinion or political belief as prohibited grounds of discrimination.

⁵⁵ Gordon H.A. MacKintosh, *The Development of the Canadian Human Rights Act: A Case Study of the Legislative Process*, (M.A. Thesis, University of Manitoba, 1982) [unpublished] at 125.

⁵⁶ Letter from The Honourable Ron Basford, Minister of Justice, (31 August 1977). Online summary: <<http://www.bccla.org/positions/discrim/77chra.html>>.

⁵⁷ *Supra* note 5, s. 15(1)(a).

⁵⁸ Shirish P. Chotalia, *The 1999 Annotated Canadian Human Rights Act* (Scarborough: Carswell, 1999) at 57.

VIII. DRAFTING AN APPROPRIATE SOLUTION

Careful drafting is required to include political discrimination—including belief, association and activity—as a prohibited ground of discrimination under the CHRA. The term or phrase used to express the prohibited ground of discrimination would have to be broad enough to include political discrimination outside the party system. The definition contained in the *Human Rights Act* (Prince Edward Island) would be too narrow, as the definition centres around membership, contribution or participation in a political party.⁵⁹ This definition is unhelpful in the context of the politics of Chiefs and Band Councils in reserve communities. The prohibitions contained in the Manitoba,⁶⁰ the Northwest Territories⁶¹ and Yukon⁶² statutes may be most helpful, as “political belief”, “political association” and “political activity” are broad protections that could cover a wide range of situations where discrimination has occurred. Careful drafting must ensure that the wording is broad enough so that Indians are able to hold their governments accountable in the provision of services and employment.

IX. CONCLUSION

The CHRA should be amended to include political discrimination as a prohibited ground of discrimination under the Act at the same time s. 67 is repealed. Without such an amendment, the political rights of non-Indians are better protected than the political rights of Indians. This disparity will continue until political discrimination is included as a prohibited ground of discrimination under the CHRA. While concerns for national security prevented the inclusion of this ground as a prohibited ground of discrimination when the CHRA was first enacted, this concern need not prevent its inclusion today. The Act contains provisions whereby *bona fide* occupational requirements relating to political discrimination would not be objectionable as a discriminatory practice. The proposed amendment would ensure that the CHRA is in compliance with the UN UDHR, as Indians would be entitled to fundamental human rights without discrimination because of political belief, association, or activity. Furthermore, the proposed amendment would ensure that Indians would have the right to an effective remedy by a competent tribunal for acts that violated their fundamental human rights.

⁵⁹ *Supra* note 34.

⁶⁰ *Supra* note 35, s. 9(2)(k).

⁶¹ *Human Rights Act*, S.N.W.T. 2002, c.18, s. 5.

⁶² *Human Rights Act*, R.S.Y. 2002, c. 116, s. 7(j).

APPENDIX A

Summary of Roundtable Discussions⁶³

A. Repeal of Section 67

1. Non-Governmental Organizations Roundtable (Halifax, NS—28 and 29 September 1999)

- Concerns expressed for off-reserve aboriginal women and their children—if they fall under *Indian Act* then no human rights protection
- Aboriginal bands not forthcoming with fair and equitable human rights policies
- Section 67 should be taken out (two organizations suggested this explicitly)
- However, there was a concern expressed with maintaining more government authority over Aboriginal peoples

2. Non-Governmental Organizations Roundtable (Montréal, QC—30 September and 1 October 1999)

- Some groups felt that section 67 has a place and should remain—let aboriginal groups sort out their human rights plans along with self-government—part of the true notion of self-determination
- One group said that while they support aboriginal self-determination—aboriginal women are worried that their human rights might be violated by aboriginal governments
- Concerns with who will be considered Band members—e.g., grandchildren
- Feel there is a need to have the CHRA to turn to for assistance in the meantime
- Aboriginal traditional collective values are in conflict with the principle of protecting individual rights

3. Non-Governmental Organizations Roundtable (Ottawa, ON—18 and 19 October 1999)

- Social condition is a big concern for Aboriginal communities. If you have low marketable skills or are on social assistance, you face discrimination. Furthermore, CHRA application on reserve is limited.
- Section 6(2) of the *Indian Act*; Bill C-49 (land management legislation); Aboriginal women do not have matrimonial property rights in this country; small

⁶³ This summary of the CHRA Review Panel's Round Table Discussions was compiled from the summaries available online at <<http://www.canada.justice.gc.ca/chra/en/summary.html>>.

sample of the way Native Canadian women have suffered. You cannot leave a void for aboriginal women—there have to be negotiations with native women.

- Aboriginal women's cases are not accepted as test cases under *Charter* challenges funding—they are not accepted anywhere. New self-government legislation does not consider rights of Native women and children.
- The *CHRA* does not apply to those subject to the *Indian Act*—why? Universal-ity of human rights. Put the emphasis on good protection.
- International covenants have been signed making promises that are not being kept. Make amendments keeping international principles in mind.

4. Non-Governmental Organizations Roundtable (Vancouver, BC—25 and 26 October 1999)

- Many participants supported the removal of section 67
- A few participants felt that while section 67 should be of the utmost concern, the Review should not be restricted to that. The *Indian Act* and related documents such as Bill C-31 need review as well.
- Concern was expressed that the government's focus always seems to be on reserve Indians, not off-reserve
- It was stated that the Assembly of First Nations should not be seen by the government as the voice for all Aboriginal people
- A participant suggested that reserve Indians need to have an Aboriginal ombudsperson. It was further suggested that Aboriginal people have no faith to bring complaints to the CHRC because of the exemptions.

5. Non-Governmental Organizations Roundtable (Edmonton, AB—27 and 28 October 1999)

- One participant felt that the Review Panel could make one of three recommendations with respect to this section: 1) leave this section alone; 2) delete section 67 with nothing to replace it; and 3) replace it with something new which reflects twenty-first century realities, particularly the rights of individual Indians vis-à-vis Métis and Native collectives. Replace section 67 with something more palatable—an Aboriginal Bill of Rights, to be implemented by the CHRC. Another participant suggested designing a “free-standing Aboriginal Human Rights Code”.
- A few participants expressed that there are many injustices on reserves regarding band elections, housing and financial assistance, and those injustices relate to Bill C-31. Courts can't really help—slow and expensive, and only help on a case-by-case basis. The *Indian Act* exception section 67 denies the CHRC jurisdiction, therefore they can't help; this exception must be repealed.
- One participant pointed out that when the CHRC talks about Aboriginal people they talk about registered Indian people. They never mention Métis or Inuit. That is a mistake that has been brought to their attention over and over again.

- The classification of people in sections 6.1 and 6.2 of the *Indian Act* were identified as being unfair and perpetuating inequalities
- It was felt that there is a need to humanize and “aboriginalize” the CHRC so that Aboriginal peoples can feel that their human rights can be addressed. Some First Nations and bands have used section 67 as a smokescreen.
- One participant pointed out that supposed representatives on band councils are not accountable

6. Federal Government Departments Roundtable (Ottawa, ON—24 November 1999)

- One representative stated that from what they have been hearing, lifting the exception would be seen as positive
- Want to address the issue that band councils are seen as not taking human rights into account—when in fact they are bound by the *Charter*—this is often a more difficult process and non-individualized but it does provide a remedy. Currently about 100 *Charter* cases are active.
- Concern that Aboriginal communities are not given the same opportunity as other Canadians in general to get to the same level with regards to human rights issues
- Also concern that lifting the exception could mean an influx of complaints, Aboriginal people, the department and the Commission need to be aware of this
- If the exception were lifted it might also put pressure on to change the *Indian Act*
- Another difficulty is the balancing of individual vs. collective rights—this issue with regards to Aboriginal people is not yet clear in law
- Many questions need to be worked out with regards to Aboriginal self government: e.g., which laws will prevail? Who would manage and enforce human rights laws? Would these laws address the needs? Would appropriate resources be available?
- One suggestion is to have input from Aboriginal communities but stay with the CHR Commission—perhaps with a separate Aboriginal section with Aboriginal Commissioners, increased training, etc. Also, if the Act were amended there may be a need for new grounds of discrimination, training of Commissioners and investigators regarding Aboriginal law, training in conciliation and mediation techniques—there may also be a need to ensure that Aboriginal communities still have the right to develop programs etc. for their own populations—need for resources to do all this.
- There is a need for transition time when a new Aboriginal government is enacted—people want a stable government—and there are concerns that the new government will be challenged from day one—thus, not allowing time to develop stability
- Any government needs time to grow into the objectives it has set for itself

- Representatives pointed out the many cases pending with the department re. membership claims etc. but it is an issue for the broader Canadian society—it was noted that the exception affects all kinds of cases
- There are examples where self-government agreements have enabled Aboriginal communities to start dealing with these complex issues—for example, the Nisga'a agreement has created a good balance

B. Political Discrimination

1. Employers and Service Providers Roundtable (Ottawa, ON—16 September 1999)

- One organization stated concern that this ground might create a defence for hate groups, and questioned whether there is a need for such a ground. This theme of ensuring there is a demonstrated need for change in a given area emerged numerous times during the Round Table.
- The panel was urged in the context of various issues to consider the consequences or “fallout” when recommending making changes to this or any other area. A panel member asked the participants to address in their submissions the issue of whether political belief should or could impinge on a complainant adversely.

2. Labour Organizations Roundtable (Ottawa, ON—13 October 1999)

- Some difference of opinion regarding inclusion of political affiliation/belief

3. Non-Governmental Organizations Roundtable (Edmonton, AB—27 and 28 October 1999)

- Many felt that civil and political rights are being violated as well as social and economic rights

4. Federal Government Departments Roundtable (Ottawa, ON—24 November 1999)

- No comments were made on this issue