

## Recent Developments in the Black Bear Crossing Dispute

By Jennifer Koshan

### Cases Considered:

[\*Tsuu T'ina Nation v. Bearchief\*, 2008 CanLII 55966 \(S.C.C.\)](#)

As noted in my previous post on [\*Tsuu T'ina Nation v. Bearchief\*](#), the Tsuu T'ina Nation was effectively prevented from enforcing an eviction notice against residents of Black Bear Crossing (BBC) whose band membership was disputed, until such time as the membership of the residents was resolved. The Tsuu T'ina's application for leave to appeal to the Supreme Court of Canada was denied by Chief Justice Beverley McLachlin and Justices Morris Fish and Marshall Rothstein on October 30, 2008 (with costs against the Tsuu T'ina Nation).

Under section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, leave to appeal may be granted from provincial and territorial courts of appeal where:

the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it....

As is its usual practice, however, the Supreme Court did not issue reasons for denying leave to appeal in this case.

The case has been back in the news recently, as the three remaining residents of BBC have been fighting the Tsuu T'ina's attempts to force them out of BBC by cutting off their water and utilities. Membership is disputed by the Tsuu T'ina Nation for all three remaining residents (Fred Fraser, Regina Noel and Florence Peshee). There have been no reported decisions posted to the Alberta Courts website in respect of this recent dispute, but media reports indicate that the Tsuu T'ina Nation was held in civil contempt by Justice Jo'Anne Streckaf of the Court of Queen's Bench for refusing to supply the residents with water and utilities after being ordered to do so (see Jamie Komarnicki, ["Judge finds native band in contempt of court"](#)). The case will be back in court on December 12, and ABlawg will provide analysis of any reported decisions.

One question that has arisen in the media is whether the residents have any remedies available to them under human rights legislation. The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 prohibits discrimination based on grounds that are at issue in the dispute, such as sex and marital and family status. The current residents of BBC lost their status and band membership when their mothers or grandmothers married non-Indian men as defined by the *Indian Act*, R.S.C. 1985, c. I-5. Until recently, section 67 of the *Canadian Human Rights Act* would have barred the

residents' claim. Section 67 provided that "Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act." In [\*Canada \(Human Rights Commission\) v. Gordon Band Council\* \(2000\), 190 D.L.R. \(4th\) 418 \(Fed. C.A.\)](#), section 67 was interpreted to preclude a claim where a woman who recovered status under Bill C-31 was denied housing on the reserve by the Band Council, as the decision regarding housing flowed from the Band's authority under the *Indian Act*.

During the last session of Parliament, the government introduced Bill C-44, *An Act to Amend the Canadian Human Rights Act*, which repealed section 67 (Bill C-44 was re-introduced as Bill C-21 in the second session of the 39th Parliament, and received Royal Assent on June 18, 2008. See S.C. 2008, c.30). Groups such as the Native Women's Association of Canada (NWAC) and the Assembly of First Nations (AFN) supported the repeal (see Native Women's Association of Canada, [\*Repeal of Section 67: An Issue Paper\*](#) (2007); Assembly of First Nations, *First Nations Perspectives on Bill C-44 (Repeal of Section 67 of Canadian Human Rights Act)*, (2007)). At the same time, these groups sought to ensure First Nations would be given the power to "adapt human rights protection based on their communities' diverse needs, cultures and traditions" (NWAC at p. 2). Section 1.2 of the Act attempts to address this concern by providing:

In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the Indian Act, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

Section 1.1 of the Act, which was recommended by the AFN, also protects collective interests:

For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

Could Fraser, Noel and Peshee use the *Canadian Human Rights Act* to redress their current treatment by the Tsuu T'ina First Nation in light of these amendments? The addition of these sections does not easily resolve the tension between gender equality and the collective interests enshrined in section 35 of the *Constitution Act, 1982*. While gender equality must be preserved in the interpretation of collective rights to determine band membership and provide housing (section 1.2), the Nation's Aboriginal rights under section 35, which may include the determination of band membership and housing issues as an aspect of self-government, are not to be derogated from (section 1.1). Overall, it seems that the Tsuu T'ina's section 35 rights would need to be assessed before a human rights claim by the individuals claiming an entitlement to housing would be successful. A claim under the *Canadian Human Rights Act* would thus raise virtually identical issues to those at stake in the constitutional action around band membership that is currently before the courts.