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Government of Canada / Gouvernement du Canada

MEMORANDUM NOTE DE SERVICE

TO / À	T.M. Cottrell-Boyd
FROM / DE	L. Tenace
SUBJECT / OBJET	**Canadian Human Rights Act Review Conducted by the Department of Justice**

SECURITY - CLASSIFICATION - DE SÉCURITÉ SECRET
OUR FILE — N / RÉFÉRENCE 23596
YOUR FILE — V / RÉFÉRENCE
DATE June 17, 1986

In response to your memorandum of May 27, 1986, the following represents Staff Relations Branch comments on the issue paper prepared by Justice:

1. Guideline - Making Power

Of the four options presented with respect to this subject area, we support the widely-held view that option 4 is the one which should be pursued; i.e. that the Commission should be allowed to issue guidelines which are not binding. We note the uniqueness of the Commission's current authority to issue binding guidelines as discussed on page 5 of the Justice background paper on the subject. In addition, we would suggest that the last phrase of option 4 as presented on page 7 of the issues paper be deleted; i.e. the phrase, "but make compliance with them a defence". It is the view of this branch that that concept is better left unexpressed, especially in actual revised legislation. Weight of evidence and argument, validity of a defence, and evaluation of the merits of cases involving compliance or non-compliance with the guidelines is best left to the judgment of the Tribunals or the Courts.

2. Primacy and Relationship to Other Laws

Recognizing the political difficulties in including override clauses in other federal legislation, option 3 is the one which we support here; i.e. "amend the C.H.R.A. to provide that it has primacy over other federal laws, and to provide a special defence (similar to the reasonable limits clause (section 1) of the Charter) for other such laws". In so recommending, we are nevertheless cognizant of the basic

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conflict which exists between the PSSRA and the C.H.R.A. with regard to the method of wage determination for federal public sector employees. Nevertheless, we understand that a separate initiative to review the provisions of section 11 is underway and this may alleviate some of the current difficulties. It is essential to recognize that maintenance of the status quo could simply render the collective bargaining system invalid as the method of determining wages and benefits for employees of the federal public service.

3. Process

We support Justice Canada's preference for option #2; i.e. "amend the C.H.R.A. to establish a permanent tribunal" for the reasons discussed in pages 17 - 21 of the Justice background paper". However, we also support the observations of the Nielsen Task Force Study Team set forth on page 13 of the issue paper that "there should be a full appeal to a superior court rather than the limited right of appeal which exists under section 28 of the Federal Court Act."

4. Union Complaints

In our view, the Act should not be amended to allow unions to file complaints on behalf of members. Such a suggestion ignores the fact of unrepresented employees, as well as employees who may not wish to have union involvement in their complaints. The kind of amendment being proposed here would go far beyond any concept of 'ensuring proper representation', to a totally unwarranted degree of union control over C.H.R.A. complaints - something which, in our view, should remain an individual right. Of even greater concern here is the point that unions should not be permitted to complain of discrimination, particularly unequal pay, in collective agreements which they have negotiated. To explicitly sanction such practices by statute subverts both the Human Rights and the Collective Bargaining Systems. We note the statement of intent contained in the preamble to the C.H.R.A., that is is an Act designed "to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals." We therefore support option #1 - maintenance of the status quo.

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5. Combining Investigation and Conciliation

We would support option #1; i.e. "maintain the present system, and amend the C.H.R.A. to permit the Governor-in-Council to provide, by regulation, general time limits for investigations and conciliations." Moving conciliation up front carries an automatic implication of guilt.

6. Publicizing Complaints and Settlements

We suggest that the Act should be amended to restrict publicity by the Commission to the decision rendered. In this area, the rights of the respondents and the importance of obtaining objective hearings and decisions should be factors of paramount concern. We therefore are in disagreement with all of the options presented on page 18, and would advocate the adoption of option 4 on page 19 with the proviso that the phrase "except where it would be in the public interest", be deleted.

7. Legal Remedies - Affirmative Action

We cannot agree that section 41 (2)(a) of the C.H.R.A. should be amended "to permit Tribunals to order special programs or plans in respect of past discrimination." The status quo; i.e. option #1 is the one we favour here. It is important to recognize that among the various types of discrimination, the ordering of special programs to rectify some kinds of past discriminatory practices can be carried out with minimal cost and little adverse effect on the general public; e.g. those which involve staffing and employment opportunities. With respect to other sorts of discrimination, however, e.g. equal pay, the ordering of a special plan to correct past practice can only be implemented at monumental cost to the Canadian public. In addition, an amendment of the kind being proposed here could have an adverse effect on an Employer's pro-active initiative to rectify equal pay difficulties. If such an amendment is considered, it must as a minimum include a statutory limit on retroactivity; e.g. adjustment retroactive to the date of the complaint.

8. Discrimination Issues

(i) Sexual Orientation

It is a short step from recognition of sexual orientation as a prohibited ground of discrimination in the C.H.R.A. to enlarging the definition of "family" with all the implications that such an enlarged definition would entail.

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We do not share Ms. Beckton's view expressed in the background paper of 12/5/86, to the effect that the government response in Toward Equality precludes the position that sexual orientation is likely to be considered by the courts to be encompassed within the protection offered by section 15 of the Charter. Nor do we agree with the conclusion that "it is no longer possible, following Toward Equality, to take the position that sexual orientation should not be a prohibited ground of discrimination". Rather, the entire last paragraph of the government statement in Toward Equality should be referred to here:

> "The Government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or facility. The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees in section 15 of the Charter. The Government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction".

Federal jurisdiction, and in particular, the federal public service, is of course the only area that is of concern to this branch, and apparently the only area of concern in the Government response quoted above. It is our view that the subject is properly covered by section 15 of the Charter and that no further measures are necessary "to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction". In areas of federal jurisdiction which are not specifically part of the federal public service, difficulties with respect to discriminatory practices involving issues of sexual orientation should be dealt with through amendments to legislation affecting those jurisdictions. The manner in which such amendments may be proposed and handled, the degree of attention which they may attract, etc. are surely the concern of the persons responsible for legislation in those areas. The Justice concern with public attention to the issue, in something as basically "public" as the passing of legislation, is not a persuasive reason for discarding the option of amending separate legislation.

The "particular" concern expressed in Toward Equality is with the possible exclusion of individuals "from employment opportunities for reasons that are irrelevant to their capacity and ability to do the job". In our view, this possibility would more properly be forestalled by amendment to the P.S.E.A. Since a review of that legislation is already underway, this would be an opportune time to propose such an amendment. It might even be managed with minimal attention to the issue; for example, the definition of "merit" to be used as the basis for appointment could implicitly preclude discrimination on the basis of sexual orientation. If desired, a no-discrimination clause could be included in regulations pursuant to the Act. We therefore can support only option 2 presented in the issues paper.

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(ii) Political Belief

There are several important points to be made in consideration of this subject which are not made in the background paper on the issue.

Firstly, our concern is with protecting the principle of the political neutrality of the public service. Two major considerations here are that the federal public service be able to provide services to the public in an impartial manner, and that the government of the day, in devising government policy, ought to be able to receive objective advice and support from employees of the federal public service.

While we can support the P.C.O. position that people appointed to government positions by the Governor-in-Council ought to be free of the demands for neutrality placed upon other public servants, and while we would support a two-fold structure of politically-oriented rights along the lines of the British or American models, we would not extend political freedoms to the point where the political neutrality of the public service would be jeopardized. This branch has already expressed its agreement with the views put forward by Mr. Tassé in his letter of September 6, 1985, to Ms. Huguette Labelle on a draft Public Service Appointment Act.

We would refer also to Mr. Manion's letter of 18/2/86 to Mr. George Post (copy attached) which emphasizes, among other points, the importance of protecting the Employer's "ability to discipline employees for any 'excessive' expression, even when it is not politically related". Of the "cases" we have had involving inappropriate public criticism, the Employer's position in imposing discipline has been upheld in every one. The most recent and most conspicuous case was that of Neil Fraser in which the Supreme Court, in rendering its decision, implied the reasonable limits to be placed on freedom of expression. Whatever broadening of existing rights may occur, the Employer must retain both the ability to discipline and the ability to fashion a remedy applicable to the circumstances of the particular case; i.e. based on job content.

We have major difficulties with the proposal to add political belief as a prohibited ground of discrimination under the C.H.R.A., and we have major difficulties with the slant taken in the Justice background paper for the following reasons:

1) the difficulty in defining political belief carries with it the concomitant difficulty of defining the distinction between political belief and political activity.

2) the Charter already contains provisions with respect to freedom of belief and freedom of association. This, in our view, is sufficient protection for this principle.

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The courts have frequently expressed the view that freedom of association includes the freedom to pursue the lawful objectives of such association. If political belief were added to the C.H.R.A., where there is no "reasonable limits" qualifier, and if the same sort of judicial interpretation were to evolve, the results could be disastrous for the maintenance of political neutrality in the public service.

3) Of the four elements described in pages 9-10 of the background paper, #1 is already permitted by the provisions of section 32 of the PSEA, #4 is covered by the Charter, #3 is not at issue at all, and #2 is the element which is readily translatable into political activity. We find this analysis an inadequate treatment of the subject and would refer instead to the February '86 MC entitled Staffing and Political Participation in the Federal Public Service: Amendments to the Public Service Employment Act. (copy attached)

4) The "instances of conflict" described on page 12 should include a reference to conflict with the basic right of the Employer to impose discipline under the F.A.A. and, of course, with section 32 of the P.S.E.A.

5) Page 19 of the background paper, under the heading Rules and Protection for Public Servants, is conspicuously inaccurate in its description of the "legislative scheme" provided by the P.S.E.A. In addition, the same paragraph in projecting a possible ban on discrimination on the basis of political belief in the C.H.R.A., seems to ignore the clearly expressed view of the Supreme Court to the effect that "no values are absolute. All important values must be qualified, and balanced against other important, and often competing values. ...the value of freedom of speech must be qualified by the value of an impartial and effective public service."

In summary, we support option #1 insofar as the C.H.R.A. is concerned, and suggest that any amendment to the existing scheme of things should properly be for the consideration of the P.S.C. in its review of the P.S.E.A.

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(iii) Criminal Conviction or Charge

Once again we can only support the adoption of option #1; i.e. status quo. There is an elemental conflict between the proposed addition of criminal conviction or charge as a prohibited ground of discrimination under the C.H.R.A., and the Employer's responsibility to discipline under the F.A.A. Paragraph 4 on page 27 of the Issues Paper is the one which applies here. The Employer must be able to impose discipline for work-related misconduct, including those types of misconduct which involve criminal conviction or charge. This is a crucial principle in all areas of the federal public service, but especially in such areas as Correctional Services, the R.C.M.P., Taxation, Customs, and all regulatory or law enforcement areas such as Agriculture/Meat Inspection, Fisheries & Oceans (Fisheries Officers), etc.

(iv) Source of Income

We support option #1; i.e. status quo. The example presented on page 29 of the Issues Paper, as the paper itself recognizes, appears "not to have much application to employment". At the federal level, such an addition to the list of prohibited grounds of discrimination is unnecessary, and could cause major conflict with the Employer's Conflict of Interest Policy - another major aspect of the authority to discipline.

(v) Perceived Disability

Noting especially the last paragraph on page 30 of the Issues Paper, we support option #1; i.e. status quo. The principle that disability includes perceived disability is already well established.

9. Scope of the Obligation of Non-Discrimination

(i) Systemic or Adverse Effect Discrimination

We support option #1; i.e. status quo, noting, as stated in the Issues Paper that "the Supreme Court of Canada held that the C.H.R.A. does prohibit systemic or adverse effect discrimination", that an amendment to the C.H.R.A. is unnecessary, and that "for the time being, it may be desirable to leave further definition to the courts."

10. Reasonable Accommodation

We support the adoption of option #2; i.e. "incorporate the concept of reasonable accommodation in the defences under the C.H.R.A."

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Standard of Accommodation

All of the options presented here fall far short of preserving our ability to respect the "operational requirements of the service." The concept of "undue hardship" is a completely inappropriate standard to be applied in an organization which is service-oriented rather than profit-based. None of the options presented are acceptable. If a standard must be devised, we would favour wording which refers to operational requirements rather than undue hardship.

Enclosures