Government of Canada / Gouvernement du Canada

MEMORANDUM NOTE DE SERVICE

55785

SECURITY - CLASSIFICATION - DE SÉCURITÉ: SECRET

TO / A: I. D. Clark

FROM / DE: G. G. Capello

OUR FILE — N/ RÉFÉRENCE: PPB 9024-3-3

YOUR FILE — V/ RÉFÉRENCE:

DATE: FEB 14 1990

ORIGINAL

SUBJECT / OBJET

Draft Memorandum to Cabinet on Amendments to the Canadian Human Rights Act - Meeting of February 15 from 8:30 to 10:00

You will find attached a briefing note which outlines the issues related to the revised draft Memorandum to Cabinet prepared by Justice.

Justice officials have indicated that the tentative list of points to be discussed at Thursday meeting is not an exhaustive one. We have therefore prepared comments on the following points:

- Tribunal Structure
- Primacy
- Reasonable Accommodation
- Equal Pay
- Mandatory Retirement
- Sexual Orientation
- Resourcing
- Reporting Relationship
- Area of Discrimination

I wish to mention that up to now Justice officials have been somewhat reluctant to accommodate our concerns. The present version does respond to some of our requests, but many have remained unattended. It should be noted, however, that the Secretariat is not the only department facing this situation. In fact, most of the interdepartmental meetings that T.B.S. representatives attended were rather stormy. This seems to be caused by the very sensitive nature of most of the issues dealt with in the MC and the important cost considerations linked to the implementation of certain proposals.

We have been informed that the following deputy heads have also been invited to attend the meeting: Messrs. Gorbet, Kroeger, Fowler, Fournier, Gravelle and Goodleaf, as well as Mrs. Catley-Carlson, Stanley and McQueen.

PROPOSED AMENDMENTS TO THE CHRA

TRIBUNAL STRUCTURE

Justice proposal: Subject to the approval of the Prime Minister, replace the present Human Rights Tribunal Panel system with the Canadian Human Rights Tribunal to hear complaints referred to the Commission, the Tribunal to consist of designated members of the Federal Court, Trial Division and other part-time lay members appointed by the Governor in Council on the recommendation of the Minister of Justice.

In your letter to John Tait, you indicated that you were opposed to the "judicialisation" of the Canadian Human Rights Tribunal. Justice makes it clear, however, that they now intend to give the right to the Human Rights Tribunal to overrule an Act and Regulations that would go against the CHRA and to use the " balancing test" under section 1 of the Charter. While we are still very strongly opposed to such insertion... should Justice not want to change its position, then we would prefer to have only Federal Court Judges to hear such complaints. The hearing of the complaint should then be made subject to the same rules that apply to a court Charter challenge, including prior notification of the Attorney General.

It is important to note that Justice has somewhat modified its original position: judges would only be required to sit on the Tribunal only when it is a complaint that involves finding an Act or a regulation "ultra vires". Justice does not seem to take into account, however, the fact that this approach creates an hierarchy among complaints. The public may end up thinking that some complaints are more worthwhile than others. Justice does not seem to realize either that in some cases, a Tribunal composed of lay person members may end up finding in the middle of its proceedings that a decision may be required a decision re the vires of an Act or regulation.

PRIMACY

Justice proposal: Provide that the Act shall prevail over other federal laws (except the Official Languages Act and Canadian Bill of Rights) unless they constitute a reasonable limit demonstrably justified in a free and democratic society or unless they expressly state that they are an exception to the Act.

Justice has indicated that they do not intend to propose repeal of the existing exemption from the Act for statutory pension plans. They do however wish to hear further from us on the rationale for extending this exclusion further than at present and we will be having these discussion in due course.

On the primacy issue generally, we understand that Justice feels that the CHRA must be amended to provide "damage control", because the Supreme Court of Canada has already established in its decisions that Human Rights legislation takes precedence over "ordinary" statutes unless a statute provides otherwise. We are concerned however that the protections proposed are not sufficient:

1. It is unlikely that any sponsoring Minister will find including a "notwithstanding the provisions of the CHRA" clause in a statute to be a satisfactory solution to any primacy problems.

2. The application of the section 1-type defence that Justice is proposing to include involves a very difficult "balancing test"; the existing jurisprudence on the "reasonable limits" is complex and far from easy to apply.

3. The insertion of such primacy clause would moreover overly judicialize an administrative tribunal.

In addition to these concerns, we understand that many have expressed the view that this additional avenue for challenging the " equality " of a federal law is unnecessary: Parliament has already provided such an avenue under the Charter, and coupled this with the " Court Challenges " program.

In any event should Justice maintain its position, we would as mentioned under item Tribunal Structure recommend/require that the entire panel of the Tribunal be composed of judges of the Federal Court.

REASONABLE ACCOMMODATION

Justice proposal: Adjust the bona fide occupational requirement and bona fide justification defences to provide that an employer or provider of services should make reasonable accommodation to the needs of individuals or groups protected by the Act except where this would cause undue hardship, a term to be defined in the Act.

We still have major problems with this proposal. Justice has responded to one of our concerns by eliminating the concept of "undue hardship" from the purpose clause, but they have maintained it at the forefront by including it in Detailed Recommendation 31 (b) of their proposal and recommending that the Governor in Council issue regulations on the same subject.

In your letter to John Tait, you had indicated that the concept of "undue hardship" generally puts a greater emphasis on the use of a "means test" (i.e. the capacity of the employer to pay) than the terms "reasonably practicable", which provide for a greater balance in the granting of a benefit and the sacrifices involved and measures necessary in providing the benefit. In other words, the terms "reasonably practicable" not only connote the notion of a "means test" involving cost but also encompass other values such as effort, time, practicability, business inconvenience, etc...

Justice in fact acknowledged our interpretation of the concept of "undue hardship" and its underlying theme, i.e. the ability of the employer to pay, as they pointed out in their earlier submission the following:

> "However it may not be clear when costs incurred by the government would constitute undue hardship on the government given the financial resources available to it."

In spite of this, Justice has refused to delete the concept from its proposal. We would have no objection however that in the enumeration of matters illustrating the different facet of the concept, the notion of "undue hardship" be used. Thus and for example part (b) of Justice proposal could read:

> "(b) provide, notwithstanding subsections 15 (a) and (g) of the Act, that a refusal, exclusion, expulsion, limitation, specification or preference in relation to any employment, or denial or differentiation under section 5 or 6, is a discriminatory practice unless it can be shown that the needs of the individual or individuals affected cannot be to the extent reasonably practicable accommodated by the employer or purveyor, considering, without restricting the generality of the foregoing, undue hardship, the cost, outside sources of funding, if any, health and safety requirements, if any, and the impact on the operational effectiveness of the employer or purveyor."

One of the key reason quoted by Justice to refuse to modify its proposal is that the Ontario Government has included it in the Ontario Human Rights Code. One should note here that the concept has not yet been tested in relation to this code. The other main reason given by Justice comes from the recommendation in Equality for All that there be an obligation of reasonable accommodation where this would not cause undue hardship. One should note here also that although this recommendation was made by the Parliamentary Committee, the Government response in Toward Equality did not encompass this whole idea. It simply stated:

> "The Government agrees in principle that the Canadian Human Rights Act should be amended to incorporate the concept of reasonable accommodation"

The Government is therefore not bound by any previous commitment to insert the concept of undue hardship.

At the interdepartmental meeting, T.B.S. proposal regarding the insertion of the terms "to the extent reasonably practicable" was considered too mild by the various departmental representatives. However, it is not surprising since none of these departments were concerned by the issue of costs, which was left to T.B.S.

If our proposal is rejected, one alternative would be to attach the terms "to the extent reasonably practicable" to the concept of "undue hardship". This is not however a favoured option.

The Secretariat should also continue to oppose strongly Recommendation 31 (c) which would empower the Governor in Council to issue regulations prescribing standards for assessing what is undue hardship to ensure that additional criteria can be added if necessary. This proposition must be rejected because of the negative perception on the part of business of having government mingling in its affairs, as well as the costs involved in evaluating administratively whether an employer is abiding by the regulations. In this regard, the experience of Labour Canada vis-à-vis the Non-Smokers Health Act is very helpful. A clause having a similar effect was removed, for the very reasons provided above, and the interpretation of the concept "to the extent reasonably practicable" was left to the Courts to determine.

It is also worrisome to have government officials decide upon the merit of having regulations in such a fundamental and contentious area.

Background is misleading since it does not present a complete picture of the cost implications linked to the implementation of the concept of "undue hardship".

Departments through the accessibility exercise have agreed to a five-year implementation of existing standards where there is any expectations disabled people will use our facilities, either as employees or clients. For operational reasons, however, departments have agreed to apply accessibility immediately on an as required basis. Plans for this exercise are available to the CHRC.

EQUAL PAY

Justice proposal: Amend the Act to empower the Governor in Council to make regulations concerning the equal pay provisions of the Act.

In your letter to John Tait, you have made it clear that T.B.S. does not support this recommendation.

We maintain that section 11 be taken out altogether from the present CHRA, and be enacted as a separate piece of legislation, as in Manitoba and Ontario. We do not support waiting until 1991, as proposed by Justice and request that immediate action be initiated in order to address this issue. Further delays could have significant ramification for such unresolved issues as relating to reverse discrimination, ratcheting, etc. This new legislation should as a minimum include:

1. redress only pay disparity which has resulted from undervaluation of work in which women tradionally/historically have predominated

2. prevent male-dominated occupational groups from submitting equal pay complaints

3. restrict employer liability for retroactive wage adjustments to one year

4. provide a reasonable expenditure limitation on wage adjustments

5. provide a sunset clause for liability

6. provide a definition of when compliance has been achieved

7. specify a time-frame for the implementation of section 11

8. incorporate wage adjustments into collective agreements

9. exclude those employees administering it from the collective bargaining process as they would be in a conflict of interest situation

10. limit equal-pay-related complaints and provisions to the present section 11, and not treat sections 7, 10, and 11 together.

MANDATORY RETIREMENT

Justice proposal: Amend the Act to abolish mandatory retirement as a general rule to meet the government commitment in Toward Equality and provide transitional rule; the Minister of Justice, in conjunction with other appropriate Ministers, to consult with industry and unions and report to Cabinet on the impact of abolishing mandatory retirement, three years from the expiry of the transitional period.

In your letter to John Tait, you stated that "only when the necessary regulations had been agreed upon, thereby establishing a clear goal, would the three-year transition period commence, allowing all employers sufficient time to bring their plans into conformity with the new rules.

At the interdepartmental meeting, we agreed to consider that the transition period be later reduced if it proved to be appropriate; we never agreed, however, to having the transition period commence before the promulgation of the regulations. None of the detailed recommendations mention this point clearly, eventhough it has been brought to the attention of Justice in all our communications. It might therefore be appropriate to ascertain when the transitional period is to commence (a chart of T.B.S. approach is included as an appendix).

SEXUAL ORIENTATION

Justice proposal: Add sexual orientation as a ground of discrimination subject to concerns set out in the attached Aide-Memoire.

The Secretarial should continue to oppose the addition of sexual orientation as a grounds of discrimination. However, if it is to be added, the Secretarial should favour Option (c) proposed in the Aide-Memoire:

> "Include sexual orientation as a prohibited grounds and defend any claim for the extension of social benefits under the Charter or Canadian Human Rights Act in the same way"

This approach would be in line with the Government position in the Mossop case, i.e. the Government is contesting vigorously through Justice any claim made in the courts or before Human Rights Tribunals for any extension of benefits to homosexual partners and their "families". It would however have the merit of extending protection to those who suffer discrimination on the basis of their sexual orientation in employment and in the provision of goods and services.

RESOURCING

Justice proposal: Approve 21 person-years beginning in 1990-91 for the Department of Justice to carry out expanded responsibilities resulting from the proposed amendments.

a) Prior to the approval of any person-years, Justice will need to justify the requirement and identify a source of funds.

The MC does not provide any rationale or detailed information to support the significant level of incremental resources identified for the purposes of providing more legal advice to departments and preparing regulations. In the absence of identifying the financial implications in this document, it now will be awkward for the TB to fund this policy decision from the Operating or Program reserve. Justice has several new initiatives requiring policy or legislative review by their Cabinet Committee which have not adequately addressed the "source of funds" issue.

b) TBS understands that the current proposal to create a permanent Canadian Human Rights Tribunal would mean that the financial resources currently dedicated to Tribunals within the Human Rights Commission budget would be transferred to fund the permanent Tribunal. It is also anticipated that some of the resources of the Federal Court will be transferred as well.

REPORTING RELATIONSHIP

TBS does not have any fundamental difficulty with a change in the reporting relationship for the CHRC which would make them a "Parliamentary agency" as long as it is well understood by CHRC that this change does not involve anything more than those specific items mentioned in the MC (ie the CHRC would report directly to Parliament to gain the appearance of independence and the Minister of Justice would be reaffirmed as the Minister responsible for the CHRA). Any further changes such as resourcing flexibility, PY decontrol, exemption from administrative policy, etc. could be negotiated through an appropriate Memorandum of Understanding but should not be considered as an entitlement or automatic simply because they would now table their report directly to Parliament rather than through a responsible Minister.

AREA OF DISCRIMINATION

This point is not dealt with in the ministerial recommendations; it does present, however, some problems for the Administrative Policy Branch since none of the comments expressed in your letter to J. Tait have been reflected in the latest version the draft MC to remove the misconception concerning the use of Personal Service Contracts to "hire" specific persons to do work. In fact, the latest version persists in its proposal to amend the CHRA to prohibit discrimination in the making of contracts for personal services, notwithstanding either the admission by the Canadian Human Rights Commission that the CHRA already provides such protection, or the concerns that were raised previously that amendments to address a perceived problem in one aspect of service contracting could introduce a detrimental affect on a system that appears to be operating effectively.

We should reiterate T.B.S. preference that section 3(a), paragraph 51, be deleted from the MC. Alternatively, we should once again propose that the wording presented in your letter to J. Tait be included in the next version of the MC.

ABOLITION OF MANDATORY RETIREMENT