

PC 21-11-85

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ANNEX B

EQUALITY RIGHTS SUBCOMMITTEE

RECOMMENDATIONS ON CHRA/CHRC

PRELIMINARY LEGAL ASSESSMENT

AIM

1. The aim of this Annex is to provide a preliminary assessment of the legal implications of adopting the recommendations of the Sub-Committee on Equality Rights for amendments to the Canadian Human Rights Act (CHRA).

DISCUSSION

2. Several of the major issues dealt with by the Sub-Committee that pertain to the Canadian Forces (CF) relate to the grounds of discrimination that are, at the present time, proscribed under both the CHRA and the Charter of Rights and Freedoms (the Charter). However, as sexual orientation is not a proscribed ground under the CHRA, the present CF policies with respect to homosexuality could not be challenged under the Act, but only under the Charter. In addition, the result of several exemptions now contained in the CHRA is to prevent complaints relating to mandatory retirement ages from being raised under that Act.

3. The Sub-Committee has recommended that the CHRA be amended, inter alia, to include sexual orientation as a proscribed ground of discrimination and to abolish those exemptions now contained in that Act which have the effect of preventing mandatory retirement from

.../2

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- 2 -

forming the basis of a complaint under the CHRA. If these recommendations are adopted, all of the issues affecting the CF could be challenged under both the CHRA and the Charter.

THE DIFFERENCES - CHRA VS THE CHARTER

4. The primary difference between a challenge initiated under the Charter and one initiated under the CHRA is that the former will be dealt with under the judicial process, whereas the latter will be dealt with under an administrative process. Because of the difference in cost to the complainant, it can be expected that, where a choice exists, most complaints will be made to the Canadian Human Rights Commission rather than to the courts.

5. The members of tribunals and boards established under the CHRA are not judges and are even unlikely to be trained lawyers. The nature of an administrative hearing differs considerably from a judicial hearing, the main requirement of the former being that it comply with the rules of natural justice. One cannot help but wonder whether the law applicable to administrative hearings is sufficient to ensure that Human Rights Tribunals and Review Boards can approach specific cases with a completely open mind.

6. While it is possible to appeal decisions rendered under the CHRA to the courts, the scope of such appeals is so limited that the courts would be virtually prevented from re-considering the merits of

.../3

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- 3 -

the decision of the administrative tribunal. That decision could only be reversed on narrow, specific grounds such as a finding by the courts that the tribunal had exceeded its jurisdiction, displayed bias or had not complied with the rules of natural justice.

7. It should also be noted that the initiative to commence proceedings under either the Charter or the CHRA is with the individual, not the Crown. If an individual starts with a complaint under the CHRA, the government may, by appealing, eventually involve the courts, if only to a limited extent. However, if the ultimate result of that process is unfavourable to the government, nothing else can be done and the government cannot initiate action under the Charter hoping for a different decision on the merits from the courts. The addition of other grounds of discrimination to the CHRA will exacerbate this situation and may prevent the courts from becoming involved in the process of determining whether alleged interferences with the rights of the individual represent reasonable limits on those rights within the meaning of section 1 of the Charter.

8. If it becomes necessary for the Department or the CF to defend a provision under the Charter, the test will be whether it is a "reasonable limit" "prescribed by law" that "can be demonstrably justified in a free and democratic society". On the other hand, the test under the CHRA is whether the provision amounts to a "bona fide occupational requirement". It seems certain that the Charter test

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- 4 -

will give the government more scope for justifying apparently discriminatory provisions, and the apparent attempt of the Sub-Committee to channel challenges under the CHRA rather than the Charter might make it more difficult to justify existing CF regulations and practices. It would seem that the Charter test will permit an examination of the background and intent of the challenged provision, as well as reference to comparable legislation in other free and democratic societies. However, the focus under the CHRA is on the effect of the challenged provision on the rights of an individual with respect to his or her job. This emphasis on a particular job will impose a greater onus on the CF by preventing arguments that all members of the CF are liable to perform other duties beyond the specific duties related to their current posting. Similarly, guidelines issued by the Human Rights Commission prevent consideration of co-workers preferences in relation to a bona fide occupational requirement. This might prevent the raising of arguments based upon cohesion and morale.

MAJOR SPECIFIC PROPOSED AMENDMENTS

9. If the CHRA is amended as proposed in respect of mandatory retirement and sexual orientation, the Commission will gain a jurisdiction that it does not now possess, which is undesirable from the CF point of view.

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- 5 -

10. While it is difficult to forecast the impact of many of the recommendations, particularly until they are translated into specific legislative proposals, the proposal to add a primary or override clause that will confirm the priority of the CHRA over conflicting federal laws, has the potential to make the Human Rights Commission far more powerful than it now is. While recent and pending cases before the Supreme Court of Canada may have the effect of expanding the role and authority of the Commission, this "over-ride" recommendation, as well as those related to "reasonable accommodation" and "systemic discrimination" may, depending on how they are translated into legislative provisions, further increase the Commission's powers to the point where the Commission, and not just the courts, could strike down statutory and regulatory provisions that it considered to be discriminatory.

SUMMARY

11. The CHRA is intended to deal with individual instances of discrimination and the focus is, therefore, on the individual and his or her job. It should continue to be a vehicle for individuals to seek relief for themselves from discrimination. It is the Charter, rather than the CHRA, that contains the mechanisms necessary to permit laws to be assessed by balancing their adverse consequences for some individuals against a compelling and legitimate national objective. It is suggested, therefore, that the thrust of the recommendations is one of fundamental change, and that this attempt to alter the role and purpose of the Canadian Human Rights Commission should be resisted.