

THE SENATE OF CANADA



LE SÉNAT DU CANADA

The Honourable Noël A. Kinsella, Ph.D., S.T.D.

L'honorable Noël A. Kinsella, Ph.D., S.T.D.

OTTAWA, K1A 0A4

CONFIDENTIAL

November 19, 1991

The Right Honourable Brian Mulroney, P.C., M.P.
The Prime Minister of Canada
House of Commons
Parliament Buildings
Ottawa, Ontario
K1A 0A6

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My dear Prime Minister:

Re: The Government's Social Justice Agenda
and Amendments to the Canadian Human Rights Act

I write to recommend that the government give priority to introducing amendments to the Canadian Human Rights Act as a major initiative in the social justice area.

Having served as Chief Commissioner of Human Rights in New Brunswick for over twenty years, two terms as President of the Canadian Association of Statutory Human Rights Agencies, and currently as Chairman of the Board of the Canadian Human Rights Foundation, it would not be surprising that I have a serious interest in the above-referenced matter.

As you know, Prime Minister, the Canadian Human Rights Act, covers federal employees and crown corporations as well as activities in the federal sphere such as national transportation, communications and banking. Beginning with the Equality For All Justice Committee Report of 1985, many suggestions for change to the Act have been recommended. As recently as May and June of this year, two Private Members' Bills were tabled in the House of Commons seeking to amend the statute.

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You will recall that a comprehensive set of draft amendments was circulated within the government in 1986 and that these were not adopted. In subsequent years, each Minister of Justice appearing before parliamentary committees dealing with human rights has promised that revisions will be forthcoming in the near future. We are all aware that the major stumbling block has been the divergence of opinion concerning the wisdom of adding "sexual orientation" to the list of prohibited grounds of discrimination. My understanding is that the government has wished to bring forward all amendments at the same time in an omnibus fashion, including this controversial ground as one of the changes. It is fair to say that this political hindrance has held back important and popular improvements to assist persons with disabilities, as well as general provisions designed to improve procedures for the handling of complaints.

The opportunity for draft legislation to be tabled, if only to be discussed in committee, may now be more favourable. The Department of National Defence and the upper echelons of the armed forces and of the R.C.M.P. seem to be less strongly opposed to the ground of sexual orientation than previously. The courts may interpret Section 15 of the Charter as already including "sexual orientation" as an unenumerated ground, and one did so in a recent Ontario case. From a political standpoint, it should be noted that at least four other jurisdictions in Canada already include "sexual orientation" in their human rights codes. Quebec and the Yukon have done so for some time, and within the past year both Ontario and Nova Scotia have added it to their list of grounds.

A complete listing of the proposed revisions to the Act by various parties would run for five or six pages. In summary fashion, here are some of the more significant changes suggested. The proposed revisions in this list have all been recommended by the Canadian Human Rights Commission itself, both before parliamentary committees and in its annual reports.

1. **Grounds** - In addition to "sexual orientation", proposed new prohibited grounds of discrimination are "political belief" and "criminal conviction or charge". (Note that the Act currently prohibits discrimination against those with a pardoned criminal record.)

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2. **Primacy - The Canadian Human Rights Act** should have primacy over inconsistent laws and regulations that do not expressly override it.
3. **Age - Mandatory retirement** should be prohibited unless it is a bona fide requirement for particular employment.
4. **Reasonable Accommodation** - Employers and service providers should have a duty to take reasonable steps to accommodate differences related to grounds of discrimination (e.g. religion, gender, disability).
5. **Undue Hardship** - As a balance to the concept of "reasonable accommodation" an employer can say that it would cause undue hardship (e.g. egregious costs) for it to accommodate. It is proposed to elaborate on the meaning of "undue hardship" in regulations.
6. **Equal Pay and Employment Equity** - Proposals have been put forward to strengthen the enforcement of these programs.
7. **Independence of the Commission and of Human Rights Tribunals** - A number of changes are suggested to ensure greater independence of the Commission from the government and of decision-making Tribunals from the Commission itself.
8. **Efficiency of the Commission** - Changes are sought to allow refusal of inappropriate complaints, to allow greater flexibility and speed in handling complaints, and to allow the Commission to initiate reviews in cases of suspected widespread or "systemic" discrimination.
9. **Tribunal Orders** - Revisions are sought to permit greater discretion in awarding damages and costs and to codify the practice of awarding such specific remedies as special affirmative programs and "retroactive seniority".

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10. **Hate Messages** - Revisions sought regarding hate messages would allow an order of damages in addition to a cessation order.
11. **Settlements** - Amendments would clarify that negotiated settlements are enforceable legal obligations.
12. **Offences** - One proposed amendment would remove the requirement to obtain the consent of the Attorney General before a prosecution could be launched for offences under the Act.

There are a number of other statutory amendments recommended by the Commission, but the foregoing should be sufficient to indicate the breadth and importance of the changes being sought.

Two Private Members' Bills have been tabled this year in the House of Commons. Peter Milliken, M.P. (Liberal), tabled Bill C-210, which received first reading on May 28, 1991. This Bill does not deal with such significant areas as prohibited grounds or reasonable accommodation. It does address many of the suggestions made concerning procedural fairness and efficiency. Bill C-246, tabled by Svend Robinson, M.P. (N.D.P.) received first reading on June 19, 1991. Its only objective is to add "sexual orientation" to the prohibited grounds of the Act.

Brief mention was made earlier of the amendments of October 18, 1991 to Nova Scotia's Human Rights Act. In addition to including "sexual orientation" in its list of prohibited grounds, Section 5(1) of the Act also now includes "an irrational fear of contracting an illness or disease"; "ethnic, national or aboriginal origin" (emphasis added) and "political belief, affiliation or activity".

Whereas in 1986 the federal government would have been pointing the way for other jurisdictions with the amendments proposed at that time, subsequent changes in provincial and territorial legislation would require substantial amendments to the Canadian Human Rights Act if there is a policy decision to be in a leadership role once again in this field.

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Since you appointed me to the Senate last year, I have attended the Wednesday morning National Caucus as well as our Atlantic and New Brunswick meetings. This experience has vividly underscored the challenge involved in managing an extremely dynamic caucus. It is because of this recognition that I have wondered whether or not a strategic approach to the desired amendments to the Canadian Human Rights Act might include giving consideration to having the legislation commence as a government bill in the Senate.

This would allow the Bill to get before a Senate Committee for public input and subsequently after third reading in the Senate, the Bill would be sent to the House of Commons. Such an approach might mollify the opposition to the Bill by a number of Members of the House of Commons, yet accrue to the government's credit, as a government sponsored bill in the Senate.

Trusting that these views might be helpful and I herewith offer to be of assistance in this matter; whatever course of action is decided upon.

With every good wish, Prime Minister,

Yours sincerely,



Noël A. Kinsella