

SECRET

Annex B

June 12, 1992

Item _____ Canadian Human Rights Act Amendments

ISSUE

Whether to ratify Committee Recommendation (4-0085-92CR(01)) and to proceed with proposed amendments to the Canadian Human Rights Act which were supported by the Human Resources, Social and Legal Affairs Committee on April 2, and June 8, 1992.

DOCUMENTS

An MC (Amendments to the Canadian Human Rights Act, 4-0085-92-MC(01) dated March 27, 1992), seeking approval for the changes was distributed prior to the April 2, 1992 meeting of the Cabinet Committee on Human Resources, Social and Legal Affairs. The Committee Recommendation (4-0085-92CR(01)) has been circulated.

BACKGROUND

The Canadian Human Rights Act was enacted in 1977 to provide protection from discrimination in areas of federal jurisdiction. It provides an informal, expeditious and inexpensive mechanism for the resolution of complaints. Complaints are investigated by the Canadian Human Rights Commission, and if they are not settled, can be adjudicated by independent Human Rights Tribunals.

In response to concerns expressed by Parliamentary Committees and others, a major review of the Canadian Human Rights Act was announced in March, 1986 in Toward Equality. In that publication, the government also made commitments to bring forward reforms relating to sexual orientation, reasonable accommodation and mandatory retirement.

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Extensive consultations were held in 1986 and further consultations were held in early 1992. Private sector groups, government departments and others have strong views on human rights protections and are keenly interested in any amendments to the Act.

The proposed amendments are extensive and include provisions which would:

- (a) enhance the fairness and efficiency of the process and structure of the Canadian Human Rights Commission and Tribunals by, inter alia, making Commissioner's guidelines advisory rather than binding except in the area of pay equity (It should be noted that a decision has been made not to proceed with the proposed structural changes, which are the prerogative of the Prime Minister.);
- (b) acknowledge the primacy of the legislation over other federal statutes but include an additional defence which would permit the discrimination if it were reasonably justifiable in a free and democratic society;
- (c) add sexual orientation as a prohibited ground of discrimination while defining marital status, family status and spouse to exclude same-sex couples;
- (d) abolish the blanket defence of mandatory retirement and provide transitional rules;
- (e) where discrimination is otherwise defensible, require the employer or provider of services to provide reasonable accommodation except where this would cause "undue hardship" (While Ministers de Cotret, Loiselle and Campbell have reached an agreement on the definition of undue hardship, Minister Masse would like an explicit assurance that "operational effectiveness" recognizes the distinct universality of service requirement of the Canadian Forces.);
- (f) end the exemption for the Indian Act, while adding that the Act would not abrogate aboriginal and treaty rights guaranteed by section 25 of the Charter; and,

- (g) cancel the present entitlement of sponsors under the Immigration Act to have recourse to the protections of the Canadian Human Rights Act.

PCO COMMENT

Any amendments in the area of human rights are likely to be controversial. This package, which meets the concerns of Ministers and government departments who are usually respondents in human rights complaints, runs the risk of being criticized by human rights advocates.

The three "progressive" elements of the package relating to sexual orientation, reasonable accommodation and Indians will be contentious in the communities most affected by them. The gay community will support including sexual orientation as a prohibited grounds of discrimination but some members of the community will argue that the explicit exclusion of same-sex couples from the definition of "family status" and "spouse" and the attendant loss of benefits is itself discriminatory. The entitlement of same-sex couples to such benefits is a current issue in the press and before the courts.

Similarly, some members of the disabilities community will be dissatisfied with the standard of reasonable accommodation, arguing that it is, at best, equivalent to the judicially-imposed status quo and less than the Ontario standard. While the disabilities groups accept that the obligation to accommodate should not cause "undue hardship" for the employer or service provider, they may argue that the proposed definition is too lax. The Ontario human rights legislation, for example, does not include "operational effectiveness" in the definition of undue hardship nor is the list of factors limiting this obligation open-ended.

While the removal of the exemption for the Indian Act will be supported by many Indian women, in particular, who would want human rights protections, others may argue that this is another imposition of "white" values and understandings without appropriate consultation. Ms. Campbell is in the process of determining how this proposal would be received by the Assembly of First Nations. She is proposing this element of the package be subject to further consultations with Ministers Clark and Siddon to ensure that it would not disrupt progress on the Unity file.

Others interested in human rights may argue that certain elements, such as the weakening of the effect of Commissioners' guidelines, the additional defence for government to defend discriminatory provisions on the basis that they are reasonably justifiable, and the removal of the entitlement for sponsors under the Immigration Act to have recourse to human rights protections, are regressive. The Human Rights Commissioner will also note the failure to make structural changes to the tribunal structure and to act on many of his other recommendations.

In deciding whether to proceed with this package at this time, Ministers may want to consider whether the "good news" elements of the proposals are likely to outweigh the criticism of the package itself and of further delays in dealing with human rights issues. If it is decided that the amendments should proceed, there will be a need for Cabinet to provide delegated authority in respect to the legislation.

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