Minister of Justice and Attorney General of Canada
Ministre de la Justice et procureur général du Canada

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OCT 28 1982

The Honourable Jack Austin, P.C.
Minister of State for Social Development
Vanguard Building
171 Slater Street
Ottawa, Ontario
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Dear Colleague:

On May 6th Cabinet confirmed certain decisions of the Committee on Social Development concerning amendments to the Canadian Human Rights Act and authorized the drafting of a Bill.

Among other things, these amendments will extend the protection of the Act to the mentally disabled (including those with a history of mental disability, alcohol or drug addiction) as well as making it applicable to the physically disabled in matters other than employment which is now covered by the Act. Such extensions of coverage were promised in the Speech from the Throne in 1980 and are required to make the Act consistent with the Charter of Rights and Freedoms which, of course, guarantees equal rights for the disabled generally.

Because we are extending the protection of the Act to the mentally disabled, however, there has been some concern in certain departments that issues of national security might come before the Human Rights Commission or Human Rights Tribunals for consideration. For example, a person might complain to the Human Rights Commission that he had been refused a promotion or an appointment in the Public Service because of some earlier mental instability. The Commission might investigate and if it felt there was a prima facie case of discrimination and could not resolve the problem with the department concerned it might appoint a tribunal to adjudicate it. The department might have some legitimate reason for refusing the appointment or promotion based on concerns about the individual being a security risk. It would then have the choice of either bringing forward to the tribunal the evidence on which it based its security decision, which it might be unwilling to do, or else it would run the risk of the tribunal, in the absence of evidence to the contrary, concluding that the sole reason for the prejudicial action was discrimination based on a past history of mental disability. If the department did put before the tribunal its security information, the tribunal would then be in the position of determining whether that information was sufficient to warrant the decision; that is whether the department had demonstrated that the complaint could not meet a "bona fide occupational requirement" because of reasonable concerns about his reliability for security purposes. While this problem already exists to some extent under

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the present Act in relation to other prohibited grounds of discrimination there has been a particular concern in some quarters because of the addition of mental disability.

As a result, when Cabinet authorized the drafting of the amendments, it was decided that a national security clause should be included which would provide that if, with respect to a complaint under the Act, a Minister submitted a certificate to the Human Rights Commission stating that the complaint involved issues of national security, neither the Commission nor its tribunal could proceed with further examination of the complaint. At the time it was recognized that this was only an interim position, because it was not clear what directions the Government would be taking with respect to national security legislation which might deal more generally with security clearance problems and provide some process for review of adverse security decisions with respect to particular individuals. It was felt that while such a national security clause would more than adequately prevent the Human Rights Commission from dealing in sensitive national security issues it would be difficult to justify politically. It was anticipated that with further work on proposals for national security legislation this problem might be resolved in some other way. Therefore Cabinet also in the same decision directed as follows:

that, "Prior to consideration of the draft Bill by the Cabinet Committee on Legislation and House Planning, Social Development Ministers consider further the issue of the inclusion of a national security clause in the context of the status of the government's response to the report of the McDonald Commission."

Since that decision my officials have been exploring with those of the Solicitor General the possibility for some alternative approach. It has now been agreed among these officials that the national security clause could be dropped from the Human Rights Act in the anticipation that some appropriate mechanism will be included in national security legislation to be proposed to Cabinet in the near future. It is felt that an alternative mechanism can be devised for some kind of independent review of security decisions in relation to employment, citizenship, and immigration. Where such procedures are available a Minister could certify to the Human Rights Commission, in relation to a complaint under investigation, that it involves national security issues and that there is an alternative procedure for dealing with the concerns of the complainant. In those circumstances the Human Rights Commission would not be able to proceed. The details of such arrangements are not yet worked out but it is clear that the problem can be dealt with, and probably better dealt with, in the context of national security legislation rather than in the Human Rights Act.

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I am therefore proposing that I will drop the national security clause from the amendments to the Canadian Human Rights Act and proceed to take those amendments directly to the Legislation and House Planning Committee for final approval. I am under continuing and growing pressure to introduce these amendments and would like to seek final approval in the Legislation and House Planning Committee on November 10th without returning first to the Committee on Social Development. Under the circumstances as set out above, it seems to me unnecessary to return to the Social Development Committee since the problem in question will be examined by Cabinet again in the context of the security legislation. I would be grateful for an early response from you on this question so that if possible I may proceed on November 10th.

I might add that Mr. Tassé has discussed this matter with the Deputy Solicitor General who is in full agreement with this manner of proceeding.

Yours sincerely,

Original signé par
Original Signed by

Mark MacGuigan