SUBMISSIONS TO - House of Commons Standing Committee
on
Justice and Legal Affairs

RE - The Federal Government's Human Rights Bill

FROM - Canadian Civil Liberties Association
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Ottawa

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Introduction

The Canadian Civil Liberties Association is a national organization with a cross-country membership of between 3 and 4 thousand individuals, 9 affiliated chapters, and some 40 groups which, themselves, represent several thousands of people. The membership is drawn from a wide variety of callings and interests - lawyers, business entrepreneurs, trade unionists, minority groups,leaders, housewives, journalists, media performers, etc.

Among the objectives of our organization is the promotion of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between this objective and Bill C-25. Discrimination on the basis of race, creed, colour, sex, etc. represents a substantial affront to human freedom and dignity. And, to the extent that the discrimination falls within the categories mentioned in the Bill, such affront is exacerbated by the loss of vital economic opportunities.

Personal freedom requires also some element of control over personal data. For many years, governments and other institutions have been gathering and storing all kinds of information relating to individuals. Thus far, there has been little effective control or even knowledge on the part of the individuals who form the subject matter of the information.

The Canadian Civil Liberties Association welcomes Bill C-25, the latest attempt by the Federal Government to protect the individual against unfair discrimination and perhaps the first attempt to provide him with greater access to Government held information about himself. While we appreciate the net gain which such legislation is likely to yield for freedom and dignity, we feel impelled to indicate the areas of disappointment. In some respects, the Bill offers too little, in some respects, it attempts too much.

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The Protection of Personal Information

On a scale unparalleled in history, computers are being employed to gather and record personal information relating to millions of people on a wide variety of matters. Substantial amounts of this material reside in powerful memory banks under the control of the Federal Government. At the moment, the persons concerned have very little control over what is being stored and how it is being used. They have virtually no opportunity to challenge any inaccuracies in the data. Indeed, it is rare that people even know what is being recorded about them. The Canadian Civil Liberties Association appreciates, therefore, the fact that the new Human Rights Bill contains some response to these growing encroachments on personal privacy.

Unfortunately, however, the powers to be preserved by the Government are so great and the remedies to be conferred upon the citizen are so weak that much of the Bill represents little more than a legal mirage. While the introductory sections of the privacy part appear to grant citizens access to Government files about them, the ensuing sections empower the relevant Cabinet Ministers to exempt, decline to acknowledge, and simply to withhold such files and information which, in their opinion, fall within certain specified categories. If the citizen disputes the Minister's opinion, he has resort to the Privacy Commissioner. But this official cannot exercise the power of a court to compel, he can only exercise the status of an ombudsman to persuade.

The Canadian Civil Liberties Association recognizes that access by citizens to such Government files cannot be regarded as an absolute to be granted under any and all circumstances. We believe, however, that, apart from certain reasonable exceptions, such access is of sufficient importance to be granted the status of an enforceable legal right.

This means that exceptions to the general right of access should be clearly and definitively set out in the statute. The Minister's "opinion" as to whether a particular file falls within an exempted category should be subject to reversal by a court or other independent tribunal. Traditionally, ombudsmen have been used as a check against the exercise by Cabinet Ministers or civil servants of relatively open-ended discretionary power. In this Bill, however, the Ministerial power is not supposed to be so open-onded. It is supposed to be exercised according to certain specified criteria. But, since the Minister's application of these criteria cannot

be overruled. His discretion, in fact, could become open-ended. In this sense the Bill would embody an unhealthy combination - the appearance of limited power and the reality of virtually unlimited power.

Even in these situations where the exercise of Ministerial discretion were legally correct, there is a great risk that it would not appear so. The claimant and many members of the public would be likely to believe that the Minister was more influenced by political self-interest than by statutory criteria.

In any event, some of the individual exceptions seem to be needlessly wide. In a number of cases, they refer to certain interests that might be injured through disclosure of certain Government records. In other cases, they would authorize concealment without any reference to prejudicial effect. Section 54(c), for example, provides for the withholding of certain categories of information irrespective of anticipated consequences. Even assuming the propriety of some such exceptions, we believe that Canadians should have access generally to such personal information about themselves unless there is a probability of injury to an overriding interest. Subject perhaps to national security, the on-going investigation of specific offences, otherwise privileged communications, and personal information concerning other people, the exceptions should be amended to require such conditions.

Elsewhere the Bill sets out one rather large exception for which we are unable to conceive of any justification - the Governmental power to withhold from publication the very existence of certain information banks. The exercise of such a power could forestall all conflicts over access to the information involved. Indeed, it would enable the Government to be arbitrary with impunity. In view of the fact that even the most outspoken critics of this legislation would concede the validity of some exceptions to the right of access, such a power must be seen as both excessive and unnecessary.

The Canadian Civil Liberties Association asks this Committee to recommend, therefore, the following amendments:

- the Government should be obliged publicly to acknowledge and identify all of the information banks under its control
- most exceptions on the right of access should require a probability of injury to the interest at issue
- a court or other independent tribunal should be empowered to overrule Governmental claims of exemption.

Hate Messages

While the Canadian Civil Liberties Association shares the Government's concern about the existence in Canada of racist invective, we must respectfully question the wisdom of the proposed ban on telephone hate messages.

The section would empower the banning of telephone messages that are "likely to expose a person or persons to hatred or contempt" on the grounds of race, creed, colour, etc. But many useful utterances in democratic societies incite what could be described, at the very least, as bitter feelings. The dividing line between creative tension and destructive hate will often be very difficult to draw.

Like the hate propaganda section of the Criminal code, this kind of legislation creates a risk of catching within its ambit a wide variety of utterances well beyond its intended targets. While the hate propaganda section had been inspired by the anti-semitic and anti-black literature of a small group of neo Nazis in the 1960's, it was used as a vehicle for suppressing anti-American leaflets during the 1975 Shriners' parade in Toronto. The police arrested, on a charge of hate propaganda, some young people who had been distributing leaflets bearing the words "Yankee Go Home".

Although a Crown Attorney subsequently withdew the hate propaganda charge, the incident illustrates how wide a net such legislation can cast. Despite the fact that the British counterpart of our hate propaganda legislation was similarly inspired by the activities of indigenous Nazis, one of the few convictions registered there in recent years was against a Black Power advocate. While we hold no special brief for the anti-white invective of some Black Power advocates and the anti-American slogans of some left-wing radicals, we do not believe that the utterances in question should be suppressible under the criminal law.

Unfortunately, the proposed section on telephone hate messages is potentially even more restrictive of free speech than the hate propaganda section of the Criminal Code. At least the latter legislation enables accused people to defend themselves on the grounds that their statements are in the "public interest". But the section in the Human Rights Bill contains no defences whatever. The Criminal Code section makes

illegal the promotion of"hatred"; the telephone section talks about "hatred or contempt". It would appear, therefore, that the telephone section may be broadening the prohibition against speech.

In any event, we don't believe that the proposed section is necessary in today's Canada. We believe that there are alternate weapons available with which to contain the kind of extremists for which the section was designed. In our view, the emphasis should be directed not primarily at outlawing the words of the hatemonger but rather at improving the social context in which he seeks to operate. Our efforts should be focused essentially upon further immunizing the Canadian public from the message of the hatemonger.

In this connection, we are encouraged by the proposed plan to strengthen the other parts of the Federal Government's anti-discrimination legislation and administration. A stronger program against discriminatory deeds will weaken the impact of bigoted words.

Accordingly, the Canadian Civil Liberties Association asks this Committee to recommend against the enactment of the section on telephone hate messages. In the alternative, the prohibitions should be no wider and the defences no narrower than those contained in the hate propaganda section of the Criminal Code.

Other Discriminatory Practices

The Canadian Civil Liberties Association welcomes the section of the Human Rights Bill dealing with discriminatory conduct. Those sections parallel and even extend the kind of protections which exist in many of the provincial jurisdictions.

There are, however, a number of loopholes which ought to be plugged.

It appears that the practices of the Federal Government and its agencies are to be only partly covered by the Bill's anti-discrimination requirements. The Government and its emanations will be prohibited, for example, from practising the impugned discrimination in the hiring of their own employees and the dissemination of their general public services. It would appear, however, that such vital areas as federal licencing and the letting of federal contracts are to be left immune. In the absence of any suggestion that such distinctions are motivated by principle, we can only believe that this represents an unintended loophole.

As regards private entrepreneurs who are subject to federal jurisdiction, the Bill would apply the anti-discrimination provisions to some of their public market activities but not to others. It would be unlawful, for example, for them to avoid hiring people because of race, creed, etc. but not to avoid trading with people on such grounds. A number of Jewish people have complained, for example, that the world-wide Arab boycott is denying them economic opportunities in this country simply because of their Jewishness. While this is not the place to assess the accuracy of these complaints, it is the place to question the failure of the Human Rights Bill to provide redress for such matters within the framework of the federal jurisdiction.

In response to these loopholes, we would propose amendments along the following lines. Subject possibly to an arrangement permitting special benefits in special cases such as the affirmative action contemplated by section 15 (1), the anti-discrimination provisions of the Bill should apply to all of the activities of the Federal Government and its public agencies and all of the public market transactions of private entrepreneurs which fall within the federal jurisdiction.

Another loophole arises in the Bill's attempt to deal with discriminatory job applications and advertisements. The difficulty here is that the Bill would prohibit the expression of discriminatory specifications but it might not stop the employer from asking potentially discriminatory questions. A number of the Provincial human rights statutes specifically prohibit both. In addition to their bar against discriminatory specifications, they also make it illegal, in writing and in conversation, for employers to ask job applicants any questions relating to such matters as ethnicity, religion, place of origin, etc. In order to eliminate any ambiguity about this matter, we believe the Federal Bill should follow suit. If, in the selection of their employees, employers are not allowed to use certain information, they should not be allowed even to ask for it.

The Canadian Civil Liberties Association appreciates the attempt of the Bill to prohibit employers from adopting different pay rates for their male and female employees who perform "work of equal value". And we appreciate also the apparent onus on the employer to justify whatever exceptions he seeks to make to this vital principle. In our view, this equal pay provision represents a substantial improvement over its federal predecessors and many of its provincial counterparts. However, in the interests of ensuring greater compliance with the goals of the Bill in this area, we would suggest certain changes. In our view, there is no reason why an employer's duty to pay equally for work of equal value should be confined to employees "in the same establishment". In the absence of other acceptable distinctions, we think employers should be legally obliged to implement the principles of job equality throughout the totality of their operations. Indeed, the Bill should not only delete the reference to "the same establishment", but it should also empower the piercing of corporate veils in order to eliminate as much as possible any employer evasions of these human rights responsibilities. In order to plug a potential loophole in the kinds of remuneration for which sexual equality is required, the Bill ought to make specific reference to pensions and other fringe benefits. There is some possibility that, despite the apparently comprehensive definition of "wages" within the Bill, the canons of statutory construction might preclude the inclusion of these types of benefits. It would be better, therefore, to adopt an amendment which more clearly incorporates all such remuneration within the duty to provide equal pay.

There is one further sanction which we believe the Bill should make available for unlawful discrimination. In our view, the Bill should provide that a violator could lose temporarily, or even permanently, whatever federal licence he may have to operate the business within which the discrimination was committed. In many ways, this represents one of the most appropriate sanctions for such misconduct. A right to enjoy the opportunities of the public market should require compliance with the standards of the public market. It is fitting, therefore, that unlawful discrimination could precipitate removal from the public market.

Administration

At the end of the last year for which there are completed statistics (fiscal 75-76), the Ontario Human Rights Commission had accumulated a back-log of more than 450 unresolved complaints. Our experience in these matters impels the belief that this state of affairs is attributable less to incompetent management than to inadequate resources.

But whatever the cause, the result is unacceptable. Human rights statutes generate an expectation of performance. To the extent that such performance is not forthcoming, people's feelings are likely to be commensurately embittered.

Thus, it is no longer sufficient for legislators on human rights to content themselves with the exercise of statutory draftsmanship. They must address themselves also to the administrative fulfillment of their legislative efforts. To neglect such concerns is to increase the risk of bitterness and frustration. This is especially true of contemporary race relations.

Within the last 2 or 3 years alone, Canada has experienced the growth of some rather disquieting interracial tensions. In the Maritimes, Toronto, and on the west coast there have been a number of nasty collisions between whites and non-whites. A recently conducted CTV opinion poll disclosed that, of the people it interviewed in Montreal, Vancouver, and Toronto, as many as 66% declared their opposition to a non-discriminatory immigration policy.

In such a climate, it is especially important that complaints of discrimination be enforced with a minimum of delay. But complaint enforcement alone will not be adequate to deal with some of the more complex racial inequities. Recent Civil Liberties surveys have revealed the following:

- -a scarcity of non-whites in the Hamilton, Kitchener-Waterloo, and London police departments
- -only two non-whites in the Toronto fire department
- -only 3 non-whites, apart from the Ontario Human Rights Commission, in the upper echelons of the Ontario civil service
- -a wide-spread willingness on the part of employment and real estate agencies to screen out non-white job applicants and home purchasers.

The underemployment of native people is, by now, a well-known national scandal. It is unnecessary here to repeat the statistics. To quote a brief presented a few years ago by an Indian organization to the Federal Minister of Indian Affairs,

> "... a once proud and industrious people (the Indians) have suffered a degree of poverty, unemployment, disease, (and) mortality...out of all proportion to its number".

The significance of these inequities is that they have survived years of provincial human rights legislation. What these facts convey is that, despite its possible efficacy on a case by case basis, complaint enforcement is not adequate to overcome such structural inequalities. Such an undertaking will require the various human rights administrations to adopt a number of special affirmative initiatives. For a discussion of the kind of initiatives which this will involve, we attach, as an appendix to this brief, a copy of an earlier CCLA brief to the Ontario Human Rights Commission. (See especially pages 11-15 inclusive).

Not all of the initiatives we recommend will require additional statutory powers. They will all require, however, substantial amounts of vigor, tenacity, and imagination. And these characteristics, in turn, to be made viable, will require money.

In view of the foregoing, it is appropriate to ask this Committee to recommend that the selection of the members and staff of the Federal Human Rights Commission be made with the above characteristics in mind. We ask also that the budgetary allocations be sufficient to enable the Commission not only to ensure expeditious enforcement of anti-discrimination complaints, but also to adopt a number of affirmative initiatives against structural inequities. In view especially of the growing interracial tensions in Canada, the new Federal Human Rights Commission should not be allowed to become a casualty of anti-inflation money-saving.

Summary of Recommendations

The Canadian Civil Liberties Association requests the House of Commons Committee on Justice and Legal Affairs to recommend, for the Federal Human Rights Bill, amendments along the following lines.

1. There should be no exceptions to the Government's obligation publicly to acknowledge and identify all of the information banks under its control.
2. To whatever extent the citizen's right of access to such Government data about himself is to be qualified, the following should apply:
   a) most exceptions should require a probability of injury to the interests at issue.
   b) a court or other independent tribunal should be empowered to overrule Governmental claims of exemption.
3. The section on hate messages should be deleted.
4. In the alternative, if such section is not deleted, the prohibitions should be no wider and the defences no narrower than those contained in the hate propaganda section of the Criminal Code.
5. Subject possibly to an arrangement permitting special benefits in special cases such as the affirmative action contemplated by section 15 (1), the anti-discrimination provisions of the Bill should apply to all of the activities of the Federal Government and its public agencies and all of the public market transactions of private entrepreneurs which fall within the federal jurisdiction.
6. To whatever extent employers are precluded from using certain information in the hiring of their employees, they should be precluded also from seeking such information before they hire.
7. The employer's duty to pay equally for work of equal value should not be confined to employees "in the same establishment" but should apply throughout the totality of the employer's operations. For such purposes, the law should empower the piercing of corporate veils in order to minimize employer evasions.
8. Pensions and other fringe benefits should be explicitly included within the employer's equal pay obligations.
9. Any person who violates the human rights legislation should be subject to suspension or cancellation of whatever federal licence he may have to operate the business within which the discrimination was committed.
10. The membership, staff, and budget of the Federal Human Rights Commission should be sufficient to enable it not only to enforce complaints quickly on a case by case basis but also to adopt a wide range of affirmative initiatives against more structural inequalities.