

**DRAFT / ÉBAUCHE**

TO  
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SOLICITOR GENERAL  
FOR INFORMATION

FROM  
DE

DEPUTY SOLICITOR GENERAL

SUBJECT  
OBJET

SEXUAL ORIENTATION: IMPLICATION OF DND POLICY ON THE RCMP

SECURITY - CLASSIFICATION - DE SÉCURITÉ
OUR FILE - N / RÉFÉRENCE
YOUR FILE - V / RÉFÉRENCE P7050-A
DATE

BACKGROUND

The Commissioner of the RCMP has sought on various occasions to obtain the support of yourself and your predecessors for a formal, written policy of excluding homosexuals from the RCMP. In 1985, the Commissioner was asked to postpone promulgation of a proposed Commissioner's Standing Order on this subject pending release of the Government's position on the equality issues. On release of "Towards Equality", your predecessors took the view that the RCMP could not discriminate against homosexuals and conform with the intent of that statement of Government policy (Tab A refers). The RCMP has since discontinued any practices of discriminating on the basis of sexual orientation.

On February 11, 1987, the Minister of National Defence appeared before the House of Commons Committee on Human Rights and set out that Department's response to the equality issues. With respect to sexual orientation, he took the position that the existing policy of non-retention of homosexuals must be maintained. DND counsel was of the view that the unique working and living conditions of members of the Armed Forces justified this limitation on the rights of homosexuals and that it was defensible under section 1 of the Charter. Mr. Beatty qualified this policy by stating that the continuing exclusion of homosexuals would be based on conduct or behaviour rather than orientation alone and that members would not be obliged to report on suspected homosexuals. A report on Mr. Beatty's statement is attached at Tab B.

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The decision of the Minister of National Defence to maintain a policy of discrimination against homosexuals offers an opportunity to reconsider your position on this issue. The legal and operational considerations behind the DND decision and an assessment of their application to the RCMP are set out below.

CONSIDERATIONS

THE DND POSITION

1. The Task Force Report states that the policy of excluding homosexuals is based on "the reactions of other members to the active distinguishing characteristic of homosexuals", and it acknowledges further that this policy is discriminatory (i.e., DND does not argue that it is "differentiating" on the basis of sexual orientation as was proposed as a defence in the Stiles case). A précis of the DND position is as follows:

- . Armed Forces members' attitudes are hostile towards homosexuals;
- . homosexuals have "active distinguishing characteristics" which (illicit) rejection; *ELICIT?*
- . the lack of acceptance has serious adverse consequences on operational effectiveness; and
- . when weighed against the diminished capability to provide for national defence, the consequence of the policy of exclusion on the individual rights of homosexuals (i.e., loss of employment options and stigma) constitutes, in the view of the Department, a reasonable and justified limitation as provided for under section 1 of the Charter.

BFOR

2. The DND decision to exclude homosexuals from the Armed Forces is not based on a bona fide occupational requirement (BFOR). The BFOR, strictly defined, normally refers to factors affecting a person's ability to perform the "essential duties of a position". The Charter DND Task Force Report admits that the limitation on the employment of homosexuals is not based on the ability of individuals to perform the essential duties of the

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occupation (para. 64, Chapter IV, Final Report). It would appear that the BFOR as it has been traditionally interpreted by the courts and the Canadian Human Rights Commission may not be relied on to defend the policies of DND and the RCMP with respect to the non-retention of homosexuals.

REASONABLE LIMITATION

3. The rationale for the DND policy of excluding homosexuals as set out in the Task Force Report relies on the "reasonable limitation" provision of section 1 of the Charter. Section 1 provides for reasonable limitations that are demonstrably justifiable and prescribed in law. The criteria for a section 1 defence are set out in case law in R. v. Oakes and include the following:

- . the measures responsible for a limit on a Charter right or freedom must relate to concerns which are pressing and substantial (i.e., national defence in the case of DND); and
- . the means chosen must be reasonable and demonstrably justified.

In making this latter determination, the courts are required to balance the interests of society with those of the individual. The proportionality test which, in the opinion of the Supreme Court of Canada, applied in these situations consisted of three important components:

- . the measures adopted must be carefully designed to achieve the object in question;
- . the means should impair "as little as possible" the rights or freedoms in question; and
- . there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".

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RETENTION/RECRUITMENT

4. With respect to the application of the DND policy of not retaining homosexuals, the Chief of Defence Staff stated before the Committee that "unacceptable behaviour" would be the criterion for discharging a serving member from the Armed Forces. On the subject of recruitment, General Manson indicated that a prospective recruit who identified herself/himself as a homosexual would be denied entry to the Armed Forces under this policy but no effort would normally be made to identify the sexual orientation of a new recruit. ]

RELEVANCE TO RCMP

5. The RCMP, in order to impose a similar limitation on the recruitment or retention of homosexuals under section 1 of the Charter would have to demonstrate that the working circumstances in the Force are similarly demanding as those found in the Armed Force. Mr. Beatty pointed out that the professions in the Armed Forces "dictate not only the conditions under which they work, but also the conditions under which they live for 24 hours a day for weeks or months on end". He believes that DND is fundamentally different from other professions with unique problems.

The RCMP would also have to demonstrate that the law enforcement objective of the Force is equally important as the national defence objective of the Armed Forces in order to claim a reasonable limitation with the same level of justification. ✓

6. In any case, the most compelling argument the RCMP could present to defend a policy of excluding homosexuals from the Force would, like DND, rely on the impact of hostile attitudes towards homosexuals on the operational effectiveness of the Force as a whole. To make this argument in defence of a policy of exclusion, the Force would have to have recourse to section 1 of the Charter and would require a prescription in law of its policy towards homosexuals. ✓

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CONSISTENCY WITH PREVIOUS GOVERNMENT STATEMENTS

7. It is important that any policy adopted by the RCMP with respect to sexual orientation be reasonably consistent with the general Government pronouncements on this issue. In "Towards Equality" the Government stated that it would take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in areas of federal jurisdiction. Amending the CHRA to include sexual orientation as a prohibited ground of discrimination could be argued to be the fulfillment of that commitment. The fact that DND has now committed itself to defend its policy of excluding homosexuals affirms that the Government's commitment in this area is qualified by the "reasonable limitation" provision of section 1 of the Charter. The DND decision also gives credence to the notion that the issue being left to the courts for final determination is appropriate.
8. A carefully crafted policy of discharging homosexuals on the basis of performance or conduct as opposed to orientation per se would also demonstrate a departure from previous RCMP practice and could be presented as a reasonable balancing of individual rights and the operational exigencies of police work. This approach would be consistent with public pronouncements made previously by the Commissioner of the RCMP to the effect that he would not knowingly hire a homosexual as a Regular Member of the Force and should also be embodied in the prescription in law, the CSO.

CONCLUSIONS

The defence of a policy of excluding homosexuals from certain areas of employment would likely be successful only if recourse were provided to the reasonable limitation provision of section 1 of the Charter. The BFOR defence offered by paragraph 14(a) of the CHRA may offer some protection for such a policy once the CHRA is amended to include sexual orientation as a prohibited ground of discrimination. The more restrictive defence provided for under the CHRA may lead to a situation where a defendant in a charge of discrimination may be successful under the Charter by appealing to section 1 but still be found in contravention of the CHRA.

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Section 1 of the Charter requires that the limitation be prescribed in law for that section to apply. Promulgation of a CSO governing the question of recruitment and retention of homosexuals might, if appropriately drafted, provide the basis for a defence under the Charter to allegations of prohibited discrimination. The objective of the prescription in law would be to provide a legal basis to discharge a homosexual member in situations where that member's performance or conduct might bring discredit or affect the operational effectiveness of the Force. The policy would be no more intrusive in the private lives of members than is absolutely necessary to protect the interests of the institution. Such a policy would be consistent with the Government's commitment made in "Towards Equality" to extend protection against discrimination on the basis of sexual orientation.

#### STILES CASE

With respect to the Stiles case currently before the Federal Court, it is essential that the RCMP avoid the possibility of a case of discrimination on the basis of sexual orientation being considered prior to the Force having the necessary prescription in law to defend such a policy.

#### RECOMMENDATION

If the Government decides that it wishes to discourage the employment of homosexuals in the RCMP, it is recommended that the Commissioner of the RCMP be permitted to develop a Commissioner's Standing Order (CSO) which embodies the principles referred to by the Minister of National Defence in his appearance on February 11, 1987 before the House of Commons Committee on Human Rights, namely:

- . that a policy of not recruiting or retaining homosexual members be affirmed; but
- . recruitment procedures not actively attempt to ascertain the sexual orientation of applicants for engagement in the RCMP; and
- . the continuing exclusion of homosexuals be based on conduct or performance rather than orientation alone; and, in addition
- . there should be no obligation for members to report suspected homosexuals.

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Finally, notwithstanding the outcome of the defence appeal which is to be heard on February 25 on the Stiles case, it is recommended that the Commissioner be directed to pursue all feasible options for achieving a settlement out of court.

John C. Tait

Attachments

Tab A - Page 13, Towards Equality  
Tab B - Memorandum, February 13, 1987

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