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National Defence

Défense nationale

Chief of the Defence Staff
Canadian Forces

Chef de l'état-major de la Défense
Forces canadiennes

National Defence Headquarters
Ottawa, Canada
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Quartier général de la Défense nationale
Ottawa, Canada
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BY HAND

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Mr. F. Iacobucci
Deputy Minister
Department of Justice
Room 346, Justice Building
Kent and Wellington Streets
Ottawa, Ontario
K1A 0H8

Dear Mr. Iacobucci:

The Judge Advocate General of the Canadian Forces, Brigadier-General Martin, has brought to my attention a matter that gives me grave concern. I am informed that an action has been brought against Her Majesty the Queen by a former member of the Canadian Forces, [REDACTED], who was released for homosexual activity. The release was based on the current policies of the Canadian Forces and was authorized, personally, by my predecessor, General Theriault. As you will appreciate, I wish to ensure that the policies of the Canadian Forces are defended in a thorough and vigorous manner until such time as those policies are changed as a result of a court decision, a decision of the Government or an internal decision within the Forces to modify the policy. Brigadier-General Martin informs me that authorities in the Department of Justice are unwilling to permit counsel charged with defending the policies of the Canadian Forces to argue that sexual orientation is not protected from discrimination under section 15 of the Canadian Charter of Rights and Freedoms. I understand that this position has been accepted by you. I strongly urge you to reconsider and modify that position in order that the policies of the Canadian Forces can be given a full and complete defence.

The question of the appropriate protection to be given to sexual orientation is a complex one. I am aware that it is proposed to amend the Canadian Human Rights Act to include sexual orientation as a prohibited ground of discrimination. I am also aware of the protection given sexual orientation in the human

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rights legislation in Quebec and Ontario. However, although limited legislative protection may exist, there is no certainty that constitutional protection will be accorded on the same basis.

The question of including sexual orientation as a specific ground of prohibited discrimination under subsection 15(1) of the Charter was considered by the Special Joint Committee on the Constitution of Canada. The then Minister of Justice, Mr. Chretien, presented his views on this subject in response to a proposed amendment to include sexual orientation in the subsection. He stated at page 48:33 of the Committee minutes: "We have explained there are other grounds of discrimination that will be defined by the courts." (emphasis added). The vote on the proposed amendment to add sexual orientation to subsection 15(1) was defeated 22 to 2. Mr. Chretien also indicated very strongly that the Government did not want sexual orientation specifically included.

In light of the comments made by the former Minister of Justice in relation to the specific question under discussion, it seems inconsistent for the Department of Justice now to take the position that the question will not be placed before the courts. The opinion of the Department of Justice expressed in "Toward Equality" that sexual orientation is protected by subsection 15(1) was formulated, no doubt, on the basis of a legal analysis of factors which a court might consider in determining if a specific ground was protected under subsection 15(1). However, the courts may arrive at a different conclusion or may use a different method of analysis than that used by officials in your Department. Failure to present an argument that sexual orientation is not covered by subsection 15(1) may result in an opinion of officials within the Department of Justice on a legal matter becoming law by default. Such a result could be viewed as a de facto inclusion by the Department of Justice of sexual orientation within the prohibited grounds of discrimination in subsection 15(1) despite the comments to the contrary by the Minister of Justice when section 15 was being formulated.

Even if the question of whether sexual orientation is protected under subsection 15(1) of the Charter is not raised by counsel for the Crown, the court may raise the question. If this occurs, counsel for the Crown will have to be prepared to present a position to the court. Is it the intention of the Department of Justice to state positively that sexual orientation

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is protected under that subsection? As you will appreciate, such a position on a constitutional matter of this nature could have considerable ramifications not only in the federal sphere, but in the provincial sphere as well. Furthermore, it would leave the court without any information with which to analyze the validity of the position. The court could only conduct such an analysis if it has been presented all the arguments for and against protection of sexual orientation under the provisions of subsection 15(1). In addition, adopting this position, or even a position of neutrality, would effectively deprive the main government institution involved in this matter, i.e. the Canadian Forces, of the benefit of a potentially powerful legal defence.

The Canadian Forces' policies with respect to homosexuals was one of the main areas considered by the Canadian Forces' Charter Task Force. The findings and recommendations of that Task Force are currently under active review. The failure to fully defend Canadian Forces' policies in this area until such time as the review is complete will, in my view, usurp the functions of myself, the Minister of National Defence, and ultimately the Cabinet if the court orders changes to the policies without having heard all relevant arguments. Even if the Government does intend eventually to require modifications to the policy, which is yet to be determined, a full presentation of this argument would not be inconsistent with such a position. Governments frequently take this type of action where, for instance, private members' bills are defeated even though the Government ultimately adopts policies similar or identical to those contained in a private member's bill. Even in the case of the Ontario Retail Business Holidays Act, the Government of Ontario has indicated it will review the Act although it has been upheld by the Supreme Court of Canada.

If the defence arguments with respect to subsection 15(1) prove successful, there is recent case law to support the position of the Canadian Forces on the other potential arguments. The unanimous decision of the Federal court of Appeal in the case of The Queen v. Sylvester, delivered in June of this year, determined that release of a homosexual from the Canadian Forces does not create a cause of action at common law nor with respect to any of the rights protected by section 7 of the Charter. Therefore, if a motion is brought to dismiss the present case on the basis that it fails to state a cause of action, the motion may well succeed if the court determines that sexual orientation

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is not protected from discrimination under subsection 15(1) of the Charter. A failure to permit this argument to be presented will foreclose the possibility of making such an application even though this may be the most expeditious and potentially successful method of proceeding.

In addition to the arguments under subsection 15(1) as to whether sexual orientation is protected at all under that provision, there may be other legal arguments as to whether the policies constitute discrimination within the meaning of that subsection. The interpretation of discrimination is a matter of controversy among the courts. For instance, in Andrews v. Law Society of B.C. (1986) 4 W.W.R., 242 (B.C.C.A.) the court included an analysis of the fairness and reasonableness of the law in determining if it violated subsection 15(1). Therefore, the fairness and reasonableness of the Canadian Forces' policies might be determined under subsection 15(1) rather than it being necessary to defend them under section 1 of the Charter. Does your objection to arguments relating to subsection 15(1) cover all arguments, including ones of this nature, or only arguments on whether sexual orientation falls within the non-enumerated grounds of the subsection?

I presume that officials in the Department of Justice are not objecting to any defences that may be open to the Canadian Forces on a procedural basis, such as the failure to exhaust all internal remedies, or on the basis of justifiable limits under section 1 of the Charter. If I am mistaken in this view, I would be grateful if you would inform me immediately in order that I may make further representations on this matter.

In light of the preceding comments, I strongly urge you to change your current direction which prohibits presentation of the argument that sexual orientation is not protected from discrimination under subsection 15(1) of the Charter. I presume that I have your assurance that all necessary steps will be taken to ensure that the position of the Canadian Forces is not compromised before these aspects of the defence are clarified.

Yours truly,

P.D. Manson
General
Chief of the Defence Staff

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