

CONFIDENTIAL

MEMORANDUM

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1456-2-2 (JAG)

26 Jan 87

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| NDHQ - CDS / VCDS / D Sec GENERAL OFFICE | | |
| REFERRED TO | DATE | BY |
| EA/CDS | 27/1/87 | Ⓢ |
| JAG | 28/1/87 | Ⓢ |

CDS

ACTION AGAINST THE CANADIAN FORCES
RELEASE OF A SERVICE MEMBER FOR HOMOSEXUAL ACTIVITY

1. Enclosed for your consideration is a draft response to the Deputy Minister of Justice with respect to his letter of 9 January 1987 on the [redacted] case. In addition, I have enclosed a draft memorandum to the Minister on the matter.
2. The argument that sexual orientation is not protected under subsection 15(1) of the Charter is a potentially strong one, although there is no certainty that a court will agree with the CF point of view. The main difficulty in the presentation of the argument is obviously a political one. By including the Department of Justice opinion that sexual orientation is protected in the government document "Toward Equality" the government has made it extremely difficult to present the type of argument we wish to present. If the argument is presented, there is a reasonable possibility that the press will pick up the inconsistencies between the arguments presented by Justice counsel in the case and the position taken by the Department of Justice in "Toward Equality". This may result in political embarrassment for the Prime Minister and the Government as a whole. In addition, it may lead to further representations from interested pressure groups. Considering the current difficulties with public image being encountered by the Government, it is highly unlikely that it will be willing to permit arguments that might be viewed as inconsistent with its prior position. Therefore, while there may be a strong legal argument, the political realities may prevent that argument from being presented.
3. In Mr. Iacabucci's response, he states that it has always been the view of the Department of Justice that as a matter of law the courts would find that sexual orientation is encompassed by the guarantees in section 15 of the Charter. However, in 1985, the then-Minister of Justice,

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Mr. Crosbie testified before the Parliamentary Sub-Committee on Equality Issues and was not so certain. He stated at page 21:44 of the Committee minutes: "...With respect to important areas of policies, such as the one I just mentioned the question of the Armed Forces and homosexual - that is something for the Minister of Justice to decide. It is not open and shut as to whether this is a form of discrimination prohibited by the Charter or not." This comment was made prior to the Government response in "Toward Equality" and, while it shows that Mr. Iacabucci's comment may not be entirely accurate, I do not believe it will advance our case on the political level to any great extent.

4. In my opinion, it would be fruitless to continue correspondence with Mr. Iacabucci on the question of arguing that sexual orientation is not protected by subsection 15(1) of the Charter. Because it is a political problem, it will be necessary for the Minister to provide the political support if he agrees with the position we are presenting. He may wish to bring it up with the Minister of Justice and the Prime Minister or possibly before the Cabinet as a whole. Unless he is willing to proceed with such discussions, I can see no possibility of success in getting the argument presented to the court. Therefore, I recommend that the enclosed letter be forwarded to determine if the Minister is willing to support the position that has been presented to Mr. Iacabucci. If he is not, I recommend that this aspect of the matter be dropped and that we proceed with other available defences. As a final matter, you requested an outline of the Andrews case discussed in previous correspondence. This was a British Columbia case involving an allegation of discrimination on the basis of citizenship brought by a lawyer who wished to join the B.C. bar but who was not a Canadian citizen as required by the B.C. legislation. Very briefly, the decision in that case incorporates an analysis of whether an impugned distinction is reasonable or fair when determining if it is discriminatory under s. 15 of the Charter. Other cases have considered that the reasonableness aspect is only considered under s. 1 which permits "reasonable limits" in certain circumstances. By conducting the analysis under s. 15 there may be arguments that the burden is on the plaintiff to show the limit is unreasonable rather than the burden being on the defendant to prove the limit is reasonable as required by s. 1. Other legal arguments are also available if the Andrews type of analysis prevails. Therefore, it would be advantageous to our position if the court accepts this type of analysis.

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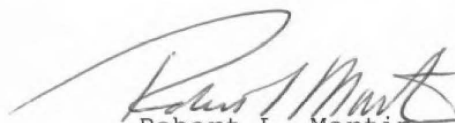
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5. I am available for discussion on this matter at your convenience.



Robert L. Martin

BGen

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Attach.

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