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National Defence / Defense nationale

National Defence Headquarters
Ottawa, Canada
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Quartier général de la Défense nationale
Ottawa, Canada
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National Defence Headquarters
Major-General George R. Pearkes
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Office of the Judge Advocate
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Ottawa, Ontario
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25 September 1989

Mr. D. Martin Low, Q.C.
Senior General Counsel
Human Rights Law Section
Department of Justice
Justice Building
Kent and Wellington Streets
Ottawa, Ontario
K1A 0H8

Re: [redacted] v. The Queen

Dear Mr. Low:

In your letter dated 15 September, 1989, you recommend that serious consideration be given to settling the [redacted] case out of court. In arriving at this recommendation, you refer to a number of considerations. These considerations include a potentially abusive search, an interview of [redacted] described as highly aggressive and unnecessarily intimate, the Canadian Forces' weak position on appeal maintaining that [redacted] has failed to exhaust the redress of grievance procedures, and your opinion that a section 15 **Charter** challenge ought best to be defended on the basis of the new proposed CFAO 19-36 rather than on the basis of CFAO 19-20, the provisions under which [redacted] was released from the Canadian Forces.

A review of the police report pertaining to the investigation of [redacted] reveals that an orange nylon ruck sack with [redacted] name on it was found in a common storage area in the Megaplex at Canadian Forces Base [redacted] This bag was found by two service members who were cleaning out the storage area and who, knowing that [redacted] no longer resided on base, opened the ruck sack to ascertain whether it did indeed belong to [redacted] The ruck sack was subsequently turned over to the military police. In light of this information, in my opinion, the circumstances fail to support the allegation of counsel for the defendant that the search was potentially abusive.

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With respect to the interview of [redacted], while I agree that the transcript of that interview reveals that there were some very intimate questions asked, these questions were in keeping with the instructions outlined in the Special Investigation Unit's Standing Operating Procedure 305 pertaining to the investigation of sexual deviation and sexual offences, the aim of which is in accord with Canadian Forces' policy.

As to the matter of the Canadian Forces' position on appeal, I am of the opinion that an argument can be made to the effect that the redress of grievance route has not been exhausted until such time as the Governor in Council has addressed its mind to the matter of the redress of grievance in question and come to a decision, whether in favour of or against the complainant. A second argument can be raised as well. Had the Minister forwarded the redress of grievance onward to the Governor in Council without [redacted] having had the opportunity to make additional representations, then [redacted] could very well have raised the argument that natural justice was denied to him.

Finally, as to the facts of the [redacted] case, [redacted] has admitted to having performed homosexual acts with a multitude of partners, including one member of the Canadian Forces. These actions clearly come within the ambit of both CFAO 19-20 and the proposed new CFAO 19-36. [redacted] "has a sexual propensity for persons of (his) own sex" and his admitted involvements clearly constitute acts "of a sexual nature which involve persons of the same sex". Should CFAO 19-20 be struck down on the basis of it being overbroad or to vague, this decision should not have an inordinate adverse impact on CFAO 19-36 which, unlike CFAO 19-20, clearly defines what is meant by "inappropriate sexual conduct".

I thank you for communicating your concerns in this matter. However, I do not believe that the circumstances of the [redacted] case justify an out of court settlement.

Yours sincerely,

Robert L. Martin
Brigadier-General
Judge Advocate General