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File No. 301994

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November 9, 1990

Lt.Col. K. Watkin
Director of Law/Human Rights
and Information
Office of the Judge Advocate General
National Defence Headquarters
MG George R. Pearkes Building
Ottawa, Ontario
K1A 0K2

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DAG/L
This opinion was of no surprise.
I thought you might want
to read it.
RW
LCol
NRE
15 Nov 90

Dear Sir:

**Re: Canadian Forces Policy with respect to
Sexual Orientation**

On September 26, 1990 we provided our opinion regarding litigation challenging the Canadian Forces policy on members who engage in homosexual activities. On October 24 through 26, 1990, examinations for discovery were held in Toronto of all parties in both the *Douglas* and *Dwyer* cases. Following discoveries, Brig. Gen. Munroe requested an updated opinion, which follows.

The examinations for discovery afforded us the first opportunity to explore the facts with the plaintiffs, and to assess how they perform as witnesses. Ms. Douglas was examined by Ms. McAllister on October 24 for the full day. She was a very impressive witness, and the facts set out in the documents and elaborated on by her, point to extremely shabby treatment of her by the S.I.U. As a result of the examination, we can confidently say that this plaintiff will make an excellent witness at trial, and that a judge is likely to be very impressed with her and quite sympathetic to her case.

Mr. Dwyer was examined by Mrs. McIsaac on the morning of October 26. While he is not as powerful a witness as Ms. Douglas, he presents the facts in a straightforward manner which a judge will probably find sympathetic.

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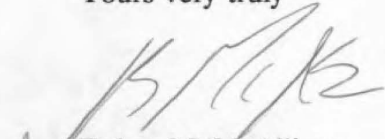
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Brig. Gen. Munroe was examined on behalf of the defendant by Ms. Harriet Sachs throughout October 25, and for most of the day of October 26. The development and impact of the interim policy were fully canvassed, as were various aspects of the CF's s. 1 defence. Ms. Sachs' very thorough examination succeeded in exposing the weaknesses of our s. 1 defence, which were explored in our letter of September 26. We emphasize that the problem was not Brig. Gen. Munroe's presentation, but was rather the difficulties in the s. 1 justification.

In conclusion, our assessment of the likely outcome should these cases proceed to trial has been altered as a result of the examinations for discovery. In our letter of September 26, we concluded that there was, at best, a thirty percent chance of successfully defending these actions. Following discoveries, we are both of the view that placing our chances of success at twenty percent is optimistic, even with favourable results from the proposed external and internal surveys to be prepared by Dr. Harvey. If we do not have evidence from the proposed external and internal surveys, our estimate would be even lower.

Balanced against this real probability of the Court finding against the Canadian Forces, is the damage which trial publicity is likely to do to the credibility of the Canadian Forces. Again, we do not fault General Munroe, but in the cold light of cross-examination, the Canadian Forces' rationale is not very persuasive. There is a real possibility that those who are called upon to testify on behalf of the Forces will simply be made to look foolish.

Yours very truly


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