

General

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We also wish to make some general observations regarding the evidence which we have been able to muster and to explain why that evidence falls short of establishing an arguable case.

*The Context - The Canadian Forces and The Policy*

? → Firstly, we have identified General McGinnes and Admiral Porter as the Canadian Forces Witnesses who would provide, respectively, the roles and structure of the Canadian Forces and the Development and application of the policy. It is our intention to have them both qualified as expert witnesses so that they could present not only the factual background of the Forces and the policy but also their opinion, as experienced, senior military officers, that the policy is required and that there will be a significant effect on the effectiveness of the Forces if the policy were to be abandoned. We have discussed the matter with both, at length, but it is our impression that they will have a great deal of difficulty articulating the problem and that neither will be able to offer the opinion that there will be a significant enough effect on the Forces to warrant retention of the policy. There is no evidence going to the degree of disruption which might be expected, and both must rely on speculation. That speculation will have to be that there is not likely to be so severe an effect that military effectiveness will be significantly compromised.

Quite frankly, we interviewed a number of senior Forces personnel and it is our opinion that most of them do not believe that the abandonment of the current policy will have serious effect on the Forces. Most appear to be of the view that appropriate adjustments will and can be made.

In addition, we intend to call two, or perhaps three, senior NCO's to testify as to life in the Canadian Forces. These individuals will present their testimony in part through videos which will show life on a ship and on a submarine, and life in barracks, in the field, and at isolated postings, all with emphasis on the lack of privacy. We will not qualify these individuals as experts to give opinion evidence and will limit the extent to which they will be required to give their opinion as to the necessity of the policy. We have not identified these individuals yet, but will only allow an individual to testify if we are absolutely certain that he or she feels comfortable with the policy, is willing to testify, and is willing to express an opinion if the Court rules that he or she must. We anticipate that there may be some difficulty in finding suitable individuals, in which case General McGinnes and Admiral Porter will have to take on that task as well.

*Expert Evidence*

Our first expert witness will be Dr. Harvey who drafted, administered and interpreted the results of the Internal Survey. That evidence will by and large confirm the findings of the Charter Task Force and he will be able to speak to the methodology used in the Task Force survey. Dr. Harvey will not be interpreting his results, he will be explaining and

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defending his methodology, explaining the responses received and outlining the results. He has no expertise in matters military or in any specialized area of sociology or psychology which would permit him to express an opinion on what the results of the survey will or might mean in the context of abolition of the policy. His results will have to be interpreted by others.

Nevertheless, the survey results, while they confirmed much of what was found by the Charter Task Force, have failed to provide any further insight into the problem. In particular, they did not give us any additional insight into the nature of people's views about homosexuality or into the reasons why people hold those views.

Although we do not have Dr. Harvey's final report in hand, he has orally briefed us on the results. First, he confirms that enough completed surveys were returned to ensure a statistically significant sample. The sample appears to be representative of the demographics within the CF in terms of male and female membership, rank and operational setting. Methodological problems which were identified in the Zuliani study have been virtually eliminated.

The survey results essentially replicate the Zuliani study. For example, while about one-third of respondents indicated they would be less likely to recommend a CF career if the policy were abandoned, only one in five said that they would like leave the CF in these circumstances. About one-third indicated they would not cooperate with known homosexuals. The most dramatic results were obtained on questions related to privacy. Sixty to seventy percent of respondents indicated that they would either strongly or moderately reject sharing shower and sleeping facilities with known homosexuals.

The overall trends which Dr. Harvey has identified are of considerable interest. Army and Navy members are less accepting of homosexuals than members of the Air Force, or individuals with base or static postings. Women are dramatically more accepting of homosexuals than men, and better educated people are also more tolerant. (This is particularly significant bearing in mind that the first case which will proceed to trial involves a female officer.)

Higher ranked respondents, and those with longer periods of service, are more accepting of homosexuals. This is consistent with our interviews of senior military officers who may be called upon to give evidence in support of the policy. All but one believed that the policy was not essential to the ongoing effectiveness of the CF.

The survey included questions designed to identify the source of the attitudes held by respondents, but the results are completely unhelpful. There is no difference in attitudes held by those with urban backgrounds as compared to respondents who have rural backgrounds. Neither religion nor moral values have any effect on these attitudes. Respondents who were very devout were just as likely to accept or reject homosexuals as those who espoused no religious beliefs.

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Both the overall trends, and the answers to questions aimed at the source of attitudes, are consistent with negative attitudes towards homosexuals being based on prejudice and ignorance. Neither the survey results, nor any of the experts we have spoken to, have been able to differentiate homosexuality from race or gender as a basis of discrimination. Thus, while we have confirmed that strong negative attitudes exist, we have not identified any reason that these attitudes should be treated any differently than other prejudices. A court would probably find that education will undermine these attitudes and minimize any difficulties the CF may experience as a result of abandoning the policy.

We will then likely call Dr. Henderson to testify as to the nature of cohesion and morale within the military setting, the importance of cohesion and morale to effectiveness, and the possible effect on cohesion and morale of abolishing the policy regarding homosexuals. Dr. Henderson has no direct expertise regarding homosexuals and will have to extrapolate findings that he has made and rely on the information obtained from Dr. Harvey as a result of the Internal Survey. While he is no doubt an expert in the area of military cohesion and morale, we do not expect that his evidence with respect to homosexuals in particular will be all that strong. He will not be able to quantify the extent to which either cohesion or morale may be affected. He will have to readily admit that much of his evidence is mere speculation.

Next we will call Dr. Suedfeld to testify as to the nature of privacy, why it is that people need privacy, and what is likely to occur or how they are likely to react when privacy expectations are not met. He does not have any expertise relating directly to issues involving homosexuals and he will only be able to speculate, again relying to some extent on what Dr. Harvey has found, on what the effect might be of not having a policy which would bar all homosexuals from the Canadian Forces. Dr. Suedfeld specifically declined to address the issue of homosexuality in the report which he has prepared for us. He was unsure as to what he would be prepared to say as to the consequence for privacy concerns which the presence of homosexuals might have. He will be reviewing Dr. Harvey's data and his comments and views may or may not be helpful to the defence. Even if his comments are helpful, they will, like Dr. Henderson's, be based on a fairly large element of speculation.

With the unflagging effort and support of George Logan and Lieutenant Commander Rosemary Park we have contacted many additional experts in the fields of ethics, sociology, psychology, anthropology and sexology, and we have conducted interviews with a number of these people. We have been unable to find anyone else who could be of assistance to the Forces.

#### *Foreign Nations*

It is typical in a s. 1 Charter defence to call evidence of laws and practices in other western democratic countries in order to establish that the Canadian position is within acceptable norms. In the course of preparing for this case, we have investigated the practices of various foreign nations with respect to service in their military

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organizations. We have found that a few countries exclude homosexuals from service by means of a written policy. Others ostensibly accept homosexuals, but engage in extensive psychological testing of potential recruits which has the effect of identifying and excluding homosexuals. Some countries which do not exclude homosexuals have quite liberal military organizations which, according to one of our experts, are also quite inept in combat situations.

The best way to present the laws of another nation to a court is to call a witness from that country. We have been unable to identify military witnesses from other countries who would be willing to testify. As an alternative, the foreign laws can be submitted through the researcher who collected them, but the weight attributed to the evidence will be significantly reduced. Even if this is done, we expect that the CF will be reluctant to suggest publicly that allied military organizations which do not exclude homosexuals are ineffective. Ultimately, once these problematic issues have been resolved, the evidence which remains of practices in other democratic countries is unlikely to have a significant impact.

### Conclusions

In conclusion, it continues to be our opinion that the policy cannot be defended in court. We have exhausted all avenues and will have to proceed with the evidence as outlined above. In our view that evidence falls far short of support for the policy and there is absolutely no arguable case to be made.

In particular, we cannot distinguish this policy from a policy which would bar all individuals of a particular religious or ethnic group from the Canadian Forces or demonstrate that, if the policy were to be abolished, there would in fact be a significant effect on operational effectiveness.

What evidence we do have suggests that the actual effect would not be as great as that which is anticipated and that the disruption, if in fact there is any, will be within bounds which can be managed.

In any event, no doubt the integration of Blacks into the American Forces caused some disruption, and no doubt the integration of Women into certain roles in the Canadian Forces has caused some disruption. Why is the case at hand any different? The Canadian Forces cannot explain to a Court why it is any different. The position that it ends up putting forward is that a significant number of its members exhibit moderate to strong prejudice against homosexuals, and the policy merely reflects that prejudice. On the other hand, there is no evidence to suggest that those prejudices or attitudes cannot be changed.

The *Charter* must be seen as the tangible expression of Canadian society's desire to eliminate prejudice against certain groups, and if homosexuality is indeed an analogous ground, and judicial interpretation and opinion to date says that it is, it cannot be seriously argued that section 1 of the *Charter* can override the rights expressed in section 15 where

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the very reason for the override is the expressed prejudice of the group in question. The argument just cannot logically be made.

It is our view that these cases must be settled and that the current policy must be abandoned in favour of a policy which applies equally to heterosexuals and homosexuals and which focuses on inappropriate and disruptive sexual conduct.