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August 5, 1992

Barbara McIsaac, Q.C.
Department of Justice Canada
Room 536, Justice Building
239 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Mrs. McIsaac:

Re: HMQ ats Douglas

Since our preliminary opinion of May 21, 1992, we have undertaken additional research and have commenced intensive preparation for trial which, as you know, has been scheduled to begin in the Federal Court on October 26, 1992. Specifically, we have:

(a) continued with our analysis of the legal issues relating to sections 1 and 15 of the Charter, the issue of the plaintiff's right to continuing discovery and the potential for an award of punitive damages against the Government of Canada;

(b) met or spoken with all the outside expert witnesses, excluding Mr. Zuliani who has been away from his office;

(c) received and reviewed the letter dated June 25, 1992 to you from Lt.-Colonel Ken W. Watkin in which our May 21, 1992 opinion was considered and have met with Lt.-Colonel Watkin to follow up on several of the issues therein identified;

(d) on a preliminary basis, reviewed documents in the context of the plaintiff's request for continuing discovery relating to the aborted Policy change;

We have identified several issues which we believe will be of assistance to you in your assessment of our recommendation that the Douglas action and related actions be settled.

1. **Is sexual orientation a personal characteristic analogous to the enumerated grounds of section 15 of the Charter to which the Charter guarantee of equality will be extended?**

We are again addressing this issue because we understand that there is some suggestion that this issue may still be open for further court consideration.

We note that the Statement of Defence filed in the Douglas action denies that Douglas' rights under section 15 have been infringed. Despite the denial in the pleading, we understand however that, at trial, it was your plan to admit that sexual orientation is a ground of discrimination protected by section 15 of the Charter and that the Policy is a prima facie infringement of Douglas' rights under section 15. We further understand that it was always contemplated that the only line of defence to be advanced would be the "reasonable limit" defence under Section 1.

Although early cases interpreting section 15 which were decided under the "similarly situated" test left it open to argue that sexual orientation was not a prohibited ground of discrimination under section 15, the remaining decided cases under section 15 come to a contrary conclusion (See *Veysey v. Canada (Commissioner of Correctional Services*, [1990] 1 F.C. 321, and *Brown v. British Columbia (Minister of Health)* (1990), 66 DLR (4th) 444).

It is clear from an analysis of the Supreme Court of Canada decisions in *Andrews* and *Turpin* that persons who suffer differential treatment as a result of their sexual orientation are the "discrete and insular minorities" entitled to the section 15 equality guarantees. We are of the view that a court would conclude that sexual orientation is a constitutionally-protected ground of discrimination and that your Department's plan to so admit this issue at trial is the correct legal approach.

Although we are not totally certain of the official position of the Attorney General of Canada in respect of the issue being considered, we have noted in some of the documentary material reviewed that the Government is committed to an interpretation of section 15 which includes sexual orientation as a protected ground. As well, we understand that the Attorney General of Canada has already conceded this position in contested litigation (See *Veysey v. Canada (Commissioner of Correctional Service)* (1990) 109 NR 300 and *Egan v. Canada* (December 2, 1991), Vancouver T-2425-88 (FCTD).). In light of this fact, we would not now be able to advance a contrary position.

For these reasons, we believe that sexual orientation is a ground to which the section 15 equality guarantee extends and that the Policy is a limitation on Douglas' equality guarantee under section 15. Our only defence would be that the Policy constitutes a reasonable limit, under section 1 of the Charter.

We will require your specific instructions to admit the applicability of section 15 so that we may, in turn, advise our opponents prior to trial.

2. Can the Policy meet the "prescribed by law" test as required by section 1 of the Charter?

The question of whether the Policy can meet the "prescribed by law" test has been the subject of consideration by your Department. Based on our current understanding of how the Policy is being, and has been, applied we have very serious concerns on whether the Policy can survive the "prescribed by law" test under section 1.

The "prescribed by law" test was set out in *R. v. Therens*, [1985] 1 SCR 613, p. 645 and is defined as follows:

> *"The requirements to limit the 'prescribed by law' test is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of the statute or regulation or from its operating requirements and may also result from the application of a common law rule."*

A limit prescribed by law within the meaning of this section may result by implication from the terms of a legislative provision or its operating requirements. It need not be an explicit limitation of a particular right or freedom (See *R. v. Thomsen* (1988, 40 C.C.C. (3d) 411, [1988] S.C.R. 640, 63 C.R. (3d) 1.)

Precision, accessibility and clarity have also been held to be necessary attributes of the "prescribed by law" test. The requirement for precision is to ensure that there are no overreaching laws which impair rights more than is justified. The doctrine of "vagueness" is founded on the rule of law particularly on the principles of fair notice to citizens and limitation of enforcement discretion. Fair notice to the citizen comprises a formal aspect -- an acquaintance with the actual text of a statute -- and a substantive aspect -- an understanding that certain conduct is the subject of legal restrictions.

A law which passes the threshold test may be so general and imprecise as not to qualify as a reasonable limit to a Charter right pursuant to section 1. The relevant question is, therefore, whether the legislature has provided a clear and intelligible

standard to permit a determination of where and what the limit is. The standard cannot be expected to specify all the instances in which it applies. However, it must be clear, understandable and not subject to arbitrary application (See *Irwin Toy Limited v. Quebec (Attorney General)* (1989), 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, [1989] 1 S.C.R. 927 and *Osborne v. Canada (Treasury Board)* supra, and *Committee for the Commonwealth of Canada v. Canada* [1991] 1 S.C.R. 139).

In your written evaluation of the defences in the Douglas matter forwarded to Lt.-Colonel Watkin on May 15, 1991, you reviewed in detail the Policy and concluded as follows:

> *"In short, the Policy has evolved without any clear direction and without any specific reference to the perceived problem which the Policy is supposed to address. In its present state, it is not possible to argue that it is clear and unambiguous or that it is rationally connected to the objective of maintaining an operationally effective military force."*

Our review of the evidence given on discovery by General Munro, a review of the Policy and of other documents currently in the possession of the Judge Advocate General confirm your conclusions.

3. Is the section 1 defence viable without the testimony of senior officers of the Canadian Forces?

In developing our defence, it was contemplated that the basis of the section 1 defence would purport to show the negative impact of homosexuals in the Canadian Forces on the two significant interests of privacy and military cohesion. The argument would be that any significant impairment of the privacy of members of the Canadian Forces or negative impact upon the military cohesion of combat units would reduce the effectiveness of the Canadian Forces. The impairment of these important and legitimate interests could fulfill the pressing and substantial concern requirements of section 1 of the Charter.

The trial evidence in support of the section 1 defence was to be advanced from witnesses involved directly with the Policy with the Canadian Forces together with outside expert opinion by way of surveys and social science opinions. It was contemplated that Major-General J. A. MacInnis and Rear-Admiral H. T. Porter would be the lead witnesses to describe the structure of the Canadian Forces and the development and application of the Policy. As well, we contemplated that General de Chastelain would be able to testify on the importance of the Policy and the necessity for continuing the Policy to ensure the continued military effectiveness of the Canadian Forces. We understand further that there would be three other senior officers who would testify as to the unique life in the military with the aid of videos to illustrate life on a ship, a submarine and at isolated postings. This evidence was

intended to show the lack of privacy in these environments and, therefore, the need to have a Policy which serves the legitimate and substantial objective of preserving the effectiveness of the Forces.

At the time of delivering our opinion of May 21, 1992, there was some uncertainty as to whether General de Chastelain could provide credible testimony in light of his announced approval of the Policy change. We have conducted further investigations since our May 21, 1992 opinion letter and have had discussions with Lt.-Colonel Watkin on the availability of senior level witnesses from the Canadian Forces. In his response letter, Lt.-Colonel Watkin outlines the situation as it relates to the availability of evidence from senior personnel at the Canadian Forces in the following terms:

> *"Therefore, it is clear that the key elements of the section 1 defence, and with it the chance to be successful at trial, hinge upon the testimony of Canadian Forces Witnesses. It does not depend nearly as strongly on surveys, foreign policies, or the reports of experts concerning survey results. ...*
>
> *"It is clear from the enclosed letters from Rear Admiral Porter and Major General MacInnis that they can no longer testify on behalf of the Canadian Forces Policy regarding homosexuality. Among the reasons for their reluctance to testify is the decision of the Chief of Defence Staff to recommend the present Policy be revoked. I have phrased the rationale for the reluctance to testify being based in part upon the Chief of Defence Staff's decision because it is clear from both letters that these two officers were either not strong proponents of the Policy (Rear Admiral Porter), or had come to the conclusion it could not be supported after reflection on the issue (Major General MacInnis). As you are aware, one of the problems in the development of this case has been identifying senior officers in the Canadian Forces who support the Policy, and once identified would be witnesses whose testimony would withstand cross-examination. At the present time I am aware of no officers who have been identified to testify at the Douglas proceeding. It has also been decided that due to the recommendation of the Chief of Defence Staff the senior non-commissioned members would not be called as witnesses since their stated views would put them in the awkward and untenable position of being in conflict with the Chief of Defence Staff."* (Emphasis added)

We also confirmed in a conversation with General Munro, the representative of the Canadian Forces produced on the examination for discovery in the Douglas matter, that he is unwilling to testify as to the importance of the Policy and the requirement that it remain in force for the continued military effectiveness of the Canadian Forces. We understand that General Munro was one of the individuals who

recommended to General de Chastelain the discontinuance of the Policy. We concur that General Munro is in an untenable conflict in respect of his potential evidence at trial. Even if General Munro agreed to testify, his evidence would not only not assist in advancing the case but would be extremely detrimental to the position taken on the section 1 defence. We cannot think of a worst scenario than to have a leading defence witness indicate that the current Policy is untenable.

It is quite obvious that it will not be possible to try this action without forceful and credible evidence from the senior leadership of the Canadian Forces in support of our section 1 defence. We have been advised by Lt.-Colonel Watkin that there is now no evidence available from the senior leadership of the Canadian Forces in this respect. As a result, we do not see how, without such evidence, this case can proceed to trial.

4. What is the effect of the aborted decision to recommend that the Policy be changed and how will it impact on the defence of the Policy at trial?

We understand that a decision was made by General de Chastelain to discontinue the Policy and that detailed preparation was made for the announcement of this change both in the press and throughout the operating division of the Canadian Forces. We also understand that the Minister of National Defence and Cabinet accepted this recommendation. However, shortly prior to the public announcement of the discontinuance of the Policy, directions were given to the Canadian Forces not to proceed with the contemplated change. We are advised that there were leaks to the media of the decision to change the Policy and of the subsequent reversal of that decision. The information relating to the decision to change the Policy is widely known and in our opinion will be the subject of intensive scrutiny at trial.

In addition, our opponents have requested additional documents in respect of the Policy change, and in all likelihood these documents will need to be produced. We have had a preliminary review of most of these documents and we are of the view that they seriously damage the proposed section 1 defence. It is apparent that the documents can be used to support the conclusion that the Canadian Forces are prepared to operate, and indeed could operate, effectively if the Policy were discontinued. It is significant to note that none of the plans in respect of implementing the Policy change addressed the concerns of privacy and military cohesion, which were intended to be the cornerstone of our section 1 defence. This omission leaves the clear inference that these were not legitimate concerns of the Canadian Forces and that they ought not to be accepted as credible components of our section 1 defence.

In summary, the evidence relating to the proposed Policy change and the unavailability of any witnesses from the senior leadership of the Canadian Forces to testify, make it untenable for us to advance any credible section 1 defence. Even if witnesses from the Canadian Forces were to testify, their evidence would lack any

credibility given the fact that they would be unable to adequately explain their reversal on the need of the Policy.

5. Is there credible expert evidence currently available for trial?

Although the two experts testifying as to the military cohesion and the privacy issues are well-qualified and their reports useful, in our view, the evidence has little or no usefulness unless the underlying basis for such expert opinion is led at trial. The underlying basis, of course, would be testimony from the Canadian Forces to purport to justify the continued need of the Policy.

We have met with Dr. Harvey of Urban Dimensions Inc. regarding his expert evidence and have discussed with him the defect in the sampling base relating to his survey evidence. Dr. Harvey has indicated to us that he is not prepared to testify unless there is a further survey done of the personnel of the Canadian Forces which would serve to verify the validity of the defective survey. He has indicated to us that such a survey could be done in approximately six to eight weeks if he received the required support from senior officers of the Canadian Forces. Generally, Dr. Harvey felt his survey evidence was supportive of the section 1 defence and we tend to agree. However, he will not testify unless a further survey is done.

Subsequent to our meeting with Dr. Harvey, we raised this question with Lt.-Colonel Ken Watkin. We received instructions <u>not</u> to authorize Dr. Harvey to do the further internal survey for the purposes of verifying his original survey.

Furthermore, we have been advised that Mr. Zuliani is not prepared to testify in respect of the survey he completed in 1986. While we could possibly compel him to testify, this is not an attractive alternative and we anticipate his evidence will not be extremely helpful. Assuming that Dr. Harvey is unable to testify because of the defects in the sampling base and that Mr. Zuliani is unwilling to testify, there is no viable evidence concerning the attitudes of members of the Canadian Forces that could be led to serve as a basis for the expert opinions of Dr. Henderson and Dr. Suedfeld.

Unless Dr. Harvey completes this additional survey, in our opinion the survey evidence is not credible and could not serve as a basis of a section 1 defence at trial. Dr. Harvey's survey, credible or otherwise, will not be of any use unless we put senior officers from the Canadian Forces in the witness box to lead evidence on the necessity of the current Policy. Since we have been advised that no such evidence can be generated, we can certainly appreciate Lt.-Colonel Watkin's instructions to us not to authorize Dr. Harvey to redo his survey.

6. Is the Government potentially liable for punitive damages and a solicitor and client cost award?

We have not directed our attention to this issue until recently and note that in the briefing material provided to us there is no detailed opinion in respect of this potential liability.

In our opinion, the Government is potentially exposed to a substantial award of punitive damages based on the manner in which Miss Douglas was treated by the Canadian Forces. Specifically, the facts which could lead to an award of punitive damages include:

(a) the manner in which Douglas was taken to the hotel for questioning and the fact that she was not advised that she was not required to attend the interview or could leave at any time;

(b) the fact that the SIU did not follow its own policies in respect of the video-recording of the interview; and

(c) the general attitude and approach of the SIU in conducting the investigation of Douglas.

Although the case law has not developed to any significant degree in this area, the courts to date have recognized a plaintiff's entitlement to an award of punitive damages in circumstances where a Charter right has been violated (see *Crossman v. The Queen* (1984) 12 CCC (3d) 547 and *Freeman v. West Vancouver* (District) (1991), 24 A.C.W.S. (3d) 936 (B.C.S.C.)). It is likely that the court will approach the question of punitive damages in terms of a Charter infringement based on the general law relating to punitive damages, in which case the court may award punitive damages in respect of conduct which is of such a nature as to be deserving of punishment because of its "harsh, vindictive, reprehensible and malicious nature" (see *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085). In the most frequently cited case supporting an award for punitive damages, the House of Lords noted that punitive damages may serve a "useful purpose" in "vindicating the strength of the law" and punishing "oppressive, arbitrary or unconstitutional action by the servants of government" (see *Rookes v. Barnard* [1964] 2 W.L.R. 269).

In summary, punitive damages may be awarded for a Charter infringement where the impugned conduct is characterized within the parameters described by the above-cited cases.

It is, therefore, our opinion that there is a substantial risk that the Government of Canada would be liable for a significant award of punitive damages should this matter proceed to trial. Further, if the Government chooses to take this matter to trial in the face of a decision by the Chief of Defence Staff, supported by the Minister

of National Defence, that the Canadian Forces can operate effectively without the Policy, it is probable that solicitor and client costs could also be awarded.

It is quite apparent that, from a financial standpoint, there is much to be gained from a settlement of the Douglas action at this time. Should the matter proceed to trial there could be exposure for punitive damages and solicitor and client costs in addition to the Government's own legal costs. Such awards would, no doubt, be accompanied by a strong judicial pronouncement on the conduct of the defendant in advancing its defence, in these circumstances.

Conclusions

We strongly recommend that you forthwith instruct us to settle this case. We have no evidence whatsoever to adduce and we have been advised that none is forthcoming.

We are left with

(i) a flawed internal survey (Dr. Harvey) which needs to be dramatically retooled, and which, in any event, is useless without foundation evidence;

(ii) an expert witness (Mr. Zuliani) who is not only reluctant to testify but whose views may have changed over the years;

(iii) two other experts (Dr. Henderson and Dr. Suedfeld) whose evidence is useless without evidence from the Canadian Forces;

(iv) key, senior officers (Rear-Admiral H. T. Porter and Major-General J. A. MacInnis) who are now unwilling to testify in a way that could benefit our case;

(v) our chief witness (General D. E. Munro) who is unable to support the current Policy;

(vi) and the Chief of Defence Staff who has gone on record as being able to support a discontinuance of the current Policy.

We add to the equation the fact that there are very damaging documents in our possession in respect of the proposed change of the Policy, which will likely need to be introduced into evidence. Moreover, we have a plaintiff who is a very good witness with a superb, albeit brief, career with the Canadian Forces and who, for these reasons, will generate considerable sympathy.

It is clear to see why our strong opinion is that this case cannot be won. In this regard, we cannot but echo the words of the Attorney-General in her letter to the

Cassels, Brock & Blackwell

Minister of National Defence that "this is not just a weak case, it is a case in which there is no arguable position to put to the courts". Simply put, there is no arguable position because we have no Canadian Forces' witnesses who will credibly support the continued existence of the Policy.

In light of this analysis, views and recommendation, we urge you to give us your immediate instructions. We believe it may be fruitful for us to meet with you and with senior decision-makers to discuss these matters further. In light of the time constraints, we would appreciate your early response.

Yours very truly,

Kenneth C. Cancellara

KCC:g