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OUR FILE NO.: 11051-27

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

You will find enclosed our detailed opinion which serves to update and supplement our preliminary opinion delivered to you on May 21, 1992.

For the reasons set out in detail in the enclosed opinion, it is our unequivocal and forceful view that there is no realistic probability of succeeding in the defence of the present Policy. There is no alternative but to settle the Douglas and other related actions and, accordingly, we require your immediate instructions to commence settlement negotiations.

An executive summary of our views and recommendations is reproduced below:

1. Our review of the cases decided under section 15 of the Charter compels us to conclude without reservation that sexual orientation is a personal characteristic analogous to the enumerated grounds to which the section 15 Charter guarantee of equality applies. Although the filed statement of defence denies the applicability of section 15, it is our view that, if pursued, this defence will clearly be rejected. Indeed, the Attorney-General has already conceded this point in other cases.

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2. Our review of the Policy leads us to conclude that the Policy is not likely to meet the "prescribed by law" test required to justify the limitation of a Charter right under section 1, and as such, even a strong section 1 defence on the facts is not likely to be accepted by the court.
3. We have now been unequivocally advised by representatives of the Canadian Forces that there are no witnesses in senior leadership positions with the Canadian Forces who are prepared to testify in support of our section 1 defence, as pleaded.
4. The evidence relating to the aborted Policy change has a dramatically-detrimental impact on any attempt to lead credible evidence before the court that a discontinuance of the Policy will have the serious effects required to justify a defence of the Policy under Section 1. In all likelihood, a substantial portion of these documents will need to be disclosed and, therefore, will be the subject of evidence at trial.
5. Although the two outside experts' evidence remains reasonably useful, the absence of credible survey evidence on which these expert opinions can be based makes the utility of the two expert witnesses extremely limited.
6. The circumstances surrounding Ms. Douglas' treatment by the Canadian Forces in this case, together with the continued defence of this Policy in the context of the above comments, may result in a substantial award of punitive and exemplary damages against the Government of Canada and the potential award of solicitor and client costs.
7. A trial would generate evidence which would be very embarrassing to the Attorney-General, the Department of Justice, the Department of National Defence, the Chief of Defence Staff and his office, and the Prime Minister's Office.

In conclusion, we see no rational or realistic basis on which the Douglas case can be tried. Moreover, a forced trial would result in nothing but a string of embarrassments for all concerned, without any counter-balancing benefits to anyone. It is therefore clear to us that this case ought not to be tried. We agree with the Attorney-General's opinion that this is case in which we have no ability to mount a defence.

In order to avoid the continuing costs of trial preparation, we require your early instructions. We believe that the implications to the Government of Canada and to the involved Departments are so negative that we would request an immediate meeting with you, a representative of the Department of National Defence and a representative from the Prime Minister's Office to discuss these matters.

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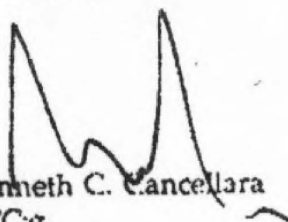
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Since this case has been fixed by court order to commence on October 26, 1992, it is essential to finalize our instructions immediately.

Yours very truly,



Kenneth C. Cancellara
KCC:g