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AIDE MEMOIRE FOR THE MINISTER

CANADIAN FORCES POLICY ON SEXUAL ORIENTATION (S)

Background

1. (S) Current National Defence policy renders persons who engage in sexual acts with others of the same gender ineligible for service in the Canadian Forces. Since mid-1986, implementation of this policy, as it relates to members already serving who object to honourable release as being not advantageously employable, has been suspended, pending a political decision that it is to continue notwithstanding the Government's announced position concerning sexual orientation as a proscribed ground of discrimination throughout the Federal Public Service. A decision is urgently required, since continued deferral of these cases is causing serious administrative problems for the Canadian Forces, and is unfair to the members who have a legal and moral right to have their cases dealt with properly and expeditiously under clearly-defined policy as reflected in Service Orders.

Options

2. (S) The following four options have been identified by the Assistant Secretary to the Cabinet (Social Development); in each case the commentary of your military staff is appended:

- 1) Abolition of the policy described above, with the result that homosexuality would no longer constitute a bar to enrolment in the Canadian Forces, or grounds for release of members already serving. The Chief of the Defence Staff, with virtually universal support from senior commanders and supervisors at all rank levels, strongly advises against such a change of policy, pointing out that it would have a seriously damaging effect on Service morale and cohesion, and therefore operational effectiveness. There is growing concern, moreover, that acceptance of homosexuals in the Canadian Forces would inevitably lead to an increase in the incidence of AIDS. To date, there have been nine known and confirmed cases of members of the Canadian Forces who tested HIV antibody positive. Of these nine cases, six

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members have been identified positively, and one in all probability, as homosexuals, for a total of seven (the sexual orientation of the remaining two has not been positively established); three of the seven have developed AIDS; and two have died. It is current policy that members will not be compulsorily tested for AIDS or the HIV antibody and will only be tested if the member so requests. Accordingly, it is impossible to determine with accuracy what proportion the figure of nine known HIV antibody positive members would bear to the total number of members now serving who would fall into this category if tested. However, the Director of Medical Treatment Services advises that the total number will materially increase if homosexuality ceases to be grounds for ineligibility to serve in the Canadian Forces.

- 2) Reaffirmation of existing policy as described in paragraph 1 above. This would take the form of approval in principle for the issue of a revised Canadian Forces Administrative Order in the form attached as Annex A. The Judge Advocate General has written a lengthy legal opinion, Annex B, in which he concludes that the Order would have a good chance of surviving a challenge under section 15 of the Charter of Rights and Freedoms. This is the position which you took in your statement to the Standing Committee on Human Rights on 11 February 1987.
- 3) Do Nothing. For reasons stated in paragraph 1 above, this Option is rejected as being indefensible from all points of view.
- 4) Assess the propriety or impropriety of sexual conduct for purposes of retention or release from the Canadian Forces solely on the basis of the circumstances surrounding the act or acts in question, i.e., make no distinction between heterosexual or homosexual acts, and apply the same standards to both. This would mean that homosexual acts per se would cease to disqualify the individuals concerned from service in the Forces. Practising homosexuals would then be

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eligible for enrolment and the pursuit of a full military career, subject only to behaviour deemed sufficiently inappropriate to justify release. Objections to this Option are set out in Annex C, which is the paper prepared for your consideration prior to the Deputy Prime Minister's Operations Meeting on 15 December 1987. As with Option 1 above, there is also the increased likelihood of AIDS infection among our military personnel if this Option is chosen.

Conclusion and Recommendation

3. (S) In summary, selection of the course of action described at Option 2 above is essential in the interests of Canada, to avoid jeopardizing the effectiveness of our Armed Forces in peace and war. Given the opinion of the Judge Advocate General, the possibility of a court challenge can be accepted with a degree of confidence in the outcome, and in fact, as you indicated in your statement to the Standing Committee on Human Rights, the judiciary is the proper authority to decide the legal validity of a policy with aspects which are relevant to national security. The selection of Option 2 above is therefore strongly recommended.

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