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Government  
of Canada

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MEMORANDUM

NOTE DE SERVICE

TO  
A

SOLICITOR GENERAL  
FOR INFORMATION

FROM  
DE

DEPUTY SOLICITOR GENERAL

SUBJECT  
OBJET

JAMES STILES AND HER MAJESTY THE QUEEN

SECURITY - CLASSIFICATION - DE SÉCURITÉ

OUR FILE - N / RÉFÉRENCE  
P7015-J

YOUR FILE - V / RÉFÉRENCE

DATE FEB - 5 1987

Arnold Fradkin is the Department of Justice lawyer handling the Stiles case. In response to your request to personally meet with him to discuss this case, Mr. Fradkin referred to departmental Legal Counsel a copy of a letter he sent to Deputy Commissioner Moffatt (Tab A) outlining the defence strategy he proposes to take in this case. What follows is a summary of Mr. Stiles' case, the proposed defence and certain factors you may wish to consider.

THE STATEMENT OF CLAIM

The Statement of Claim (Tab B) points out that Mr. Stiles was a Regular Member of the Force for approximately 15 years during which time he performed his duties in a competent and fully satisfactory manner. It states that in 1984 when it became known he was a homosexual, Mr. Stiles was threatened with discharge from the Force and that Force policy with respect to homosexuals was misrepresented to him. Mr. Stiles alleges that there was, in fact, no valid or lawful basis for discharging him. Based on this alleged misrepresentation coupled with alleged duress and coercion, Mr. Stiles agreed to resign from the Force as a Regular Member in August 1984.

According to the Statement of Claim, Mr. Stiles has, since April 17, 1985, sought readmission as a Regular Member of the RCMP and that his requests have been denied on the sole ground of the RCMP policy preventing employment of homosexuals. The plaintiff states that this policy and the refusal of the RCMP to readmit him as a Regular Member of the Force constitute an infringement of his rights under S.15 of the Canadian Charter of Rights and Freedoms. (A similar claim is made against CSIS for that agency's refusal to rehire him.)

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### THE DEFENCE

The defence set out in Mr. Fradkin's letter of January 12, 1987 (Tab A) does not turn on whether or not Mr. Stiles was denied re-entry into the Force solely on the grounds of RCMP policy preventing employment of homosexuals (item 21 in the Statement of Claim). He proposes to take the position "...that the facts in this case, although they involve a differentiation between homosexuals and non-homosexuals, do not constitute discrimination under section 15 of the Charter". This position asserts the principle that differentiation does not amount to discrimination under section 15 of the Charter if the differentiation is not unreasonable or unfair. Mr. Fradkin believes that arguments used in the Force's "Aide-Mémoire" on sexual orientation could be used to argue the fairness and reasonableness of a policy of denying homosexuals employment in the RCMP.

A second line of defence (if the first fails) would rely on section 1 of the Charter. This defence would try to argue that the (tacit) policy prohibiting the retention of known homosexuals and their discharge on the grounds of "unsuitability" (section 74, RCMP Regulations) constituted a reasonable limit prescribed by law. Mr. Fradkin advises in his memorandum that Regulation 74 "is too broad and arbitrary to be acceptable as a section 1 defence" and that without a more explicit regulation excluding homosexuals from the Force, this defence had "little chance of success".

### FACTORS

1. The primary issue of concern raised by the Stiles case is its potential for directing RCMP policy on homosexuals. Mr. Fradkin is of the view that a policy of "differentiation" on the basis of sexual orientation is still a viable option with respect to the RCMP and he assumes that the RCMP can marshal evidence in support of such a policy. Earlier Secretariat consideration of the RCMP "Aide-Mémoire" concluded that some of the arguments put forward by the Force were at best weak and inconclusive. In view also of the weakness in the second line of defence (section 1), there is little chance of the Government being successful in defending a policy of differentiation on the basis of sexual orientation.

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Should the Stiles case be lost, as is likely, it will be lost on the general proposition that RCMP policy on sexual orientation is discriminatory and is contrary to the Charter. This case will then establish a precedent; it would be against this background that any future consideration of the issue under amended legislation that would include sexual orientation as a prohibited ground of discrimination would be judged.

2. The second question raised by the Stiles case is whether the Government wants to publicly take the position that homosexuals should be excluded from the RCMP as Regular Members based on oral affirmations of the policy by the Commissioner. The answer to this question must be consistent with the Government's commitment in "Towards Equality" (Tab C) and the pending amendments to the Canadian Human Rights Act which is to add sexual orientation as a prohibited ground of discrimination under that Act. To deny employment to homosexuals based on a very general oral declaration in the RCMP could be interpreted as demonstrating a lack of commitment on the part of the Government to its stated position that:
  - . the Government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.
3. The Commissioner of the RCMP and members of the DSRRs have requested former Solicitors General on various occasions to authorize the RCMP to argue its case for disallowing homosexuals in the Force in a court of law. It has been pointed out, as it is by Mr. Fradkin, that a specific Regulation or at least a Commissioner's Standing Order providing for the discharge of homosexuals would be required in order for the Force to make such a case. Previous Ministers have precluded the Commissioner issuing such a CSO. Your predecessor also took the view before the DSRRs that the Government did not want a court to decide this issue. This issue is subject to reconsideration based on the DND approach, but it may be extremely difficult to reconfirm such a policy faced with a court pronouncement on the Charter - the RCMP and sexual orientation.

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Although the Force has not recruited a known homosexual, it now seems to be accepted by RCMP recruiting officers that a priority candidate (bilingual, university graduate, women and natives), who otherwise met the suitability requirements of the Force, would have to be accepted even if he or she was a professed homosexual. Since the Government announced its policy on sexual orientation in "Towards Equality", no member has been discharged or transferred to a civilian position because of his/her sexual orientation. If the Stiles case was pursued in the manner set out by Justice counsel, it would undermine the developing recognition that qualification and performance, not sexual orientation, are the criteria against which a recruit or member must be judged. Of course, they may not feel they have any choice. Certainly the general view of the Force is opposed to recruiting homosexuals.

4. Paragraph 21 of Mr. Stiles' Statement of Claim states that he has, since April 17, 1985, sought readmission as a Regular Member of the RCMP and all of his requests have been denied on the sole ground of the RCMP policy preventing employment of homosexuals. RCMP officials report that they have no record of ever having received a request from Mr. Stiles to rejoin the Force. Accordingly, they have had no opportunity to reject his application on any grounds. Defence counsel has appealed to strike out paragraph 21 of Mr. Stiles' Statement of Claim. Departmental counsel is of the view that if the appeal (to be heard on February 25, 1987) is successful, Mr. Stiles will have no case (Tab D refers). Mr. Fradkin was not so optimistic, but he did feel that it had sufficient merit to be brought forward.

#### CONCLUSIONS

1. If Mr. Stiles were successful in obtaining a judgement in his favour (which is likely in the current circumstances), then future policy options with respect to RCMP employment and recruitment practices would be affected. At the same time, the Government would be in the difficult position of having to qualify considerably its own stated policy position on sexual orientation. This action would be viewed by members of the civil rights community as being a serious breach of the Government's commitments made in "Towards Equality".

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2. A decision in this case favourable to the Government (unlikely, especially without a CSO) would in all likelihood be determined on a technicality or the facts (whether or not Stiles has reapplied for admission). In any future cases against the Government, legal counsel would likely be successful in distinguishing the decision leaving the Charter issue unresolved.

#### RECOMMENDATIONS

There would appear to be no benefit to be derived, but some political costs, from pursuing the Stiles case under the present circumstances. Should the Government want to test the legality of a policy of differentiation on the basis of sexual orientation, it should do so only with a well-formulated bona fide occupational requirement (BFOR) defence and with the enabling (section 1) regulations in place. I would therefore recommend against contesting this case.

However, prior to taking a decision and instructing that an out-of-court settlement be negotiated, you should await the outcome of a defence appeal to strike out the assertion in the Statement of Claim that Mr. Stiles has sought readmission to the Force; this appeal is to be heard on February 25, 1987.

In view of its implications on a national policy issue, the decision to pursue (or not to pursue) the Stiles case should be made in consultation with the Prime Minister's Office.

On February 11, 1987, the Minister of National Defence will be appearing before the Parliamentary Committee on Human Rights to set out the case for "differentiation" with respect to homosexuals and women in the Armed Forces. The response of Committee members to Mr. Beatty's statements may be helpful in determining the viability of a policy of differentiation in the RCMP with respect to sexual orientation.

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John C. Tait

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#### Attachments

Tab A - Mr. Fradkin's letter of January 12, 1987

Tab B - Statement of Claim

Tab C - Page 13, Towards Equality

Tab D - Departmental counsel, Note to File,  
December 18, 1986

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