

WARNING THIS FOLDER SECRET CONTAINS CONFIDENTIAL THE QUEEN'S PRIVY COUNCIL FOR CANADA WHICH ARE TO BE PROTECTED BRIEFING NOTE WITH DG EXEC SEC INSTRUCTION 4/83 DATED 1 SEP 83	AVERTISSEMENT CE DOCUMENT DOCUMENT CONTIENT DES RENSEIGNEMENTS PRIVILÉGIÉS DU CONSEIL PRIVÉ DE LA REINE POUR LE CANADA. CES RENSEIGNEMENTS DOIVENT ÊTRE PROTÉGÉS CONFORMÉMENT AUX RÈGLES DE LA INSTRUCTION 4/83 DU DG SEC EXCO DATÉE DU 1er SEPTEMBRE 1983
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SUBJECT POLICY AND ORIENTATION

PROCEDURE - INAPPROPRIATE SEXUAL CONDUCT / SEXUAL ORIENTATION

BACKGROUND

1. (S) On April 17, 1985 the equality provisions of the Charter came into force, specifically prohibiting discrimination on the basis of sex, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In October 1985, the Parliamentary Committee on Human Rights recommended that the Canadian Armed Forces and the RCMP bring their employment practice into conformity with the Canadian Human Rights Act, as amended, to prohibit discrimination on the basis of sexual orientation. In March 1986, the government stated: "The Government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or facility. 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".

2. (S) DND established an internal task force to study Charter of Rights issues. The task force ultimately recommended that homosexuals not be permitted to enrol or serve in the Canadian Forces. On February 11, 1987, before the Standing Committee on Human Rights, Mr. Beatty endorsed the recommendations of the internal task force, but announced that "the obligation for members to report suspected homosexuals will be reviewed. ~~More~~ ^{More} importantly, the continuing exclusion of homosexuals will be based on conduct or behaviour rather than on orientation alone."

3. (S) Canadian Forces Administrative Order (CFAO) 19-20^{in its present form} which is issued under the authority of the Chief of the Defence Staff pursuant to section 18 of the National Defence Act, ^{has been} came into effect ^{11 years ago} and reflects existing Canadian Forces policy in this area. Its content is presently under review and its application is currently in abeyance. In accordance with this CFAO members who are determined with reasonable certainty, after full investigation, to have a sexual propensity for persons of the same gender are honourably released in accordance with regulations made by the Governor in Council. Similarly, persons seeking enrolment are deemed ineligible for service when it is determined with reasonable certainty, through their acknowledgement or otherwise, that they fall in the same category.

4. (S) As an interim policy, the Canadian Forces continue to investigate ^{accidents involving} ~~identify~~ ^{currently} serving homosexual members. ^{Those members are} notified that it is intended to release them, ^{accorded the opportunity} ~~to~~ ^{omit}

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OMIT

~~to make representations thereon and, if release is supported, informed of their right to apply for redress of grievance under the provisions of section 29 of the National Defence Act.~~

Notwithstanding, the practice of retaining members who object to being released

The careers of members so identified, and whose releases have been recommended, are then placed on hold pending final release approval. There are currently 24 members being retained on this "special status". This policy necessarily creates the operationally negative and demoralizing situation whereby commanding officers must investigate and identify practising homosexuals but then, having done so, are precluded from having such members removed from the unit in an effective and timely fashion. It is a situation that has prompted the Chief of the Defence Staff to conclude that he "... finds it increasingly difficult to carry out my responsibilities for ensuring the well-being of individual servicemen and servicewomen and for sustaining the morale of the Canadian Forces".

The concurrence of the Minister of National Defence has however been obtained for the release of members identified as homosexuals who wish to be released under the appropriate "honourable".

5. (S) A case in point is worthy of elaboration. On December 17, 1986, an administrative clerk at Canadian Forces Base Cornwallis submitted an application for Redress of Grievance objecting to her recommended release from the Canadian Forces on grounds of homosexuality. This matter was dealt with by the appropriate successive levels of command. Each authority pointed out to the member that indefinite employment as a homosexual servicewoman was not possible but that her release must be held pending resolution of the policy in this matter. When the application was received at National Defence Headquarters on April 23, 1987, the following covering comments from the member were attached:

"Note that [my grievance] was dated 17 Dec 86. Four months have elapsed and NDHQ has reached no decision on my release or retention. I have given 11 years of service to the CF and after four months of patiently awaiting a decision I am now requesting that the decision be made immediately.

A quality of good leadership is to look to the welfare of subordinates, and, in my case NDHQ is exerting unnecessary mental stress and strain by avoiding the issue at hand. I do not toy with other peoples' lives and I expect the same consideration to be given to me. Being a homosexual is not a crime and I am tired of being treated as a criminal.

I therefore request an immediate decision on this matter, and if one is not forthcoming I request that all recommendations for release be retracted and I be allowed to carry on with my duties as per normal. I think that this is a reasonable request and if the powers that be have the welfare of their subordinates in mind, then a decision will be forthcoming soonest."

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→ On the basis of the information available, including her acknowledgement of her propensity for persons of her own gender and participation in acts of a homosexual nature, there is no doubt that she is a person to whom the existing Canadian Forces policy of non-retention of homosexuals applies. It is also apparent that, in the interests of both the Service and the individual, an early decision is required with respect to her application for Redress of Grievance and on the question of her release. In this regard, CFAO 19-32, which deals with the staffing of Redresses of Grievance, stipulates that "an application for redress of grievance shall be dealt with as expeditiously as possible ..." There is therefore a justifiable perception on the part of all concerned, including the applicant, that this Order is not being complied with in this case, and this non-compliance is itself becoming a morale problem of serious proportions.

6. (S) In the absence of a resolution of the policy in this matter, there are two courses open to the forces. First, to grant the redress by approving her retention in the Canadian Forces. This, of course, would be in direct conflict with the current Canadian Forces policy and Mr. Beatty's statement to the Standing Committee on Human Rights. The only other option is to deny the redress thereby refusing to grant her request that the recommendation for her release be withdrawn, but taking no further action to implement her release. This would maintain the status quo. However, it would almost certainly induce the member to pursue her redress to the next higher level for adjudication, the Associate Minister, and, ~~if necessary~~ to the Governor in Council, with the attendant possibility of unfavourable media reports and Ministerial inquiries, all for naught, as the policy decision must ultimately be taken. ~~The delay accomplishes nothing save to exacerbate the problems discussed above in the eyes of all concerned.~~

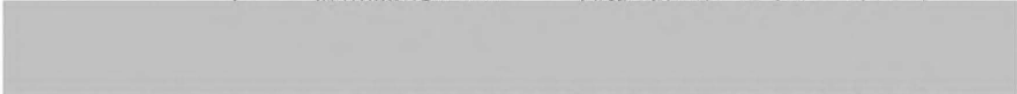
ANALYSIS

7. (S) Sexual orientation is not specifically enumerated in section 15 of the Charter, thus it has been left to the courts to determine whether or not it is a ground of discrimination protected by the Charter. To date, the issue has not been settled by the courts. However, assuming without affirming that it is a protected ground, the Canadian Forces contends that it can be shown that the enrolment or retention of individuals who have engaged in homosexual conduct will have an adverse impact on operational effectiveness and the policy is therefore a "reasonable limit" which can be justified under section 1 of the Charter.

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8. (S) The Department of Justice recognizes the need for the Canadian Forces to have a policy concerning unacceptable sexual behaviour. But because the proposed policy singles out homosexuals, they believe it would be difficult to justify it, if challenged. They do not believe the lack of privacy inherent to military life meets the criteria set by the Supreme Court for constituting a "reasonable limit" under the Charter. In a letter to Mr. Beatty dated June 29, 1987, Mr. Hnatyshyn stated, without elaboration thereon: "I cannot give my approval to the proposed C.F.A.O. in its present form. I am of the view that there is a serious risk that it would be in conflict with the Canadian Charter of Rights and Freedoms."

PRESENT SITUATION

9. The current CFAO on sexual conduct is not being enforced. DND wishes to have a new CFAO reflecting Mr. Beatty's statement of February 11, 1987 in place shortly, so that action can be taken on the identified cases. It is expected that the CFAO may well be challenged in Court, but Canadian Forces authorities are confident that it is defensible as a "reasonable limit" recognized under the Charter. The Department of Justice would like the CFAO to define unacceptable sexual conduct in a way that applies to homosexual and heterosexual conduct.

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