

Minister of National Defence



CANADA

The Honourable L'honorable  
Marcel Masse

Ministre de la Défense nationale

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The Right Honourable Brian Mulroney, P.C., M.P.  
Prime Minister of Canada  
Parliament Building  
Room 309-S  
Ottawa, Ontario  
K1A 0A6

Dear Prime Minister,

As you may be aware, we are rapidly approaching the next important milestone in the Douglas case which challenges the Canadian Forces policy on sexual orientation.

It was originally agreed that on August 26<sup>th</sup>, today, all documents upon which the Canadian Forces wishes to rely in defence of its policy on sexual orientation would be filed. By agreement between counsel, that milestone had been delayed a few days, most probably until the 1<sup>st</sup> or 2<sup>nd</sup> of September. As the final deadline for filing of documents approaches, we are faced with two important new developments.

First, we have received the final opinion of Mr. Kenneth Cancellara, the independent counsel hired by the Department of Justice. Mr. Cancellara's opinion concludes without reservation that sexual orientation is protected by section 15 of the Charter and that there is no realistic basis upon which the Canadian Forces policy can be justified.

Second, the Ontario Court of Appeal within the last two weeks issued its decision in the Haig and Birch case. That decision confirms the correctness of our previous legal advice, and that of Mr. Cancellara, that the Canadian Forces policy on sexual orientation is covered by section 15 of the Charter and is, prima facie, discriminatory.

The Court of Appeal's position in relation to the Canadian Forces' policy as it applied to the litigant Joshua Birch (a

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former captain) is clear and unambiguous. At page 4 of the judgment, it states:

"It is difficult to imagine a clearer case of invidious discrimination in employment by reason only of sexual preference than the experience of the respondent Birch referred to above."

If we proceed to try the Douglas case, there will be three unavoidable consequences:

- (a) we will be perceived as refusing to acknowledge the existing law of Canada. (This may well result in the award of punitive and exemplary damages.);
- (b) the Canadian Forces' reputation will be brought into disrepute; and
- (c) the evidence generated at trial will seriously embarrass the Government.

I urge that you give your immediate approval to settle the Douglas case and the other pending sexual orientation cases and to abandon the current Canadian Forces policy with respect to sexual orientation, in accordance with the advice and recommendations previously provided by the Attorney General of Canada.

Your sincerely,

Marcel Masse