

MEMORANDUM/NOTE DE SERVICE

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CONFIDENTIAL

Date

November 21, 1985

TO/À: Minister
FROM/DE: Deputy Minister

SUBJECT/OBJET: MEETING WITH MR. NIELSEN - EQUALITY FOR ALL

Comments/Remarques

As you recall, I suggested that you meet with Mr. Nielsen to discuss the recommendations in Equality for All which present problems for the Department of National Defence. It has become very clear that at least the issues concerning women in combat, sexual orientation and mandatory retirement cannot be resolved at the officials level without some ministerial direction.

I believe it is important to indicate to Mr. Nielsen that you understand his concerns and want to be able to deal with them in a manner that will protect the special interests of the Canadian Forces while still permitting a positive response to these recommendations in the Equality for All report. To facilitate that goal we have prepared some possible compromises which take into account the needs of DND, while responding affirmatively to the report.

Recommendations of Concern to DND

Sexual Orientation

Recommendation 11 of the Equality for All report says that the Canadian Human Rights Act should be amended to add sexual orientation as a prohibited ground of discrimination. Recommendation 11 states that the R.C.M.P. and the Canadian Forces should bring their employment practices into conformity with the Human Rights Act as amended to include sexual orientation. It is very clear, at least at the officials level, that the Canadian Forces is opposed to changing its policy to allow lesbians and homosexuals into the Forces. I am of the view that there are strong legal and policy reasons for amending the Human Rights Act to include sexual orientation. Appendix A to this note summarizes the argument in this regard.

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That note does point out that in other countries, particularly the United States, the courts seem to have permitted exceptions for the Armed Forces when extending protection to homosexuals and lesbians. As such, I would suggest there is a possible argument for a bona fide occupational requirement exception even if sexual orientation is added to the Human Rights Act. Therefore, it would be possible to amend the Human Rights Act while still leaving it open to the Canadian Forces to pursue an argument that their needs fall within the b.f.o.r. guidelines. Mr. Nielsen may see it as a problem to leave it in the hands of the Human Rights Commission, but we do not see any options.

Women in Combat Roles

Recommendation 29 states that all trades and occupations in the Canadian Forces should be open to women and recommendation 30 says that the Canadian Human Rights Commission should monitor the implementation process. It is clear from recommendation 30 that the Committee contemplated that there would be a transitional period rather than an immediate opening of all trades and occupations.

It appears also that trials could be continued although they may have to be expedited and there would have to be evidence that the structure of these trial programs was adequate to fairly test the feasibility of women in many of these roles. Even though sex is a prohibited ground under both the Charter and the Canadian Human Rights Act it may be possible to justify a transitional period if it is done on a reasonable basis. Also, if reasonable trials demonstrated problems with women in any occupation or trade, this would be a factor for consideration by the Human Rights Commission and the Courts.

Mandatory Retirement

The Parliamentary Committee in recommendations 6 to 8 has recommended that as a general policy mandatory retirement should be abolished. This would be accomplished by repealing sections of the Canadian Human Rights Act which provide defences where there is a normal age of retirement and to ensure that the Canadian Human Rights Act would apply to all mandatory retirement policies embodied in legislation

regulations or orders. We have taken the position in our early interdepartmental consultations that there is good legal and policy justifications for making such changes. These changes would still leave the possibility of a bona fide occupational requirement defence.

This affects the Armed Forces because they have several mandatory retirement ages which are based upon a career development plan and the need for a young and vigorous force. While we believe the upper age limits for retirement may fall within the b.f.o.r. requirements the 20/40 point career plan may not. However, there seem to be some strong reasons for retaining such a career plan apart from normal occupational requirements such as health or safety. These are the unique nature of an Armed Force and the need to have it young and vigorous.

As a consequence, there appear to be several options to facilitate abolition of mandatory retirement while protecting the Canadian Forces. These are to provide a provision in the Canadian Human Rights Act exempting the Canadian Forces from the mandatory retirement rules. A second option is to state in the Department of National Defence Act that the mandatory retirement rules in the Canadian Forces would apply notwithstanding the Canadian Human Rights Act. A third option is to do nothing and have DND try to justify their rules as a b.f.o.r. This latter is likely not satisfactory for DND. It must be pointed out that even if either of the first two options is accepted, their policies could still be attacked under s.15 of the Charter. However, s.1 of the Charter would permit a broader defence than the b.f.o.r. rules of the Human Rights Commission. I have attached a more detailed note as appendix B on mandatory retirement and the Canadian Forces.

Since there may be other legislation such as that relating to judges where exemptions may be desirable, I would recommend that a clause in specific legislation which overrides the Canadian Human Rights Act would provide more flexibility to meet specific governmental needs. It may also perceptually be more desirable not to have specific exemptions in the Human Rights Act.

Comme remarques

You may wish to suggest that you agree on general policy and leave it to your respective officials to work out the details.

Frank Iacobucci