

CONFIDENTIAL

MEMORANDUM

*Not to be released to other Dept. Col. McDonald*

1456-2-2 (JAG)

*28* Jan 87

DND / MND

Referred to / Transmis a

*Judy for Minister*

JAN 29 1987

The Minister

ACTION AGAINST THE CANADIAN FORCES  
RELEASE OF A SERVICE MEMBER FOR HOMOSEXUAL ACTIVITY

File No.  
Dossier No. *410-BTD X 3479*  
Charged to / Charge a  
*pp 29-8-86*

Ref: 1456-2-2 TD 6357 (JAG) 24 Dec 86

1. On the 24th of December, 1986, I forwarded a letter to the Deputy Minister of Justice relating to a suit brought against Her Majesty by [redacted] who was released in 1986 for homosexual activity. A copy of the letter was forwarded to you under cover of the referenced memorandum and a further copy is attached. On the 9th of January, Mr. Iacabucci responded to my letter. A copy of his response is attached for your information.

2. As you are aware, I am deeply concerned that the admission of homosexuals into the Canadian Forces would have a negative impact on the morale and cohesiveness of the Forces and ultimately the operational effectiveness. Therefore, I am most anxious that the present suit be defended vigorously and that all reasonable arguments capable of supporting the Canadian Forces' policies be presented. However, Mr. Iacabucci has indicated in his response that he does not wish to permit counsel to argue that sexual orientation is not protected under subsection 15(1) of the Charter. He is concerned that presenting such an argument would be contrary to the policies of the Government as expressed in the response to the Parliamentary Sub-Committee's report "Equality Issues in Federal Law". As Mr. Iacabucci is informing his Minister on this case and as I can see no further benefit in discussing the matter at the officials level, your views on whether the matter should be pursued at the political level are sought.

3. The argument that sexual orientation is not protected under subsection 15(1) of the Charter appears to be a viable one according to advice received from the Judge Advocate General. While there is uncertainty as to whether the court will accept this position in light of the lack of precedents in the area, success on this point would likely bring the

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suit to an end as the Federal Court of Appeal decided in another case in 1986 (Sylvestre) that release of a service member for homosexual activity is not a basis for a suit of this nature.

4. I understand that the Department of Justice has sought particulars of the complaint from [redacted] and will be making a motion to quash the suit on the basis that the redress of grievance system was not fully utilized. However, even if this argument succeeds and [redacted] goes through the complete redress of grievance process, the case may well arise again if [redacted] is not granted redress. If the case is not quashed or if it arises again, it will be necessary to present a substantive defence in establishing why the Canadian Forces policies constitute reasonable limits within the Charter requirements. Success with the argument that sexual orientation is not protected under subsection 15(1) of the Charter would negate the requirement to present this type of substantive defence and reduce the publicity and controversy which would likely attend the testimony on this matter. However, I must also acknowledge that an argument that sexual orientation is not protected would also generate considerable publicity and controversy.

5. In light of the above considerations, I recommend that you discuss the matter with the Minister of Justice with a view to having the Department of Justice counsel argue that sexual orientation is not protected under subsection 15(1) of the Charter. Because of the potential for political controversy, you may also wish to raise the matter with the Prime Minister. Should you determine that the Canadian Forces should accept the Department of Justice position set out by Mr. Iacobucci, then I will instruct my official to start preparation of the substantive defence mentioned earlier. I am available at your convenience to discuss this matter further should you desire to do so.

*Further to our discussions  
this week, I believe  
our defence should  
be confined to Sect. 1  
of the Charter.*

*P.D.  
Feb. 13/87.*

P.D. Manson  
Gen  
CDS  
992-5054