

OFFICE OF THE  
JUDGE ADVOCATE GENERAL

CANADA

CABINET DU  
JUGE AVOCAT GÉNÉRAL

MEMORANDUM

1461-31 (DLaw/HRI 2)

NOTE

22 Sep 89

DLaw/HRI

██████████ v. THE QUEEN

- Refs:
- A. Letter from Mr. Low to JAG 15 Sep 89
  - B. CFAO 19-20
  - C. CFAO 19-36 Draft
  - D. SIU SOP 305
  - E. SQM 670-1-86 9 Apr 86

1. Reference A is a letter from Mr. Martin Low of the Department of Justice to the Judge Advocate General recommending that serious consideration should be given to settling the ██████████ case out of court and that this could probably be done at a cost of approximately \$35,000 plus costs. In support of this recommendation, Mr. Low advances several arguments to the effect that the facts of the ██████████ case would be highly prejudicial should the challenge to CFAO 19-20 under section 15 of the Charter be litigated.

2. The first area of concern raised is stated as follows: "The matter arose out of a search of the personal effects of ██████████ which search was described by counsel for the Defendant as **potentially abusive**" (the emphasis is mine). In actual fact, after discussing the case with LCol Champagne, former AJAG Eastern Region, and reviewing Ref E, it turns out that a bag with ██████████ name on it was found in a common storage area in the ██████████. When this bag was found by the two service members cleaning out the storage area, it was turned over to the Military Police since ██████████ was then residing elsewhere. It is a weak argument at best to say that the bag should never have been opened to support the allegation of a potentially abusive search.

3. The second area of concern deals with the interview of ██████████ by the SIU which is described as "highly aggressive and unnecessarily intimate." LCol Champagne informs me that he has heard the taped interview and confirms that there were indeed some very intimate questions, but that these questions were in keeping with the instructions outlined at Ref D, the Standing Operating Procedure 305 for the "Investigation of sexual deviation and sexual offences." A copy of Ref D is provided.

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4. The third area of concern deals with the weakness of the Canadian Forces' position on appeal maintaining that [REDACTED] has failed to exhaust the grievance procedures available to him under the **National Defence Act** (NDA). Mr. Low maintains that the argument is weak because the Minister did not submit the redress of grievance to the Governor in Council as "required by the complainant" and that [REDACTED] even wrote directly to the Governor General who replied that she could not intervene in the matter. However, I believe that there are two issues which Mr. Low has not considered with respect to his third point. Firstly, I am of the opinion that an argument can be made that until the Governor in Council has addressed its mind to the matter of the redress of grievance in question, and until it has come to a decision, whether in favour or against the complainant, the redress of grievance route has not been exhausted. Secondly, another argument could be raised to the effect that had the Minister forwarded the redress of grievance onward to the Governor in Council without [REDACTED] having had the opportunity to make additional representations, then [REDACTED] could well have raised the argument that natural justice was denied to him.

5. With respect to Mr. Low's final argument in which he distinguishes between CFAO 19-20 and the proposed new CFAO 19-36, the facts of the [REDACTED] case, in which [REDACTED] has admitted to having performed sexual acts with a multitude of partners, including one member of the Canadian Forces, clearly come within the ambit of both CFAO 19-20 and the proposed CFAO 19-36. [REDACTED] clearly "has a sexual propensity for persons of (his) own sex", and his admitted involvements clearly constitute acts "of a sexual nature which involve persons of the same sex." Therefore, I am of the opinion that the distinction drawn by Mr. Low in this case is an artificial one.

6. In conclusion, I disagree with Mr. Low's recommendation to settle this claim out of court. I am available to discuss this matter at your convenience.



M.M.S. Boudreau  
Maj  
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