

ESSENCE OF DND'S ARGUMENTS ON SEXUAL ORIENTATION POLICY AS SET OUT IN LETTER OF AUGUST 31, 1989 FROM LCOL R.A. MCDONALD WITH CRITICAL COMMENTS

What follows is a review of the different points made in the letter addressed to John Scratch and dated August 31, 1989, in which LCol McDonald presented arguments in favour of the validity of the proposed CFAO dealing with inappropriate sexual conduct. Where appropriate, comments/remarks have been inserted. These are meant to identify possible weaknesses in the argumentation or to identify questions which would deserve being looked into.

It should be noted that what the summary of the arguments submitted on behalf of the Canadian Forces appears in underlined characters below.

I- Orientation vs. Acts

Pp. 1-3

Orientation and acts are two different concepts and an argument could be made that sec. 15 would not apply to the proposed CFAO which deals with acts: if the distinction in the CFAO were based on orientation, then sec. 15 would apply.

Comments:

The distinction made here would be difficult to advance in the courts and in any event would have little chance of being accepted.

II- Section 1- Background Law

Pp. 3-9

This lengthy section reviews the pre-Charter case-law from Canadian courts together with recent decisions of human rights tribunals with a view to showing that in the main, these bodies have recognized the special needs of the military at the expense of the individual. It also reviews American jurisprudence and a decision of the European Human Rights Commission dismissing a complaint filed by a British soldier dismissed from the army because he had engaged in homosexual acts.

Comments:

1- The courts in Canada, even after the Charter, will probably agree that the military have special needs.

000882

- 2 -

2- The decisions of human rights tribunals referred to have little, if any, relevance to the issue under examination here.

3- While American courts have indeed adopted an approach extremely deferential to the Executive and superior commanders with respect to issues such as sexual orientation in the armed forces, there is no indication that Canadian courts will take a similar approach. The decision of the Supreme Court of Canada in Operation Dismantle Inc., [1985] 1 SCR 441 might provide useful guidance on this issue.

4- No mention was made of the fact that in the case dealt with by the EHRC, one of the two incidents at the basis of the dismissal of the member would have constituted an offence even for a civilian member - such was the case by reason of the age of the other participating individual. In addition, no comment is offered on the nature and relevance in the Canadian context of the evidence submitted by the British Ministry of Defence to the Select Committee of the House of Commons on the need to exclude homosexuals from the armed forces. This was a crucial element in the decision of the Commission. It should be looked into.

III- Section 1 - Evidence and Arguments

Pp. 9-16

A- General

Pp. 9-10

This Part discusses in general terms the manner in which the Supreme Court of Canada has dealt with section 1 of the Charter and reviews the test it has enunciated for the purposes of that section.

Comments:

1- No issue is taken with this Part.

B- Cohesion and Morale

Pp. 10-12

It is asserted that cohesion and morale are essential to the proper functioning of any armed forces. However, subcultures may constitute a threat to cohesion and morale if they "develop loyalties and goals that are inconsistent with those of the Canadian Forces." Homosexuals may

000883

- 3 -

very well form such subcultures and may develop loyalties harmful to cohesion and morale. Likewise, hostility and violence between homosexuals and heterosexuals would have negative impact.

Comments:

1- It is not clear why homosexual "subcultures" might have more detrimental effects than other subcultures which no doubt currently exist in the CF, ie, subcultures based on race, religious or political convictions, language, etc. Is there empirical and reliable evidence to support the assumption made here?

2- It is not clear either why homosexual subcultures would be more likely than other subcultures to develop "loyalties and goals that are inconsistent with those of the [CF]." Is this an assumption that is being made here and, if so, can it be reliably demonstrated?

3- This Part contains a number of references to theories and behavioural models developed by social scientists (most of whom appear to be American). Has the whole field been covered? Could these theories and models be impeached or attacked? Given the different values prevailing in Canada, has an attempt been made to examine work produced by Canadian social scientists?

C- Recruitment

P. 12

If homosexuals are enrolled or kept in the CF, it is fair to assume that potentially good recruits will choose not to apply for enrolment by reason of their aversion to homosexuals.

Comments:

1- The statements made in this Part appear largely impressionistic. Has this issue been studied carefully? Do the CF currently have problems in attracting good candidates? If such is not the case, how can it be stated that a change in policy would have the effect described in this Part? Will the evidence adduced to support this argument stand up in a court of law?

2- Has any allowance been made for the fact that a change in policy would mean that homosexuals would be free to seek enrolment and would perhaps become good soldiers (as was Sgt Watkins)?

000884

- 4 -

D- Privacy

Pp. 13-14

After a detailed exposé of the law concerning the viewing of the human body by a member of the opposite sex (an issue which is not directly relevant here), an argument is made that the CF might have to provide separate ablution facilities for homosexuals and heterosexuals of the same sex. This appears unfeasible.

Comments:

1- While privacy is certainly a value which is deserving of some protection in our society, no analysis is offered on whether the right to privacy, to the extent that it exists, would include the right not to be seen by/exposed to individuals of the same sex with homosexual tendencies.

2- If it does, then a subsequent question arises: how will it be protected if the CF adopt a policy of retaining members with homosexual tendencies who are not known to have engaged homosexual acts?

3- Has the question of whether some form of accommodation could be devised to reduce the breach of privacy been considered? Could a parallel be drawn between the situation under examination and the integration of women in combat?

E- Recruits and Cadets

Pp. 14-15

The presence of homosexuals in the CF "may well create" unacceptable pressures on young members of the Forces and cadets.

Comments:

1- There is an underlying assumption that homosexuals have a tendency to behave improperly in the presence of younger persons of their own sex. Is this established by evidence which will stand up in court?

2- What about unacceptable pressures on the part of adult men vis-à-vis young women and teenage girls? How different is the problem? How have the CF dealt with it?

000885

AGC-1926_0004

- 5 -

F- Survey Accuracy

P. 15

This issue has been dealt with at some length in Yves Côté's memorandum of July 18, and in the letter John Scratch sent LCol McDonald on September 27. No useful purpose would be served in addressing this issue here.

G- Foreign Nations

Pp. 15-16

Britain, Australia, the United States and New Zealand all have volunteer forces, and they all exclude homosexuals from service in their armed forces. This question is still being investigated.

Comments:

1- More information would be required on the countries which admit homosexuals in their armed forces. How has the "integration" been done? How are they performing now? Etc.

2- It would also be interesting to know which of the countries which exclude homosexuals (apart from the United States) have a charter of fundamental rights (or a similar instrument) guaranteeing the right to equality and how their courts have reacted to challenges launched by homosexuals.

H -Security

P. 16

For homosexuals who do not wish their orientation known, there is a real security risk. In addition, the "individual's loyalty to a homosexual friend... may be stronger than the member's loyalty to the goals of the... [CF]."

Comments:

1- There is no doubt that as long as the CF will maintain a policy excluding homosexuals, the potential will exist for foreign states to attempt to compromise and blackmail CF members with a homosexual orientation. But that is hardly a ground for maintaining such policy. Indeed, the best way to eliminate that risk is precisely to admit homosexuals.

000886

- 6 -

2- On the issue of loyalty the following comments should be made: it appears to be more speculation than fact, and, in addition, many other "loyalties" which have nothing to do with sexual orientation may be equally injurious to the interest of the country.

YC
29 September 89

000887