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January 10, 1990

Proposed Canadian Forces Administration
Order (CFAO) on Sexual Orientation

Issue

Whether and when Operations Ministers should consider the DND proposal.

Background

Attached to this update is an extract from the key passages in the proposed CFAO. The effect of the Order will be to expel or exclude from the Canadian Forces any homosexuals who have conducted themselves on the basis of their sexual orientation.

Ministers McKnight, Collins, Lewis, and Mazankowski met to consider this proposed order on August 30, at which time its implementation was being urged to precede the imminent retirement of the former Chief of Defense, General Manson. General Manson, who retired on September 8, 1989, did not want this issue to be a problem for his successor.

On August 30 the Ministers agreed to proceed with the proposed CFAO subject to the concurrence of the Prime Minister. Prior to bringing the matter to the Prime Minister, the Prime Minister office requested that we ask DND and Justice Canada to assess the Order from a Charter perspective, and to present the best possible case for defending the CFAO if it were challenged in court.

The elements of the best possible case were developed in a series of meetings between officials, and are summarized in the second attachment to this memorandum. It is important to note that Justice believes the Government would not succeed in defending this CFAO. Work is continuing on strengthening the "best case", but Justice is not optimistic that a court would find even our best arguments convincing. Notwithstanding the perceived weakness of the "best case", Mr. McKnight believes that the Canadian Forces require a clear statement at this time on the unacceptability of practising homosexuals in its ranks.

Mr. Lewis wrote to the Prime Minister in September, 1989, proposing that decisions on the CFAO be taken in the context of Canada Human Rights Act (CHRA) amendments, and that he would be prepared to exempt DND if the CHRA is amended to specifically include sexual orientation as a

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prohibited ground for discrimination. CHRA amendments are now targeted for consideration by Cabinet Committee in February 1990. An early draft of a proposed MC makes no mention of possible exemptions.

PCO Comment

The options include:

1. Operations Ministers to consider the DND proposal as soon as possible, and decide on a course of action (approval, return to selected Ministers, refer to Committee, delay consideration, rejection);
2. decide that Operations Ministers should not look at the DND proposal as a separate issue, and instruct DND to coordinate their proposal with Cabinet consideration of CHRA amendments, when they move forward to the Cabinet Committee on Justice and Legal Affairs.

Minister McKnight prefers option #1. If Operations Ministers consider the DND proposal on its own merits, the recommendation of the Social Development Secretariat will be that the proposal be rejected, in view of its likely eventual defeat in court.

An added consideration, however, is that there is no guarantee the CHRA amendments will be ready for Cabinet committee in February as planned. Among other things, the amendments address the role and structure of the Human Rights Commission and tribunals, introduce "reasonable limits in a democratic society" to qualify interpretation of the Act, and specify sexual orientation as a prohibited ground for discrimination. When Ministers previously considered the last amendment in particular, P&P expressed reservations about it.

Recommendation

Our recommendation is that an outline of the proposed CHRA amendments be developed as soon as possible (expect early February), and that the DND proposal be considered by Operations Ministers together with the outline. Operations Ministers could decide at that time whether the two subjects should be considered in tandem by Cabinet Committee, or move separately for early decision on the DND proposal.

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