



Deputy Minister of Justice and
Deputy Attorney General of Canada

Sous-ministre de la Justice et
sous-procureur général du Canada

Ottawa, Canada
K1A 0H8

CED / VCED / SEC
Bureau d'administration

DEC 10 1991

General Office
CDS / VCDS / SEC

JUDGE
ADVOCATE GENERAL

91 331 16 43

REFERRED TO 913243(n)
CONTROL NO.

DEC 4 1991

General A.J.G.D. de Chastelain
Chief of the Defence Staff
National Defence Headquarters
Ottawa, Ont.
K1A 0K2

Dear General de Chastelain,

Thank you for your letter of November 23, 1991. The opinion of this Department has always been that the Courts would find that sexual orientation is a prohibited ground of discrimination within the meaning of section 15 of the Charter. That opinion was strengthened by the comments of the Supreme Court of Canada in the case of Andrews v. Law Society of B.C.. The other Andrews case which is cited by Mr. Reimer was decided by a single judge of the Supreme Court of Ontario, (now the General Division) and involved the question of whether the definition of "spouse" in the Health Insurance Act included same-sex partners. The court used the "similarly situated" test which was rejected by the Supreme Court of Canada in Andrews v. Law Society. The Court did find that homosexuals living together in a domestic situation could be identified as a distinct class, but went on to find that homosexual couples are not similarly situated to heterosexual couples and that the distinction in treatment between heterosexual and homosexual couples is not a discriminatory distinction.

In my view, the case is not authority to the effect that homosexuality or sexual orientation is not a ground of discrimination within the meaning of section 15 of the Charter. In the Vesey case the issue again revolved around the concept of homosexual partner and the definition of the concept of spouse. The Federal Court of Appeal decided the matter on the basis of the wording of certain directives issued by the Commissioner of Corrections and, in the circumstances, did not have to deal with the issue as a Charter matter. The Court refrained from any comment, either of approval or disapproval, on the Trial Judge's finding that sexual orientation was a prohibited ground of discrimination.

This Department is appealing the recent decision in Haig, which held that the Canadian Human Rights Act violates the Charter by failing to include sexual orientation. However, the appeal

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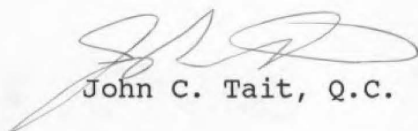
is not based on the issue of whether sexual orientation is a prohibited ground under section 15 of the Charter, but on the issue of whether there is, in such a situation, discrimination.

It continues to be the opinion of this Department, as expressed in the Minister of Justice's letter to the Minister of National Defence, that these cases cannot be successfully defended and that they ought to be settled. In light of the publicity surrounding the aborted announcement that the Canadian Forces was changing its policy in respect of homosexuality and the resultant leak of press releases and background material, many of the arguments that counsel would have made on behalf of the Canadian Forces cannot now be made at all, and, if anything, the case to be made under section 1 is even less viable than it was.

I concur in your draft response to Mr. Reimer. He had also written to me raising the same questions, and a copy of my response to him is enclosed for your information.

If you require any further information on this issue, or if you wish to discuss the matter further, please do not hesitate to give me a call.

Yours very truly,



John C. Tait, Q.C.

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