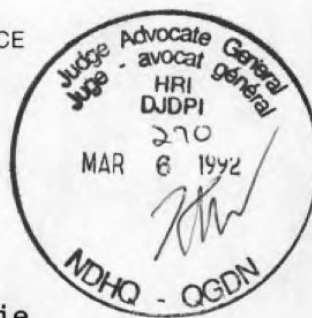


MEMORANDUM / NOTE DE SERVICE



File number - Numéro de dossier
Date March 4, 1992
Telephone/FAX - Téléphone/Télécopieur 957-4868/996-9916

TO/DEST.: Eric Bowie

FROM/ORIG.: Barbara A. McIsaac
General Counsel, Civil Litigation Section

SUBJECT/OBJET: Canadian Forces Policy regarding Homosexuals

Comments/Remarques

Counsel for Ms. Douglas has written asking that we clarify our position as to whether sexual orientation is an analogous ground under section 15 of the Charter. During discovery we tried to leave our options open in case the Court in Egan & Nesbit was prepared to make some statement limiting the scope of sexual orientation as an analogous ground.

Attached hereto are excerpts of the Discovery where the Crown's position regarding sexual orientation and section 15 was discussed.

As I now understand the problem with the caucus and the failure to implement the recommendation of the Chief of the Defence Staff that the policy be changed, it is partly related to a reluctance on the part of certain members of the caucus to accept that sexual orientation is an analogous ground. Indeed, one of the matters reviewed in connection with the idea of a reference was the referring of that very question to the Supreme Court of Canada.

While we were fairly categorical in conceding that sexual orientation was an analogous ground in Vesey and in Egan & Nesbit. In Haig I tried to be less categorical by pointing out that whether a particular ground is an analogous ground depends on the circumstances of the case. In Turpin, [and more recently in Generoux], the Supreme Court found province of residence and being a member of the military to not be analogous grounds in the circumstances of those cases. The Court specifically declined the close the door on the possibility of either being an analogous ground in some other circumstance. I argued that the converse was also likely and that it would be dangerous to assume that because sexual orientation was found to be an analogous ground in one circumstance it

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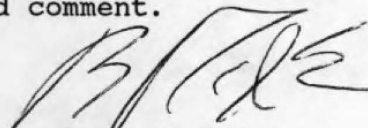
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- 2 -

would be in all future, and as yet unidentified, circumstances.

I am concerned that in the spousal benefits cases we may be limiting ourselves too much if we don't leave ourselves as much room as possible to argue that **in the circumstances of a particular case** sexual orientation is not an analogous ground. Is there no violation of section 15 when a homosexual couple is treated differently than a heterosexual couple because homosexual couples do not constitute a discrete and insular minority, or is there no violation of section 15 because the differentiation between heterosexual and homosexual couples is not discriminatory, [see: Hess].

In light of this background, I want to be certain that everyone is in agreement with our response to Ms. Douglas' counsel and I have attached a draft for your consideration and comment.



Barbara A. McIsaac

cc Ed Sojonky
Graham Garton
John Scratch
Ken Watkin ✓
Dan Munro
Debra McAllister

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