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May 21, 1992

BY FACSIMILE & ORDINARY MAIL
Barbara McIsaac, Q.C.
Department of Justice Canada
Room 536, Justice Building
239 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Barbara:

Re: HMQ ats Douglas

You have asked for our opinion on the issues in this case and we are pleased to provide to you the following comments and analyses concerning the more salient issues in this matter.

I. SOURCES OF INFORMATION

For the purposes of this opinion, we have relied upon the following information:

1. Our lengthy discussions with you, both by telephone and at two meetings in Ottawa, during which all key aspects of this litigation were discussed.

2. Two meetings with Brigadier General Dan Munro, Lieutenant Colonel Ken Watkin (JAG), Mr. George Logan (Directorate, Personnel Policy, DND), Debra McAllister (Department of Justice, Toronto Office).

3. A one hour meeting with the Chief of Defence Staff, General De Chastelain, to discuss the issues generally and more particularly the circumstances behind the proposed change in policy.

4. A review of the pleadings.

5. A review of the examinations for discovery.

6. A review of the available experts' reports.

7. A review of a number of legal opinions emanating both from the Department of Justice, and from the Office of Judge Advocate General.

While we have not had any opportunity to interview other key witnesses from the Canadian Forces (for example General MacInnis and Admiral Porter), we feel that from our various meetings and discussions and from a review of the above-referenced documentation, we have obtained sufficient information to be able to properly assess the thrust of the available evidence. Similarly, while we have not had an opportunity to review these issues directly with the experts, we have reviewed their written comments and we are therefore able to express our views on the basis of the information received. No doubt, we would need to conduct further reviews with these experts, and indeed with all witnesses prior to, and in preparation for, trial.

However, we do believe that we have reviewed sufficient information to be able to express the opinions contained in this letter.

II THE MAIN ISSUE

(a) The Facts

Ms. Douglas joined the Canadian Armed Forces in November, 1986. The uncontested evidence is that Ms. Douglas was exemplary during Basic Training, was ultimately posted to the Military Police and was ultimately given a "top secret" security clearance. Ms. Douglas completed the Basic Security Officer Training Course at the top of her class with an expectation that she would be promoted to the rank of Lieutenant. By June 1988, Ms. Douglas was posted to the central detachment of the Special Investigations Unit as an Operations Officer. Within a month of her posting, she was questioned in connection with her sexual orientation and ultimately admitted that she was a lesbian. Directly as a result of this admission, Ms.

Douglas was released from the Military Police and was re-assigned as Base Protocol Officer to CRB Toronto.

In April 1989, Ms. Douglas' security clearance was revoked and she was released on August 20, 1989. However, prior to her release, she was promoted to Lieutenant and received a retroactive pay increase.

Ms. Douglas commenced an action on or about January 19, 1990 in which she claimed the sum of $500,000 for infringement of her rights under the Charter, punitive or exemplary damages in the sum of $50,000, interest, legal costs, and declarations that the plaintiff's constitutional rights have been infringed and that the CAF Policy with respect to homosexuality violates Sections 15, 2 (b), 2 (d) and 7 of the Charter.

(b) **The Issues**

(i) Simply put, the main issue is whether Ms. Douglas' constitutional rights under Section 15 of the Charter have been infringed and, in that regard, whether the CAF policy on homosexuality represents a violation of Section 15.

(ii) Whether this challenge to the policy can be defended on the basis that the policy constitutes a reasonable limit to the alleged infringement, within the meaning of Section 1 of the Charter.

(iii) Whether the conduct by the CAF with respect to the imposition of the policy on Ms. Douglas can said to be blatant misconduct such that it attracts punitive and exemplary damages. This is a subsidiary issue which will not be analyzed in this letter.

III ANALYSIS OF MAIN ISSUES

It is now clear that sexual orientation is a ground of discrimination to which Section 15 applies. Accordingly, at least prima facie, Ms. Douglas has a constitutional basis for complaining that she was not treated equally before and under the law, and that she was discriminated against, contrary to Section 15 of the Charter.

Section 1 provides that the guarantees under the Charter are subject to reasonable limits. Much jurisprudence has evolved purporting to precisely define what constitutes a "reasonable limit". It is clear that in order to override the rights guaranteed in the Charter, it will be necessary to establish that the impugned law relates to pressing and substantial concerns. In other words, it must be shown that the CAF Policy under attack was designed, and

is of such importance, as to warrant overriding Ms. Douglas' constitutionally-protected right to be treated without discrimination.

In addition, in order for the Section 1 defence to succeed, it must also be shown that the CAF Policy is not excessive, disproportional or inappropriate in accomplishing the intended objective. This requirement, which is often referred to as the "proportionality test", provides that the limiting measure must be rationally connected to the objective sought with the least impairment to the right of the individual. In other words, not only must it be shown that the impugned law is a substantial concern but it must equally be proven that the CAF Policy causes the least amount of impairment to the constitutionally-protected right.

To put it in simpler thought, in order to succeed, we need to show that the CAF Policy relates to a substantial objective of major importance and that it is the least offensive (constitutionally) way of achieving the objective.

IV THE AVAILABLE EVIDENCE FOR THE SECTION 1 DEFENCE

Prior to our retainer, the Department of Justice in conjunction with DND, fully analyzed the Section 1 defence and concluded that there are at least four components: privacy, cohesion and morale, leadership and discipline and recruitment, cadets and attrition.

The evidence available in support of our defence for each of these categories has been set out in detail in the opinion letter from the Department of Justice dated September 26, 1990, and will not be repeated here.

The evidence at trial to substantiate the Section 1 defence would involve the testimony of senior Canadian Forces Officers and of our experts who would be called upon to give evidence based on the findings in their reports. In addition, we may be seeking to introduce into evidence similar policies from foreign countries, assuming that foreign representatives would be willing to testify, and provided that their rationale would assist us to confirm and advance our position.

V THE ANNOUNCED POLICY CHANGE

In late 1991, General De Chastelain announced that there would be a change in policy in order to remove sexual orientation as a bar to service, or continued service, in the Canadian Forces. General De Chastelain has gone on record to announce that a person's sexual orientation is no longer a relevant criterion for the determination of whether that individual can perform his job properly.

General De Chastelain has indicated that his announced policy change was triggered by a legal opinion from the Minister of Justice to the Minister of National Defence, in which the Minister of Justice indicated that in her opinion "this is not just a weak case, it is case where there is no arguable position to put to the courts".

The CDS' announcement with respect to the change in policy creates some very serious concerns for us in advancing our case. We believe that it will be very difficult to find witnesses within the Canadian Forces who can credibly testify in a way that is, or may appear to be, inconsistent with their Chief's announcement. In addition, General De Chastelain may well be uncomfortable in justifying his position with respect to the proposed change in policy while at the same time trying to advance our Section 1 defence. This is an obvious inconsistency which will, in all likelihood be exploited at trial and which will further weaken our case, or at the very least, potentially cause major embarrassment.

We also understand from various discussions, that Major General MacInnis and Admiral Porter have altered their views in respect of the current CAF Policy. While we have not spoken to them directly, we have been led to believe that they would be reluctant witnesses if they were to be summoned to contribute to the Section 1 defence. In fact, we understand that Major General MacInnis would not now be able to testify in a way that would be helpful to our case. It is not clear whether this evolution in their thinking has been wholly or partially triggered by the announcement by General De Chastelain. However, the inability of these key witnesses to testify in a manner that could assist us in our defence is extremely prejudicial. It remains to be be seen whether we are able to find suitable replacements.

As to the experts, we have been advised by Mr. George Logan that recently Dr. Zuliani advised that he would be very uncomfortable in testifying on our behalf. While he understands that he is a compellable witness, he has indicated that he is now no longer convinced that the 1986 survey results upon which he relied are particularly relevant to a justification of the CAF Policy in 1992. As you know, while we can certainly compel the testimony of Dr. Zuliani, we would not be able to compel his evidence qua expert. Accordingly, the value of such evidence would be tremendously lessened. It is clear to us, therefore, that we would need to meet with all our potential experts in order to determine the extent to which their views may have changed over time. We have not spoken directly with these witnesses and we are therefore unable to say conclusively whether it will be possible to present expert evidence in support of the defence.

Based on our current knowledge, we are in agreement with the Department of Justice that the advancement of the Section 1 defence is weak.

VI THE CONTINUING DISCOVERY PROCESS

The examinations for discovery have been completed. Not unexpectedly, however, plaintiff's counsel is seeking to re-open the discovery process and in that regard, has requested production of all documents relating to the announced policy change.

Plaintiff's counsel will obviously wish to engage in a continuing examination with the express purpose of extracting all relevant information leading to the announced policy change. We reviewed numerous documents in Ottawa which, at first instance, appear to be relevant to the issues being litigated. We have seen documents subject to confidence and privilege which we would likely be successful in excluding from production. We have also seen many other documents which do not fall within the ambit of privilege and which, in the end, we would likely be obliged to produce.

We are of the view that the disclosures of the policy change to the media do not constitute a waiver of the solicitor/client privilege attaching to the Attorney-General's opinion to the Minister of National Defence. Similarly, we believe that there has not been any waiver in respect of legal opinions flowing from the Department of Justice and/or the office of JAG.

This does not, however, end the story. While we are confident that we will be able to prevent disclosure and/or testimony by the Attorney-General and the Department of Justice and JAG's lawyers who have given advice on these issues, we believe it would be very difficult to keep from evidence other information in respect of the policy change. As you know, the scope of production, examinations for discovery and cross-examination at trial is very broad. Our courts favour full disclosure and, save for exceptional circumstances, normally allow for exhaustive cross-examination.

Accordingly, while we may be able to succeed in keeping out of evidence specific documents, we do not believe we will succeed in keeping out all the evidence relating to the policy change. The introduction of this issue at trial will likely cause substantial embarrassment to the Minister of National Defence, the CDS, the Attorney-General and various other persons who subscribed to the policy change. The introduction of this issue will also further weaken our case.

VII SUMMARY

(i) We concur with the analysis made by the Department of Justice, and it is our opinion that it will be very difficult for us to advance a successful Section 1 defence.

(ii) We believe that the CDS' announced policy change creates an additional, very serious problem for our Section 1 defence. While General De Chastelain may be able to justify his changed position due to the Attorney-General's opinion and thereby preserve his own credibility as a witness, nevertheless, we believe that if this evidence is declared admissible our case will be seriously, and perhaps critically, weakened by the announced policy change.

(iii) Some of our experts seem to be relaxing their original views on the issues, and unless we are able to help them regain their confidence in supporting our Section 1 defence, we will not have any chance at trial. We would need to confirm the experts' opinions by virtue of renewed discussions with them.

VIII "TO DO" CHECKLIST

Our current instructions are to prepare assiduously for trial. As you know, the Federal Court has scheduled this trial to commence October 26, 1992. There is much to be done in the interim:

(i) the internal and external surveys will need to be recanvassed; all experts must be interviewed and their reports finalized in preparation for production of the experts' reports by no later than August 26;

(ii) a witness list will need to be compiled and individual witnesses interviewed; "will say" statements will need to be drafted and executed by each potential witness;

(iii) communication must be made with representatives from foreign countries in order to determine whether such evidence will assist us in our trial;

(iv) the open issues of further production and continued examinations for discovery in respect of the policy change must be settled; in this regard, we expect a number of motions and possibly appeals therefrom.

While the trial is still five months away, we believe that we will need to work hard to be ready given the substantial tasks that need to be completed. This is especially so in light of the approaching summer with resulting vacation plans by the many potential witnesses.

We therefore propose to continue with our trial preparation at full speed and in that regard will be contacting Debra McAllister in Toronto to review with her various items necessary for our preparation. Over the next two weeks, we will submit a

checklist of priority items and will be recommending that we be instructed to begin the interview process.

One final word. In respect of the plaintiff's request to re-open discoveries, we are strongly recommending that we resist any effort to re-open the examinations and to provide additional productions. We believe that there is an argument for the proposition that all examinations have been concluded and that they ought not to be re-opened at this late stage. We feel comfortable with the position that the plaintiff does not now have an automatic right to re-open the examinations, or to be entitled to further productions on the policy change issue. If the plaintiff wishes to pursue these issues, she may bring the appropriate motions. To date, our opponent has not seen fit to pursue these issues formally.

In advising you not to consent to further productions or to the re-opening of the examinations, we are not purporting to guarantee results; we are simply saying that we have a reasonable argument to support our position and that, unless court ordered, we ought not to accede to the plaintiff's requests. We believe that from a tactical standpoint there is much to lose in re-opening the production and discovery processes and, therefore, from this standpoint alone, we should not be voluntarily complying with our opponent's requests.

We are available to discuss the contents of this letter or indeed any other issue, with you at your convenience.

Yours very truly,

Kenneth C. Cancellara
KCC:g