Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et Procureur général du Canada

SEP 24 1991

The Honourable Marcel Masse
Minister of National Defence
Room 207, Confederation Building
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Colleague:

You have asked that I provide you with my opinion with respect to the court cases in which the Canadian Forces policy regarding the enrolment and retention of homosexuals has been challenged. In each case it is argued that the policy violates section 15 of the *Canadian Charter of Rights and Freedoms* in that it discriminates against homosexuals.

The policy is embodied in Canadian Forces Administrative Order 19-20, and in modifications authorized by your predecessors and previous Chiefs of the Defence Staff. It currently provides that individuals who have engaged in homosexual acts will not be enrolled, or re-engaged when their terms expire, in the Canadian Forces. Serving members who are found to have engaged in homosexual acts may be released or, if they decline to be released, may serve out their current term subject to certain career restrictions.

As you are aware, it has always been the view of this Department that the Courts would find that sexual orientation is an analogous ground of discrimination within the scope of section 15. The Federal and British Columbia Courts have now found that sexual orientation is a ground of discrimination to which section 15 applies.

Accordingly, counsel assigned to these cases, in conjunction with the Offices of the Judge Advocate General and the Director of Personnel Policy, have concentrated their efforts on the development of a justification of the policy as a "reasonable limit, prescribed by law" in accordance with the provisions of section 1 of the *Charter*.

Ottawa, Canada K1A 0H8

On September 26th and November 9, 1990 and again on May 15, 1991 counsel provided opinions to the Office of the Judge Advocate General in which they reviewed the case law relating to section 1 of the *Charter* and the available evidence and provided their opinion that all of the cases ought to be settled and that the policy cannot be defended in court. For convenience I am attaching copies of those two opinions.

I am aware of the extreme importance with which the Canadian Forces has viewed this policy in the past, and I have kept current on the continuing attempt to develop a viable defence for the Canadian Forces. I am in agreement with the assessment of these cases as expressed by counsel in their two opinions.

As reviewed in some detail in the May 15th opinion, the policy has evolved to its current state in a manner which simply does not make it possible to present it as clear and unambiguous or rationally connected to the objective of maintaining an operationally effective military force. It is my view that it does not meet the tests which the Courts have enunciated for a law which will be capable of meeting the scrutiny of section 1 of the *Charter*.

On the other hand, it does not appear that it is possible to address the issue by way of a revised policy. It seems unlikely that it would be possible to draft a policy which would meet the standards of clarity that have been set by the Courts under section 1, and the evidence which is available does not support the policy as a reasonable limit. Both opinions provided by counsel address the evidence and I concur in the conclusion that the evidence falls short of establishing an arguable case.

In my opinion this is not just a weak case, it is a case in which there is no arguable position to put to the Courts. The outstanding Court cases ought to be settled, and the policy ought to be abandoned in favour of a policy which focuses on specific sexual conduct, whether heterosexual or homosexual, which can be demonstrated to have a disruptive effect on the effectiveness of the Canadian Forces.

Yours Sincerely,

Original Signed by
Original signé par

A. Kim Campbell