



TORONTO, ONTARIO, THURSDAY, THE 29TH DAY OF MARCH, 1990.

PRESENT: THE HONOURABLE MR. JUSTICE CULLEN

IN THE MATTER OF the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, as amended;

AND IN THE MATTER OF an Application pursuant to s. 18 of the Federal Court Act, R.S.C. 1985, c. F-7, as amended.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by THE MINISTER OF NATIONAL DEFENCE

Applicant

- and -

THE SECURITY INTELLIGENCE REVIEW COMMITTEE and
MICHELLE DOUGLAS

Respondents

Upon Motion dated the 16th day of March, 1990, on behalf of the Applicant for a writ of prohibition, prohibiting the Security Intelligence Review Committee from investigating a complaint by Michelle Douglas with

respect to her security clearance; upon reading all the material filed and upon hearing counsel for the Applicant and the Respondents

It Is Ordered That this application be dismissed with costs to the Respondents.

"B. Cullen"

Judge



IN THE MATTER OF the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, as amended;

AND IN THE MATTER OF an Application pursuant to s. 18 of the Federal Court Act, R.S.C. 1985, c. F-7, as amended.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by THE MINISTER OF NATIONAL DEFENCE

Applicant

- and -

THE SECURITY INTELLIGENCE REVIEW COMMITTEE and
MICHELLE DOUGLAS

Respondents

REASONS FOR ORDER

CULLEN, J.

This is an application pursuant to section 18 of the Federal Court Act for an Order prohibiting the Security Intelligence Review Committee (S.I.R.C.) from investigating a complaint by the Respondent

Michelle Douglas (Douglas) with respect to revocation of her security clearance.

BACKGROUND

Douglas enrolled in the Canadian Forces on November 26, 1986 as a Direct Entry Officer. She reported for Basic Officer Training on December 8, 1986. In March of 1987 she graduated top of her class, received a Senior Parade appointment and was promoted to the rank of 2nd Lieutenant. From March 1987 to September 1987 she was posted to French Language Training, and during that period, i.e. May 1987 she received her Level 3 security clearance. In September 1987 Douglas was posted to Military Police section at Canada Forces Base Ottawa. From November 1987 to May 1988 she was enrolled in Basic Security Officer Training, and again graduated first in her class. On June 1, 1988 Douglas was assigned to the Central Detachment of the Special Investigation Unit (S.I.U.) of the Military Police as an Operations Officer.

Two affidavits, one by Douglas and one by Col G.R. Hirter (Hirter) see the next step this way

Hirter - para. 6 On June 27 and 28, 1988 she (Douglas) was interviewed during an S.I.U. investigation. In the course of the interview, she denied having engaged in homosexual activities.

Para. 7 - During a further S.I.U. interview conducted on July 25, 1988 she admitted having engaged in several homosexual relationships. As a result of this admission, a Change of Circumstances Report was filed August 2, 1988. On August 8, 1988, she was posted from the Central Detachment of S.I.U. and reassigned as Basic Protocol Officer/Basic Information Officer/Basic Coordinator of Official Languages at the Canadian Forces Base in Toronto

Douglas sees these actions somewhat differently.

Para. 7 - From July of 1988 I was repeatedly and extensively interrogated by members of the Canadian Armed Forces concerning my sexual orientation. During the course of these interrogations, I admitted I was a lesbian.

Para. 8 - As a result of this admission a "Change of Circumstances Report" respecting my security clearance was filed on 2nd August 1988. This report indicated that my security clearance status could be affected by the fact that I admitted I was a homosexual.

This Report headed up Change of Circumstances Report
Security Clearance

is Exhibit A to the affidavit of Hirter and paragraph 2 reads

The following change of personal circumstances which could effect the security clearance status of the subject has been noted: (and then reference is made to Douglas' admission - "She describes her sexual orientation as Gay".

From this point on Douglas maintains she "became the subject of an on-going security investigation (emphasis mine) which was repeatedly referred to in internal documentation as

476 986 948 ZLD Douglas, Michelle Denise
Security - Sexual Deviation - Homosexuality
C.F.B. Toronto, Toronto, Ontario."

Douglas provided an example as Exhibit A to her affidavit - which has the date August 11, 1988.

Hirter describes this follow up differently. The admission of her homosexual activities brought her within "the Canadian Forces Interim Policy" (Para 8 Hirter) which provides that administrative release action may be taken. The process requires "an acknowledgment that a member is a homosexual, the Department of National Defence considers the member to be homosexual, the member desires to be released and the member does not object to being released under Item 5(d) of the Queen Regulations. If the member does not agree to be released, the member will be retained with certain career restrictions" (para 8 Hirter). Exhibit B to Hirter's affidavit is a copy of a memorandum dated January 20, 1988 which outlines

"the following restrictions are authorized and will remain in effect until a final policy decision is made by an appropriate authority (MND/CDS)

- (a) no promotion
- (b) no career courses
- (c) will not enter the protected window
- (d) will not be reengaged, granted an 1E, 1PS, CD or an extension.

(c) will not advance in QL and

4. ... and this office currently maintains a list of personnel reported to fall under policy CFAO 19-20.
5. Addresses are requested to advise all personnel within their directorate of the foregoing, so that where the staff become aware of proposed course of action contrary to that contained in clause 3, they should attempt to resolve the matter in accordance with the guidelines, and inform DPCAOR (ADM). ADM (Per) has directed that a general instruction on this subject will not be sent to the field, but rather each case will be handled on an individual basis."

This memorandum is signed by a Brigadier General.

Hirter's affidavit states there was "an ongoing administrative consideration" of Douglas' position in the Canadian Forces in light of her acknowledged homosexual conduct and the interim policy with respect to such conduct. On February 20, 1989 a Special Career Review Board which was convened to consider her case recommended that she be released in accordance with interim policy. This recommendation was accepted on April 19, 1989. (Para 9).

But the affidavit does not tell us the date the Board was convened.

Paragraph 10 of Hirter's affidavit tells us that

"On May 16, 1989 Douglas was given written notice of intent to recommend her release from the Canadian Forces under 5(d) because of her admitted homosexual activity contrary to Canadian Forces policy. In a memorandum of June 5, 1989 Douglas advised that it was her intention to accept release under 5(d)."

But it's not that straight forward. It's true that Douglas signed the Notice of Intent to Recommend Release Exhibit D affidavit of Hirter but it's also clear that she did so for her reasons stated in that document:

The printed portion of the form reads

"I do not object to being released from the Canadian Forces under the provisions of OR & O 15.01 item 5d. Objection attached:

(and here Douglas wrote)

"The inability of the CF to clearly define an equitable policy on homosexuality and the decision to invoke (sic) an interim policy that is archaic, discriminatory and blatantly unjust reveals the true ignorance of the CF on this issue. As there is no alternative, I reluctantly accept a 5d release."

Some of the above appears on the surface at least to have been confined to the fact of Douglas' homosexuality, her admissions, the policy followed and procedures adopted to secure "administrative release." If Douglas had not signed the "Notice of Intent to Recommend Release", she could have remained a member of the Canadian Forces, albeit under an interim policy which she described as "archaic, discriminatory and blatantly unjust." Aside from this policy, she was also aware that if she didn't sign the Notice of Intent to Recommend Release, Canadian Forces would release her because the Chief of the Defence staff had approved the 4 April 1989 Security Clearance Review Board's recommendation that Douglas be denied any level of security clearance. "Douglas was advised on April 20, 1989 that her security clearance has been revoked." A person as knowledgeable as Douglas about the Canadian Forces and Security would know it was only a matter of time before she would be released from the Canadian Forces, "since she was not employable due to loss of security clearance." (Para 13 Hirter).

Security Clearance

Douglas knew in as early as August 2, 1988 that her security clearance would be affected, when she read the Change of Circumstances report. Douglas is convinced that with the admission by her of her homosexuality, "I became the subject of an on-going security investigation", and Exhibit A to her affidavit confirms this fact.

Until February 7, 1989 Hirter seems to suggest they were only looking to a 5(d) administrative release based on Douglas' admission of homosexuality. He knew the policy and if Douglas chose to remain she could.

However, the affidavit states they had initiated a separate investigation with respect to her security clearance. Para 11 is vague - no dates as to when the "separate investigation" was launched.

In paragraph 12 Hirter tells us

12. On February 7, 1989, I review Douglas' file, and at that time became aware that additional evidence had come to light that while employed at S.I.U., Douglas accessed and reviewed a classified report, and divulged information on that file to the subject of the report, contrary to security procedures. Accordingly, on April 4, 1989, the Security Clearance Review Board recommended that, because of a demonstrated disregard for security regulations and apparent strong loyalty to members of the homosexual community, Douglas be denied any level of security clearance. The recommendation was approved by the Chief of the Defence Staff on April 17, 1989

Paragraph 14 and 15 Hirter's affidavit reads

14. In all cases where a security clearance is revoked, the Canadian Forces advise the persons concerned that they have a right to appeal the Security Clearance Review Board's decision to Security Intelligence Review Committee ("S.I.R.C."). Accordingly, on July 7, 1989, I requested in a message that Douglas be advised of her right of appeal to S.I.R.C. I made this request as a routine matter after consulting the Director of Personnel Legal Services, and without considering the specific statutory jurisdiction of S.I.R.C. I also noted in my message that Douglas' release as the result of other circumstances would proceed. Attached hereto and marked Exhibit "H" is a copy of the message.

15. On August 20, 1989, Douglas was released from the Canadian Forces pursuant to Item 5(d) in accordance with the Canadian Forces' policy regarding individuals who engage in homosexual activities. She was not released because of the decision to revoke her security clearance.

Exhibit H - states in part

- subject: loss of security clearance ... 2nd Lt. Douglas
- 1. (P.B.) Ref. informed change to MBR 5 security clearance
- 2. (P.B.) Request MBR be advised of her right to appeal to SCRB finding to Security Intelligence Review Committee (SIRC) ... within 30 days of receiving this msg.

3. (P.B.) MBR 5 release as a result of other circumstances will proceed.

CONCLUSIONS

Thus, even to this point it is clear there is no agreement as to the facts or the interpretation of the actions taken by the Canadian Forces.

What is quite clear however is that a decision was made to transfer Douglas from a sensitive post calling for a high security clearance to one where a lesser degree of security clearance was required. I agree with counsel for the respondent Douglas that Section 42(1) of the Canadian Security Intelligence Service Act, has only 2 requirements, namely a decision be made to dismiss or transfer, and by reason only of a denial of a security clearance. The document - Change of Circumstances leaves no room for doubt that security clearance was the basis for the transfer to another job.

Also SIRC, following the procedures outlined in the Act determined it had jurisdiction. I cannot find any error in law, or that the decision was so patently unreasonable that gives the Court authority to sign an Order prohibiting the review.

Counsel for SIRC has indicated the door on the jurisdiction argument is not closed and may very well be raised during the review. SIRC's preliminary determination is that it has jurisdiction and intends to proceed. No order of prohibition should be granted in these circumstances.

With counsel for SIRC's comments that the issue of jurisdiction may be raised again during the review I will not comment further.

For the reasons stated above the application must be dismissed
with costs to the respondents

"B. Cullen"

Judge

Toronto, Ontario

March 29, 1990

FEDERAL COURT OF CANADA
NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: T-763-90

STYLE OF CAUSE: HER MAJESTY THE QUEEN IN RIGHT
OF CANADA as represented by the
MINISTER OF NATIONAL DEFENCE

- and -

THE SECURITY INTELLIGENCE
REVIEW COMMITTEE and
MICHELLE DOUGLAS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 29, 1990

REASONS FOR ORDER BY: CULLEN, B.

DATED: March 29, 1990

APPEARANCES

Ms. Debra McAllister
For the Applicant

Mr. Clayton Ruby
For the Respondent
Michelle Douglas

Mr. Simon Noel
For the Respondent
The Security Intelligence
Review Committee

SOLICITORS OF RECORD:

John C. Tait, Q.C.
Deputy Attorney General of
Canada

For the Applicant

Ruby & Edwardh
11 Prince Arthur Ave.
Toronto, Ontario
MSR 1B2

For the Respondent
Michelle Douglas

Noel, Decary, Aubry & Associates
111 Champlain St.
Hull, Quebec
J8X 3R1

For the Respondent
The Security Intelligence
Review Committee