

IN THE FEDERAL COURT OF APPEAL

BETWEEN :

MINISTER OF NATIONAL DEFENCE

Applicant

- and -

MICHELLE D. DOUGLAS

Respondent

AFFIDAVIT OF RHEA M.J. HOARE

I, RHEA M.J. HOARE, of the City of Toronto, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY AS FOLLOWS:

1. I am employed as Counsel in the Toronto Regional Office of the federal Department of Justice, which acts as solicitors for the Defendant. I am one of a team of three lawyers who are representing the Applicant Minister of National Defence (the "Minister" in this application) and as such have knowledge of the matters hereinafter deposed to.

2. I have reviewed portions of the Case prepared by the Registry pursuant to Rule 1402(4). It appears from the transcript of the proceedings before the Security Intelligence Review Committee (the "SIRC") that papers relevant to the complaint which was the subject of the investigation have been omitted from the Case.

3. During argument before the SIRC, counsel for the Minister referred to minutes of the Committee on Justice and Legal Affairs. At Volume IV, page 527 of the Case, he indicates that "you have a copy of the particular minutes in the material in front of you". However, this document does not appear in the Case. Attached hereto and marked Exhibit "A" is a copy of the relevant page of the Case.

This is Exhibit E referred to in the affidavit of Aminda Prastin sworn before me, this 30th day of October 1991
John Norris
A COMMISSIONER FOR TAKING AFFIDAVITS

4. During argument, counsel for the Minister also referred to the SIRC's last annual report, presumably a reference to its 1989 annual report. At Volume IV, page 528 he stated "I have provided a copy of that page of the Report". This document does not appear in the Case. Attached hereto and marked Exhibit "B" is a copy of the relevant page of the Case.

5. During his responding argument before the SIRC, counsel for the Respondent Michelle D. Douglas ("Douglas") referred to a memorandum of law filed by him. At Volume IV, page 598 he says "[y]ou have a packet of material, together with a small factum, in front of you on the desk." This material does not appear in the Case. Attached hereto and marked Exhibit "C" is a copy of the relevant page of the case.

6. At the conclusion of the argument, the SIRC granted counsel for the Minister an opportunity to file written Reply submissions, which he agreed to do by April 26, 1990. This exchange appears at Volume IV, pages 655 to 657, but Reply submissions do not appear in the Case. Attached hereto and marked Exhibit "D" are copies of the relevant pages of the Case.

7. In the course of the hearing, counsel for the Minister objected to dealing with the constitutional validity of the Canadian Forces' interim policy regarding persons who engage in homosexual activity since this is the matter in issue in an action before the Federal Court Trial Division. For example, at page 281 he says this "is a matter of a civilian law suit," and at page 283 he says "[t]his is what the law suit is all about." Attached hereto and marked Exhibit "E" are copies of pages 280 to 283 of the Case.

8. The pleadings in the civil action (specifically the Statement of Claim, Statement of Defence and Reply) were not filed with the SIRC, and do not form part of the Case. Nonetheless, these pleadings are relevant to the issues before this Honourable

Court on review, since it is the Minister's position that the SIRC did not have jurisdiction to decide the constitutional issue, in part because this issue will be fully canvassed in the action which is before the Trial Division.

9. I make this affidavit in support of a motion pursuant to Rule 1402(2) to vary the contents of the Case, and for no other or improper purpose.

SWORN before me at the City)
of Toronto, in the Regional)
Municipality of Metropolitan)
Toronto, in the Province of)
Ontario, this 29th day of)
July, 1991.)

Rhea M.J. Hoare
Rhea M.J. Hoare

Deirdre Rice
A Commissioner for Taking Affidavits
Deirdre A. Rice

1 Argument (McDonald)

2 the word "only" from the statute. Each word in the
3 statute should be given a meaning.

4 There is additional support for this position in
5 the discussions in the Committee on Justice and Legal
6 Affairs that looked at the Canadian Security Intelligence
7 Service Act when it was being developed. In this
8 particular case, Section 42 was discussed.

9 I believe you have a copy of the particular
10 minutes in the material in front of you, Madame Gauthier.

11 Mr. Robinson, the Member of Parliament for
12 Burnaby, had moved an amendment to Section 42 to specify
13 "that where the denial of a security clearance by the
14 Government of Canada is a factor in a decision". He was
15 trying to get this idea that as long as it is one factor,
16 then that is all that is required in order to give the
17 Security Intelligence Review Committee jurisdiction.

18 This was discussed in detail. Mr. Kaplan, the
19 Solicitor-General at the time, made objections, and
20 ultimately this amendment was defeated. And the statute
21 as passed continued to require that "where by reason only
22 of the denial of a security clearance".

23 Therefore, I submit that there was a clear
24 reference to the intention of Parliament that it has to be
25 the sole factor and not just a factor.

This is Exhibit "A" mentioned and
referred to in the affidavit of
RHEA M.J. HOWRE
Sworn before me this 29th day of
July A.D. 1991
Rheal M. J. Howre
A Commissioner for Taking Affidavits

Argument (McDonald)

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Also, I submit that the Committee itself has recognized this particular aspect in its last Annual Report.

I refer specifically -- and I have provided a copy of that page of the Report -- to where it says near the bottom of the page:

"Fourth, the Act refers to a loss of employment opportunity 'by reason only of the denial of a security clearance'. What happens if the employer can honestly say that there were other reasons, albeit very secondary ones? This particular point has been cited on at least two occasions in challenges to the Committee's jurisdiction to investigate a complaint."

So the Committee itself, as well, has recognized this particular aspect.

The Committee, in my understanding from its report, wishes to go with the position that Mr. Robinson put forward on the matter when it was first considered by Parliament. However, that is not the way that Parliament went. Parliament went with the requirement that it be the only consideration.

In light of those factors, I would submit that the statute has to be read in that context.

This is Exhibit "B" mentioned and referred to in the affidavit of RHEA M.J. HOARE Sworn before me this 29th day of July A.D. 1991
A Commissioner for the ...

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Argument (Ruby)

1 and that you had an obligation to decide that it was
2 unconstitutional. I didn't attempt to persuade you of
3 that at the time, and I now want to persuade you of that.
4

5 So let me move in to that.

6 You have a packet of material, together with a
7 small factum, in front of you on the desk. Let me refer
8 to this, then.

9 One digression before I commence; a digression
10 only because I made a note on this particular page and I
11 don't want to forget.

12 I am making a request for costs in this hearing.
13 Would you please note the request and consider it.

14 Section 52(1)(a) of the SIRC Act gives you to
15 consider any recommendations that "the Committee considers
16 appropriate" on completion of an investigation. The
17 widest possible language.

18 It is my submission that that includes a
19 recommendation with respect to costs for the following
20 reasons:

21 It is in SIRC's interest to see that valid
22 complaints, arguable complaints, are brought forward. On
23 the one side you have a huge entity with, as far as I can
24 tell, unlimited money, the Government of Canada.

25 I know they are not feeling that it is unlimited

This is Exhibit "C" mentioned and
referred to in the affidavit of
RHEA M.J. HOARE
Sworn before me this 29th day of
July A.D. 1971.
Rheal Hoare
A Commissioner for taking Affidavits

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LT.-COL. McDONALD: Yes, Madame Chairperson.

THE CHAIRPERSON: The hearing adjourned.

Thank you very much. It was a difficult case and well presented.

--- Whereupon the hearing adjourned at 2:20 p.m.

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Hirter, cr.ex. (Ruby)

They knew what the rules were and, suddenly, now we are being told that the rule is wrong because now it applies to a Career officer. It applies to the civilian that walked in the door of that recruiting office, too.

Q. Do you ask people when you recruit them whether they are gay?

A. I can't honestly answer that. I have no idea whether they do or not. I suspect it's probably against human rights, or whatever. I have no idea.

Q. These nasty little human rights people. They keep on making these rules preventing you from doing what you want to do. Right?

A. I won't answer that.

Q. One of the arguments that I am going to make is that the policy we are talking about is unconstitutional and if there is any justification -- I think you started getting into one and I brought you back to the line of cross-examination I was interested in. But I don't want to cut you off.

If there is any justification in terms of operations that you alluded to, I would like to hear it.

LT.-COL. McDONALD: Once again, Madam Gauthier, I would object to this particular line of

This is Exhibit "E" mentioned and referred to in the affidavit of RHEA W.J. HOARE Sworn before me this 29th day of July A.D. 1991
Russell K. ...
A Commissioner for taking Affidavits

1 Hirter, cr.ex. (Ruby)

2 questioning.

3 This is a security hearing and the policy
4 and the basis for the policy for release of practicing
5 homosexuals from the Canadian Forces is a matter of a
6 civilian law suit, and this is not, I would submit, a
7 forum for discovery for that particular law suit.

8 The questioning in relation to this should
9 be restricted to the question of security clearance.

10 MR. RUBY: I am going to ask him at the end
11 to find that this policy, as applied on documents and
12 orders containing it, are contrary to Sections 15(7) and
13 15(2) of the Charter. It will be relevant to that issue
14 of whether there is any evidence to justify this policy
15 and these orders.

16 If you decide not to allow this evidence to
17 come forward -- and it is my friend's right to bring it
18 forward. I am giving him an opportunity, because I cut
19 him off, out of fairness, to do that -- he will say quite
20 reasonably at the end: "You haven't allowed me to show
21 that this is a necessary policy under Section 1 of the
22 Charter."

23 So, I want to preclude that by giving him an
24 opportunity to answer that question, which I cut him off
25 from in the first place.

1 Hirter, cr.ex. (Ruby)

2 I am not asking you to declare it
3 unconstitutional at large, but it seems clear from the
4 evidence we have heard so far that organizations such as
5 the Army, unlike CSIS or the RCMP, have a policy of
6 non-tolerance in one form or another of gays. It creates
7 security risks by creating a class of people who are
8 vulnerable to blackmail and coercion. That issue is
9 squarely before you.

10 The policy creates a danger to security by
11 creating a class of otherwise good officers who are
12 vulnerable to blackmail. So, the policy is directly
13 central to the issues in this case, only through its
14 security aspect.

15 Therefore, I think it is important that he
16 be given an opportunity to tell us what the justification
17 is in terms of operations, if there is one.

18 Thank you.

19 LT.-COL. McDONALD: In reply, Madam
20 Gauthier, to begin with my friend has indicated that he
21 plans on requesting that the Committee make a finding of
22 unconstitutionality on the policy for the Canadian
23 Forces. I would submit this is not a finding that is open
24 to the Committee and, therefore, any arguments and
25 documentation relating to the constitutionality is not an

1 Hirter, cr.ex. (Ruby)

2 issue that should be argued before this Committee. This
3 is what the law suit is all about; about those policies.

4 This Hearing is to determine what were the
5 circumstances surrounding the denial of the security
6 clearance and what recommendations the Committee may wish
7 to make to the Deputy Head with respect to those security
8 clearances.

9 Therefore, the question of the
10 constitutionality does not even arise, cannot arise, and
11 would not be within the jurisdiction of the Committee to
12 determine, in any case. Therefore, this line of
13 questioning, I would submit, is totally irrelevant to the
14 matters before the Committee.

15 THE CHAIRPERSON: I understand this
16 distinction.

17 What was your question again?

18 MR. RUBY: I had cut him off when he started
19 saying, "If you want to get into it, there are
20 operational or administrative justifications for this
21 policy." I brought him back to another area and I want to
22 give him an opportunity to give an answer to that.

23 THE WITNESS: I also qualified that, if I
24 may, by saying that I don't think this is the forum to do
25 it in.

Court File No: A-660-90

IN THE FEDERAL COURT OF APPEAL

B E T W E E N :

MINISTER OF NATIONAL DEFENCE

Applicant

- and -

MICHELLE D. DOUGLAS

Respondent

AFFIDAVIT OF RHEA M.J. HOARE

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