

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

FACTUM OF THE APPLICANT

1. This is an application by the Minister of National Defence (the "Minister") pursuant to s.28 of the Federal Court Act, R.S.C. 1985, c.F-7 to review the report of the Security Intelligence Review Committee (the "SIRC") dated August 14, 1990 with respect to the Respondent Michelle Douglas ("Douglas") complaint pursuant to s.42 of the Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23 (the "CSIS Act").

Originating Notice Under s.28 of the Federal Court Act, Case Book, Vol. X, p.1477.

PART I - THE FACTS

(A) **Background**

2. Douglas enroled in the Canadian Forces (the "CF") on November 26, 1986 as a direct entry officer. Starting December 8, 1986 she was posted to Basic Officer Training, and upon graduation in March, 1987 was promoted to the rank of Second Lieutenant.

Reasons for Order of Cullen J., Case Book, Vol.V, p.682.

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3. From March 1987 to September 1987, Douglas was posted to French language training. During that period, on May 6, 1987, she received her Level 3 (Top Secret) security clearance.

Reasons for Order of Cullen J., Case Book, Vol.V, p.682.

Security Clearance Certificate, Case Book, Vol. VIII, p.1082.

4. During her French language training program, Douglas developed a close relationship with Jeanette Turpin ("Turpin"), a female member of the CF who was suspected of engaging in homosexual activities.

Military Police Investigation Report, Case Book, Vol.VIII, pp.1087-1099.

5. In September, 1987, Douglas was posted to the Military Police Section at Canadian Forces Base ("CFB") Ottawa for on job training. Between November 24, 1987 and May 12, 1988 she was posted to Basic Security Officer Training. Before she left CFB Ottawa for the training program, a senior security branch officer informed her of the possible career implications of her continued association with Turpin.

Military Policy Investigation Report, Case Book, Vol.VIII, pp.1087-1099.

Course Report, Case Book, Vol.VII, p.954.

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(B) Investigation re: homosexual activities

6. On May 26, 1988, the Commanding Officer of the Special Investigation Unit (the "SIU") ordered an investigation into allegations that Douglas was involved in a homosexual relationship.

Memorandum dated May 26, 1988, Case Book, Vol.VIII, p.1084.

7. On June 1, 1988, Douglas was assigned to the Central Detachment of the SIU as an Operations Officer. On June 27 and 28, 1988, she was interviewed by SIU investigators. During the interviews, Douglas denied having engaged in homosexual activities, and declined to undergo a polygraph examination.

Military Police Investigation Report, Case Book, Vol.VIII, pp.1087-1099.

8. On July 18, 1988, the SIU investigators were advised that Douglas had requested a polygraph examination. On July 25, 1988, she attended for the polygraph, declined to take it, but was interviewed by an SIU investigator, at which time she admitted having engaged in homosexual relationships.

Military Police Investigation Report, Case Book, Vol.VIII, pp.1087-1099.

9. As a result of this admission, the Commanding Officer of the SIU requested that Douglas be removed from the SIU immediately for two reasons. First, the SIU conducted investigations into allegations that members of the CF are homosexual, and Douglas was uncertain that she could pursue this obligation with conviction. Secondly, Douglas was unlikely to be able to provide good leadership and guidance to SIU

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investigators who view homosexuals as part of "the opposition" which they are charged with investigating. Consequently, Douglas was reassigned as Base Protocol Officer/Base Information Officer/Base Coordinator of Official Languages at CFB Toronto on August 8, 1988.

Letter dated September 7, 1988, Case Book, Vol.VIII, pp.1152-1153.

Change of Circumstances Report, Case Book, Vol.VIII, p.1085.

(C) Investigation re: Security Clearance

10. A Change of Circumstances Report on Douglas was filed on August 2, 1988. The purpose of the report was to notify the Director of Security Clearances that there was a change of circumstances that had not, in all likelihood, existed at the time of Douglas' security clearance being in issue in 1987, and that warranted a review of her suitability for continued security clearance. The Report did not constitute a posting notice, nor did it downgrade her security clearance. Indeed, the Report indicated that Douglas "has continued access as denial is not considered necessary at this point...to information classified Top Secret."

Testimony of Lt.Col. Jones, Case Book, Vol.I, pp.120-122.

Change of Circumstances Report, Case Book, Vol.VIII, p.1085.

11. The Change of Circumstances Report and the Military Police Investigation Report prepared by the SIU investigators raised security issues for the Director of Security Clearances. He was concerned that Douglas' unnamed partners might present a security risk, that Douglas may have passed personal information acquired in the performance of her duties to homosexuals in the CF, that she would place her code of

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ethics (which prevented her from reporting names of homosexuals in the CF) before her other responsibilities, and that she might be vulnerable because she had not informed her mother of her sexual orientation. The Director of Security Clearances therefore requested that Douglas be interviewed by an SIU investigator regarding her security awareness.

Testimony of Lt. Col. Jones, Case Book, Vol.I, pp.122-126.

Lettergram dated November 1988, Case Book, Vol.VIII, pp.1100-1101.

12. On December 13, 1988, an SIU investigator interviewed Douglas regarding security concerns, particularly her vulnerability to being approached by hostile intelligence services. She was offered a polygraph examination to verify that she had not been approached, which she subsequently agreed to take. On December 15, 1988 Douglas was interviewed in the pre-polygraph test phase, but did not take the polygraph examination.

Personnel Security Investigation Report, Case Book, Vol.VIII, pp.1102-1107.

SIU Polygraph Examination Report, Case Book, Vol.VIII, pp.1108-1109.

13. During this interview, Douglas stated that Turpin asked her for any information about her which was on file with the SIU. Douglas memorized Turpin's SIU file number from papers which she had seen during the interviews on June 27 and 28, 1988, accessed the file (which contained Turpin's field investigation, including names of persons contacted and their responses), searched the file for any adverse information about herself, and then told Turpin that the SIU had a file on her which contained no

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information regarding her homosexuality. Douglas acknowledged that she had been used emotionally by Turpin to obtain this information.

Personnel Security Investigation Report, Case Book, Vol.VIII,
pp.1102-1107.

14. These actions were contrary to the basic principles governing handling of classified information, which require that persons accessing information must have a need to know the information for the performance of their duties, and that they hold the same level of security clearance as the classification of the information. There is a correlative responsibility not to release information to anyone who does not have a need to know or the appropriate security clearance. Douglas was a trained security officer who had received instruction in these principles.

Testimony of Lt. Col. Jones, Case Book, Vol.I, pp.129-130.

1987 Security Orders - Principles of Security, Case Book,
Vol.VI, p.904.

Testimony of Douglas, Case Book, Vol.III, p.381.

15. During the interview of December 15, 1988, Douglas also stated that Turpin had asked her to get information on another CF member, but Douglas told Turpin she did not have access to the file. Turpin asked Douglas to pull and destroy a Military Police card on a former lover, but Douglas did not do so. Douglas admitted being approached by three homosexual members of the CF for information regarding SIU investigative techniques. She stated that she knew of about 100 homosexual members of the CF, including one in the security branch, but declined to identify them. She also acknowledged that she had not told her mother of her sexual orientation.

Personnel Security Investigation Report, Case Book, Vol.VIII,
pp.1102-1107.

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16. In January, 1989, after reviewing the Personnel Security Investigation Report on the interviews of December, 1988, and following the normal practice for security investigations, the Director of Security Clearances requested that Douglas' Base Commander, Col. Desloges, conduct a security clearance interview with her. This was done on February 13, 1989, over a period of four hours. Col. Desloges submitted a nine page report to the Director of Security Clearances which concluded that there was no cause to lower Douglas' security clearance.

Testimony of Lt.Col. Jones, Case Book, Vol.I, pp.100-101 and 132-133.

Testimony of Douglas, Case Book, Vol.III, p.461.

Memorandum dated January, 1989, Case Book, Vol.VIII, p.1111-1113.

Report of Col. Desloges, Case Book, Vol.VIII, pp.1114-1122.

(D) Circumstances of Release

17. The CF's interim policy with respect to persons who engage in homosexual activities (the "interim policy") provides that administrative release action may be taken where a member acknowledges he or she is a homosexual and the Department of National Defence ("DND") 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 Queens Regulations and Orders 15.01 ("Item 5(d)"). If the member does not agree to be released, the member will be retained subject to career restrictions.

Memorandum dated January 20, 1988, Case Book, Vol.VIII, pp. 1147-1148.

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18. There was an ongoing administrative consideration of Douglas' position in the CF in light of her acknowledged homosexual conduct and the interim policy. On February 20, 1989, a Special Career Review Board which was convened to consider her case recommended that she be served with a notice of intent to recommend release in accordance with the interim policy. This recommendation was accepted on April 19, 1989.

Special Career Review Board Report, Case Book, Vol.VIII, pp.1165-1166.

19. On May 24, 1989, Douglas received a written notice, dated May 16, 1989, of intent to recommend her release from the CF under Item 5(d) because of her admitted homosexual activities contrary to the CF's interim policy. In a memorandum dated June 5, 1989, Douglas advised that it was her intention to accept a release under Item 5(d). She confirmed this in writing on June 8, 1989. Since Douglas did not object, the Special Career Review Board accepted her release on June 21, 1989.

Notice of Intent to Recommend Release, Case Book, Vol.VIII, p.1178.

Memorandum dated June 5, 1989, Case Book, Vol.VIII, p.1177.

Memorandum dated June, 1989, Case Book, Vol.IX, pp.1246-1247.

20. In the meantime, the Director of Security Clearances had reviewed Col. Desloges' report on the security clearance interview, and concluded that the security concerns had not been resolved. In particular, Col. Desloges did not understand the gravity of Douglas accessing Turpin's file, and Douglas admitting that she had been

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emotionally used. Therefore, the Director decided to place the file before the Security Clearance Review Board.

Testimony of Lt. Col. Jones, Case Book, Vol.I, p.134.

21. The Security Clearance Review Board is composed of five officers who review, in advance of their meeting, a security clearance file containing all supporting documents, such as Military Police reports, polygraph reports, the base commander's report and the senior officer interview report. When the Board convenes, each member expresses their views with respect to security concerns, and a vote is taken regarding the disposition of the case.

Testimony of Lt. Col. Jones, Case Book, Vol.I, pp.103-113.

22. The Security Clearance Review Board met on April 4, 1989 to consider Douglas' case. After discussing all of the security concerns, the 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 discussions of the Board members took approximately thirty to forty minutes. Neither Douglas nor Col. Desloges was present. The Board's recommendation was approved by the Chief of the Defence Staff on April 17, 1989, and on April 20, 1989 Douglas was advised that her security clearance had been revoked.

Security Clearance Review Board Case Summary and Recommendations, Case Book, Vol.VIII, pp.1128-1131.

Message dated April 20, 1989, Case Book, Vol.VIII, pp.1132-1133.

Testimony of Lt. Col. Jones, Case Book, Vol.I, pp.135-144 and 151, and Vol.II, pp.215-219.

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23. A Career Review Board was subsequently convened by the Director of Personnel Careers to consider the effect that the revocation of her security clearance would have on Douglas' career and employment. The Board recommended that she be released from the CF since she was not employable due to the loss of her security clearance. This recommendation was approved on June 16, 1989.

Decision Slip of Career Review Board, Case Book, Vol.IX, p.1240.

Testimony of Col. Hirter, Case Book, Vol.II, p.254.

24. In all cases where a security clearance is revoked, the CF advises the person concerned that he or she has a right to appeal the Security Clearance Review Board's decision to the SIRC. Accordingly, on July 7, 1989, a message requested that Douglas be advised of her right of appeal to the SIRC. This request was made as a routine matter, and without considering the specific statutory jurisdiction of the SIRC. The message also noted that Douglas' release as the result of other circumstances would proceed.

Message dated July 7, 1989, Case Book, Vol.V, p.673.

Testimony of Col. Hirter, Case Book, Vol.II, pp.256-257 and 316-317.

25. On July 19, 1989, Douglas' retirement leave commenced. She was released under Item 5(d) pursuant to the CF's interim policy regarding homosexual activity, and not because of the loss of her security clearance.

Message dated June 29, 1989, Case Book, Vol.VIII, p.1189.

Testimony of Col. Hirter, Case Book, Vol.II, pp.255-256.

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(E) S.I.R.C. Proceedings

26. By letter dated August 6, 1989, Douglas filed a complaint with the SIRC regarding the denial of her security clearance. DND was advised by the SIRC of this complaint by letter dated August 14, 1989.

Letter dated August 6, 1989, Case Book, Vol.V, p.658.

Letter dated August 14, 1989, Case Book, Vol.IX, p.1220.

27. DND advised the SIRC by letter dated August 28, 1989 that it would be contesting the SIRC's jurisdiction to deal with Douglas' complaint because she was released in accordance with the CF's interim policy regarding homosexual activities, rather than by reason only of the denial of a security clearance. By letter dated September 27, 1989, the SIRC requested written representations from the parties with respect to its jurisdiction to investigate the complaint.

Letter dated August 28, 1989, Case Book, Vol.X, pp.1389-1390.

Letter dated September 27, 1989, Case Book, Vol.V, pp.659-660.

28. DND made written representations with respect to the jurisdictional issue by way of a letter dated October 20, 1989, reiterating that Douglas had not been released by reason only of a denial of a security clearance. Furthermore, it was submitted that her acceptance of her release pursuant to the CF's interim policy constituted recognition that she was not released solely because of a denial of security clearance. Her counsel also

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made written representations to the SIRC regarding the jurisdictional issue by letter dated October 17, 1989.

Letter dated October 17, 1989, Case Book, Vol.V, pp.666-671.

Letter dated October 20, 1989, Case Book, Vol.V, pp.661-665.

29. By letter dated October 24, 1989, the SIRC rendered its decision that it had jurisdiction to investigate Douglas' complaint. The SIRC found that the decision to adversely affect Douglas in her employment came about through a series of events which, taken together, supported the SIRC's jurisdiction. First, she was transferred from SIU to CFB Toronto in August, 1988 for security reasons. Secondly, she was advised on April 20, 1989 that her security clearance had been revoked. Third, on May 16, 1989 she was given notice of the CF's intention to recommend her release. Finally, on July 10, 1989 a message was sent requiring that she be informed of her right to appeal the change in her security clearance to the SIRC. Her right to file the complaint was held not to be affected by her release from the CF in July, 1989.

Letter dated October 24, 1989, Case Book, Vol.V, pp.674-676.

30. On March 29, 1990, DND sought a writ of prohibition in the Federal Court Trial Division, to prevent the SIRC from investigating Douglas' complaint on the basis that it lacked jurisdiction. The Honourable Mr. Justice Cullen dismissed the motion, having found that a decision as made to transfer Douglas from a sensitive post with the SIU requiring a high security clearance, to the post of Base Protocol Officer at CFB Toronto, which required a lesser degree of security clearance, and that the security

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clearance itself was the basis of the transfer. He concluded that the SIRC had not committed an error of law that would justify issuing a writ of prohibition.

Order and Reasons of Cullen J., Case Book, Vol.V, pp.679-690.

31. When the SIRC hearing convened, and again during oral argument at its conclusion, DND repeated its argument that the SIRC did not have jurisdiction over this complaint. The SIRC concluded that the jurisdictional issue had been correctly decided on October 24, 1989, since no new facts were presented which would justify a departure from that decision. Furthermore, the SIRC found that the evidence demonstrated that Douglas was transferred from her SIU posting because her commanding officer thought she could not be trusted since she was a homosexual.

SIRC Report, Case Book, Vol.X, pp.1352-1354.

32. In the course of its reasons, the SIRC "strongly suggested" that, in future, Security Clearance Review Board meetings "...should include the individual whose security clearance is being decided and any other witnesses who could contribute to [its] deliberations." The SIRC also "strongly suggested" that in SIU investigations, the questions be prepared by teams composed of one man and one woman, both of whom should be present during questioning, and that due care be given to the dignity and privacy of the individual being investigated.

SIRC Report, Case Book, Vol.X, pp.1383-1384.

33. Counsel for the Respondent argued that the CF's interim policy regarding persons who engage in homosexual activity is unconstitutional because it violates s.2(d) and s.15(1) of the Canadian Charter of Rights and Freedoms, 1982 (the "Charter"). DND

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took the position throughout the hearing that the SIRC did not have jurisdiction to decide this constitutional issue, and that it was limited to investigating the denial of Douglas' security clearance, and making recommendations. Furthermore, the constitutional validity of the interim policy is the subject of a civil action in the Federal Court Trial Division. DND consequently declined to call any evidence under s.1 of the Charter.

Testimony of Col. Hirter, Case Book, Vol.II, pp.280-300.

Legal Argument of the Respondent, Case Book, Vol.IV, pp.598-654.

Statement of Claim, F.C.T.D. No. T-160-90.

34. The SIRC made the following findings in its report:
- (a) Douglas was considered by the SIU to be a threat to the security of Canada simply by reason of the effect of the interim policy regarding persons who engage in homosexual activities;
 - (b) DND did not focus on the interim policy, and did not conduct a proper evaluation of Douglas' loyalty, reliability or suitability to hold a security clearance;
 - (c) DND erred in failing to conclude that the interim policy was inconsistent with s.2(d) and s.15(1) of the Charter and that, to the extent of the inconsistency, the interim policy was of no force or effect, and;
 - (d) Douglas is not a security risk.

SIRC Report, Case Book, Vol.X, pp.1387-1388.

35. The SIRC recommended that:
- (a) Douglas be granted a Top Secret Security clearance retroactive to April 17, 1989 (the date on which it was revoked), and;

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- (b) Douglas be reinstated as an employee of DND with all seniority, benefits, privileges, promotions and compensation that would have accrued had she not been released.

SIRC Report, Case Book, Vol.X, p.1388.

PART II - THE ISSUES

36. The Minister submits that the SIRC exceeded its statutory jurisdiction to investigate complaints with respect to decisions affecting employment which are made "by reason only of the denial of a security clearance". The decisions affecting Douglas' employment were made pursuant to the CF's interim policy regarding homosexual activities, and not solely because of a denial of security clearance.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, s.42(1).

37. The Minister submits that the SIRC exceeded its jurisdiction, and erred in law, by recommending that the Security Clearance Review Board hold oral hearings, that questions be prepared and administered by SIU investigative teams composed of male and female members, and that Douglas be reinstated as an employee entitled to all benefits which would have accrued had she not been released from the CF.

38. The Minister submits that he is not bound by the SIRC's recommendation that Douglas be granted a Top Secret Security clearance retroactive to April 17, 1989, or that she be reinstated by the CF.

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39. The Minister submits that the SIRC exceeded its jurisdiction by finding that DND erred in failing to conclude that its interim policy was inconsistent with s.2(d) and s.15(1) of the Charter and, to the extent of the inconsistency, was of no force or effect.

Canadian Charter of Rights and Freedoms, 1982, ss.2(d) and 15(1).

Constitution Act, 1982, s.52(1).

40. The Minister submits that the SIRC based its decision that Douglas is not a security risk on erroneous findings of fact made without regard for the material before it.

PART III - THE LAW AND ARGUMENT

(A) The CSIS Act

41. The essential principle of statutory interpretation, which has been expressly approved by the Supreme Court of Canada, is that the statute must be read as a whole to determine the intention of Parliament, and the object and scheme of the Act. The words of the specific provision under consideration are then read in their grammatical and ordinary sense, in light of Parliamentary intention, and the object and scheme of the Act. If the words are clear and unambiguous, and in harmony with the intention, object and scheme of the statute, that is the end of the interpretive exercise.

E.A. Dreidger, Construction of Statutes (2nd ed.), 1983 at 105.

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British Columbia v. Henfrey Samson Bellaire Limited, [1989]
2 S.C.R. 24 at 31.

Multiform Manufacturing Co. v. The Queen, [1990] 2 S.C.R.
625 at 630.

42. When interpreting a statute, words should not be added or deleted, nor should the reader try to fill in any gaps which he or she thinks may exist.

Dreidger, supra, at 94.

43. The CSIS Act establishes the Canadian Security Intelligence Service (the "Service") and confers on it the responsibility to collect, analyze, retain and report information and intelligence respecting activities that may reasonably be suspected of constituting threats to the security of Canada. The Service may also provide security assessments to departments of the federal government, and advise Ministers of the Crown on security matters. In certain circumstances, the Service may assist in collecting information or intelligence regarding the capabilities, intentions or activities of foreign states or persons.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, ss.3, 12, 13, 14 and 16.

44. The CSIS Act also establishes mechanisms for judicial control of investigations by the Service, and for the review of the Service's activities. The CSIS Act establishes the SIRC, which is empowered to review the performance of the Service, and to arrange for reviews of specific activities of the Service. The SIRC also has authority to conduct investigations in relation to complaints under s.41 and s.42 of the CSIS Act,

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and in relation to reports on government security or organized criminal matters which are made pursuant to specified statutes.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, ss.21, 30, 34 and 38.

(B) **Jurisdiction to Investigate Complaint**

45. The SIRC's powers and jurisdiction, which are derived solely from statute, include conducting investigations in relation to complaints made under s. 42 of the CSIS Act, which provides in part as follows:

(1) Where, by reason only of the denial of a security clearance required by the Government of Canada, a decision is made by a deputy head to deny employment to an individual or to dismiss, demote or transfer an individual or to deny a promotion or transfer to an individual, the deputy head shall send, within ten days after the decision is made, a notice informing the individual of the denial of the security clearance.

(3) The Review Committee shall receive and investigate a complaint from

(a) any individual referred to in subsection (1) who has been denied a security clearance...[emphasis added]

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss.34, 38 and 42.

46. It is submitted that, reading the CSIS Act as a whole, Parliament's intention was to deal with matters affecting the security of Canada, and the object of the legislation was to establish an accountable system for collection and use of security information. The

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scheme of the statute was to create the Service to perform the function of collecting information, and the SIRC which monitors the work of the Service.

47. It is submitted that, when read in this context and in their ordinary and grammatical sense, the words of s.42(1) establish two preconditions for the SIRC to have jurisdiction to investigate a complaint:

- (a) a decision must have been made to deny employment, dismiss, demote or transfer an individual; and
- (b) the decision must have been made "by reason only" of the denial of a security clearance.

That is, the decision could not have been made for any reason other than, or in addition to, the denial of a security clearance.

48. It is submitted that to permit the SIRC to investigate decisions which were made for other, or additional, reasons would be contrary to Parliament's intention, and to the object and scheme of the Act, which deal solely with national security matters. To do so would also have the effect of deleting the word "only" from s.42(1).

49. Parliamentary debates may be admitted as evidence of the mischief which the legislation is intended to correct. During the deliberations of the Committee on Justice and Legal Affairs, an amendment was proposed to s.42(1) such that it would provide "that where the denial of a security clearance by the Government of Canada is a factor in the decision" then the SIRC would have jurisdiction to investigate a complaint. The amendment was defeated. It is submitted that this is further evidence of Parliament's intention to limit the SIRC's jurisdiction to decisions made solely on the basis of the denial of a security clearance.

Dreidger, supra, at 156.

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Argument on behalf of DND, Case Book, Vol.IV, p.527.

50. It is submitted that the decision to recommend Douglas' release was made by reason of her admitted homosexual activities, contrary to the CF's interim policy. It is further submitted that Douglas acknowledged this was the reason for her release when she accepted release under Item 5(d).

Notice of Intent to Recommend Release, Case Book, Vol.VIII, p.1178.

51. It is submitted that the decision to remove Douglas from her position at the SIU and post her as Base Protocol Officer at CFB Toronto was not made by reason only of the denial of a security clearance. Rather, the Commanding Officer of the SIU was concerned that she would be unable to perform her functions, which included investigating allegations of homosexual activity. Furthermore, the Change of Circumstances Report which was prepared at the time indicated there was no need to alter Douglas' security clearance, and she retained her Top Secret clearance until April, 1989.

Change of Circumstances Report, Case Book, Vol.VIII, p.1085.

Letter dated September 7, 1988, Case Book, Vol.VIII, pp.1152-1153.

Security Clearance Review Board Case Summary and Recommendations, Case Book, Vol.VIII, pp.1128-1131.

52. It is therefore submitted that the SIRC lacked jurisdiction to investigate Douglas' complaint, since the preconditions established in s.42(1) of the CSIS Act had not been met.

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(C) Jurisdiction to Make Recommendations

53. Section 52(2) of the CSIS Act provides as follows:

(2) On completion of an investigation in relation to a complaint under section 42, the Review Committee shall provide the Minister, the Director, the deputy head concerned and the complainant with a report containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, s.52(2).

54. Security in the public service is part of personnel administration, which is the responsibility of each federal government department. The authority to require a security clearance as a condition of employment, and the authority to decide whether a clearance should be granted in a particular case, are part of the management authority conferred upon the deputy head of the department. In the case of the CF, the deputy head is the Chief of the Defence Staff.

Lee v. Attorney General of Canada, [1981] 1 F.C. 713 (C.A.) at 728-729; approved at [1981] 2 S.C.R. 90 at 95-97.

Testimony of Lt. Col. Jones, Case Book, Vol.I, pp.101-102.

Security Policy of the Government of Canada, Case Book, Vol.V, pp. 753 and 763, and Vol.VI, pp.845-862.

55. Employees who are required to access classified information must be assessed for loyalty to Canada and reliability. The Service conducts, and reports on, investigations as requested by federal government departments to assist the departments in evaluating the employee. If doubt arises as to the person's suitability to access classified material, the department may ask the Service to conduct further investigations.

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The Service does not decide whether the employee should be granted a security clearance. This decision is made exclusively by the department.

Security Policy of the Government of Canada, Case Book, Vol.V, pp. 746-767, and Vol.VI, pp.845-862.

56. The primary focus of the SIRC's activities is to review the work of the Service. Sections 38 and 42 of the CSIS Act provide that the SIRC shall investigate complaints of persons who are denied employment by reason only of the denial of a security clearance. It is submitted that the SIRC's role in conducting these investigations is to review the investigations and assessments of the Service, not the actions of the department which requested the information, nor those of the deputy head who made the decision to deny the security clearance.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, ss.38 and 42.

57. It is therefore submitted that the SIRC exceeded its jurisdiction when it recommended that the Security Clearance Review Board hold oral hearings, that questions be prepared and administered by SIU investigative teams composed of male and female members and that Douglas be reinstated by the CF. All of these were internal matters of the CF, having nothing whatever to do with the activities of CSIS.

58. It is further submitted that the SIRC's recommendation concerning oral hearings constituted an error of law. It is submitted that the deliberations of the Security Clearance Review Board are administrative, (rather than judicial) in nature, and there is consequently no requirement for an oral hearing.

M.N.R. v. Coopers & Lybrand, [1979] 1 S.C.R. 495.

Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643.

59. It is submitted that Douglas was treated fairly in that she knew of the security concerns which had been raised, having been advised of them by SIU investigators during the personnel security investigation interviews in December, 1988, and by her Base Commander during his security clearance interview in February, 1989. She had ample opportunity to answer those concerns during the interviews and, in addition, her Base Commander submitted a lengthy written report which was highly supportive of her. All of this material was before the Board during its deliberations. It is therefore submitted that any administrative duty of fairness which the Board may be required to observe was discharged.

Testimony of Lt. Col. Jones, Case Book, Vol.I, pp.103-113.

Personnel Security Investigation Report, Case Book, Vol.VIII, pp.1102-1107.

SIU Polygraph Examination Report, Case Book, Vol.VIII, pp.1108-1109

Report of Col. Desloges, Case Book, Vol.VIII, pp.1114-1122.

(D) Effect of Recommendations

60. Section 52(2) of the CSIS Act provides that on completion of its investigation, the SIRC is to provide to the Solicitor General, the Director of the Service, the deputy head and the complainant a report containing any recommendations that the Committee considers appropriate.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, s.52.

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61. It is submitted that nothing in the CSIS Act indicates a Parliamentary intention to relieve deputy heads of their statutory responsibility for management and direction in relation to security clearances, and to place that responsibility with the SIRC. To find that recommendations of the SIRC are binding on the Chief of the Defence Staff would have this effect.

62. The word "recommendation" is defined in a variety of ways, but never in the sense that the communication is binding on the person to whom it is sent. The correlative word in the French version of s.52(2) is "recommandations", which is defined in a manner suggesting advice. It is submitted that by using the word "recommendations", Parliament expressed its intention that communications of the SIRC to a deputy head not be binding in nature.

Shorter Oxford English Dictionary, 3rd ed. Vol.II.

Grand Dictionnaire Encyclopédique Larousse, Tome 8
(Librairie Larousse, Paris, 1986).

63. It is submitted that if Parliament intended that the SIRC have power to make a binding decision on whether to grant a security clearance, either that power would have been expressly vested in the SIRC, or the CSIS Act would have provided for one recommendation directed to only the deputy head and the complainant.

64. Section 113(1) of the Public Service Staff Relations Act provides that statutory provisions are not to be construed so as to require an employer to act in a manner which is contrary to any instruction or direction made by the Government of

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Canada in the interest of the safety and security of Canada. The Security Policy of the Government of Canada is such an instruction or direction. It is submitted that the effect of s.113(1) is that the mandate of the deputy head to issue security clearances remains unimpaired, and that he is free to accept or reject the recommendation of the SIRC.

Public Service Staff Relations Act, R.S.C. 1985, c.P-35, s.113(1).

Lee v. A.G. of Canada, *supra*, at 728-732 (C.A.).

65. It is therefore submitted that the recommendations of the SIRC are not binding on a deputy head and that the deputy head, in this case the Chief of the Defence Staff, may render a decision contrary to the SIRC's recommendations.

Cardinal v. Director of Kent Institution, *supra*, at 656 and 661.

Canada v. Canadian Tobacco Manufacturers' Council, [1986] 2 F.C. 247 (C.A.) at 257 and 263.

But see: Thomson v. Canada (Deputy Minister of Agriculture), [1988] 3 F.C. 108 (C.A.); [1989] 1 F.C. 86 (T.D.); [1990] 2 F.C. 820 (C.A.); leave to appeal to S.C.C. granted January 25, 1991.

(E) **Jurisdiction to Decide Constitutional Issue**

66. An administrative tribunal has jurisdiction to decide whether a provision of its enabling statute is unconstitutional if it has jurisdiction over:

- (a) the parties;
- (b) the subject matter, which is the issue of whether the legislative provision in question is unconstitutional; and,

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- (c) the remedy sought, which is a remedy that requires the tribunal to disregard the impugned provision.

Douglas College v. Douglas/Kwantlen Faculty Assoc. (1990), 77 D.L.R. (4th) 94 (S.C.C.).

Cuddy Chicks Limited v. Ontario Labour Relations Board, unreported, released June 6, 1991 (S.C.C.).

Canada Employment and Immigration Commission v. Tétreault-Gadoury, unreported, released June 6, 1991 (S.C.C.).

67. A tribunal may also be called upon to decide the constitutional validity of a provision in a statute other than its enabling legislation, but only if this is necessary in order to dispose a matter which is properly before it. It is submitted that the same test and analytical structure apply to a constitutional challenge to a collateral statute, as apply to challenges to provisions of the tribunal's enabling legislation.

Taylor & Son Ltd. v. Barnett, [1953] 1 All E.R. 843 (C.A.)

McLeod v. Egan, [1975] 1 S.C.R. 517.

68. If the tribunal has express statutory authority to interpret and apply law which is necessary to resolve matters properly before it, then it will have jurisdiction over the subject matter of constitutional validity, and authority to grant a remedy which requires it to ignore the impugned provision.

Douglas College, *supra*.

Cuddy Chicks, *supra*.

69. If the statute does not grant express authority to interpret and apply the law, then the statutory scheme must be reviewed to ascertain whether the legislature intended to confer such authority on the tribunal. The factors to be taken into account include:

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- (a) whether another level of administrative appeal exists which has express statutory authority to decide legal issues;
- (b) whether the purpose for which the tribunal exists, such as speedy disposition of a large volume of cases, would be defeated by the added burden of carefully considering constitutional issues; and,
- (c) whether the nature of the administrative procedure will be compromised by consideration of constitutional issues, as it would be if a tribunal structured to perform administrative tasks were turned into an adjudicative body by considering such issues.

Tétreault-Gadoury, supra.

70. It is submitted that it was unnecessary for the SIRC to consider the constitutional validity of the CF's interim policy in order to dispose of the matter before it. While the investigation pursuant to the interim policy precipitated a security investigation, the SIRC had no need to inquire into the constitutional issue in order to decide whether the denial of Douglas' security clearance was appropriate.

71. If the constitutional validity of the CF's interim policy was properly before the SIRC, then the tests enunciated by the Supreme Court of Canada apply. On the first of these tests, it is submitted that the SIRC does not have jurisdiction over the parties to this complaint, since the statutory preconditions to jurisdiction which are set out in s.42(1) of the CSIS Act have not been fulfilled. (See paragraphs 45-52 above.)

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, s.42(1).

72. With respect to the requirements that the tribunal have jurisdiction over the subject matter and the remedy sought, the SIRC does not have express statutory authority

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to interpret and apply the law. It is submitted that a review of the statutory scheme indicates that Parliament did not intend that the SIRC be empowered to interpret and apply the law.

73. While there is no administrative appeal from the SIRC's report, it is submitted that the function, responsibilities and administrative structure of the SIRC indicate that it was intended to perform the exclusively administrative tasks of monitoring the Service and engaging in fact-finding investigations with respect to the Services' activities. It is further submitted that full consideration of constitutional issues would defeat the SIRC's purpose, and fundamentally alter the nature of its process by turning it into an adjudicative body.

Canadian Security Intelligence Service Act, R.S.C. 1985, c.C-23, ss.34-55.

74. It is further submitted that, if the SIRC had jurisdiction to decide whether the CF's interim policy violated s.2(d) and s.15(1) of the Charter, then the Minister ought to be afforded an opportunity to constitute a record of evidence with respect to s.1 of the Charter. Throughout the hearing, DND took the position that the SIRC had no jurisdiction to decide the constitutional issue, and accordingly declined to call s.1 evidence. It is inappropriate to decide a constitutional issue of this magnitude without a properly and fully constituted record, such as will be before the Trial Division in an action between the same parties, which squarely raises the constitutional issue.

MacKay v. Government of Manitoba, [1989] 2 S.C.R. 357.

(F) **Findings of Fact**

75. The SIRC made the following findings of fact in its report:

- (a) Douglas became a possible threat to the security of Canada simply by reason of the effect of the CF's interim policy regarding homosexual activities;
- (b) DND did not conduct a proper evaluation of Douglas' loyalty or reliability, and did not consider her suitability to hold a security clearance in a proper manner; and,
- (c) Douglas is not a security risk.

Report of the SIRC, Case Book, Vol.X, pp.1387-1388.

76. It is submitted that the SIRC made these findings of fact in a perverse or capricious manner, or without regard for the material before it. The security investigation was triggered by a Change of Circumstances Report recording Douglas' admission of homosexual activities contrary to the CF's interim policy. However, the SIRC's findings ignore the evidence that the security investigation revealed breaches of basic principles governing access and release of classified information, in which Douglas was fully trained.

Personnel Security Investigation Report, Case Book, Vol.VIII, pp.1102-1107.

Change of Circumstances Report, Case Book, Vol.VIII, p.1085.

77. The SIRC's findings also ignore other security concerns identified through interviews with Douglas, including her acknowledgement that Turpin had emotionally manipulated her into breaching basic security principles. It is submitted that the SIRC focused its attention on the CF's interim policy regarding homosexual activities and, in so doing, chose to ignore or disregard legitimate security concerns identified by the Director of Security Clearances.

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Personnel Security Investigation Report, Case Book, Vol.VIII,
pp.1102-1107.

Security Clearance Review Board Case Summary and
Recommendations, Case Book, Vol.VIII, p.1129-1131.

PART IV - ORDER SOUGHT

78. It is therefore submitted that this Honourable Court make an order setting
aside the report of the SIRC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF
JULY, 1991.

Debra M. McAllister
of Counsel for the Applicant

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