Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Court File No.: T-160-90

B E T W E E N:

MICHELLE DOUGLAS

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT

MacKAY, J.

In this action, commenced by Statement of Claim filed in January, 1990, the plaintiff claims damages and declaratory relief following her severance from the Canadian Armed Forces in which she had formerly served as an officer.

Shortly before trial of the action was scheduled to commence the parties through counsel agreed on settlement of the matter including the terms of a declaratory judgment relating in part to the relief claimed by the plaintiff. The draft judgment as agreed upon between them was presented to me at the hearing scheduled for the trial and after brief consideration I signed that judgment as presented and requested by the parties.

I did not render oral reasons at the time. However, because the circumstances are somewhat unusual, because the judgment might hereafter

be given more significance than a resolution between parties ordinarily warrants, and because the process raises an issue of policy where *Charter* questions are raised, these Reasons are now recorded and filed.

The plaintiff joined the Armed Forces on November 26, 1986 as a direct entry officer. In the following March she graduated from basic training at the top of her class, received a senior parade appointment and was promoted to the rank of 2nd Lieutenant. From March to August 1987 she successfully completed French language training, and in September she was posted to the Military Police following her earlier top secret security clearance, essential for that posting. From November 1987 to May 1988 she was posted to basic security officer training, a course from which she graduated first in her class. She ought then to have been appointed to the rank of 1st Lieutenant but was not at that time, the defendant says by a mere oversight. In June 1988 she was assigned to central detachment of the Special Investigations Unit as an operations officer. In late June and July of that year she was interviewed on more than one occasion by senior officers concerning her sexual orientation and in July she admitted she was a lesbian, after having earlier denied this. She was then transferred from the Military Police and was transferred to Toronto as base protocol officer/information officer/co-ordinator of official languages.

In February 1989 a special career review board was convened to consider the effect on her career of her admission of having engaged in homosexual activities. That Board's recommendation that she be released from the Canadian Armed Forces, in accordance with the Forces' interim policy then applicable, was accepted by the Forces on April 19, 1989. Then on May 16 the plaintiff was given notice of intent to recommend her release

from the Canadian Forces because of her admitted homosexual activities, in accordance with the then interim policy of the Forces.

That interim policy applicable at the time provided that administrative action might be taken to release a member of the Canadian Forces who acknowledges that he or she is a homosexual and the member concerned does not object to being released. If the member did not agree to be released he or she would be retained with career restrictions which, in the plaintiff's case, would have meant she was ineligible for promotion, for conversion of her existing terms of service, for posting outside the geographic area, for transfer to the reserve force or for any further qualification courses or training except that required to carry out restricted employment.

The policy applicable in the Canadian Armed Forces is described in the Statement of Claim, and admitted by the Statement of Defence filed on behalf of Her Majesty the Queen, in the following terms.

> 15. The Canadian Armed Forces Administrative Order (CFAO) 19-20 provides in paragraph 7 thereof:
>
> > "Service policy does not allow homosexual members or members with a sexual abnormality to be retained in the CF."
>
> and further provides in paragraph 8 thereof that in such a case a member is to be released under Item 5(d) of the table to Queen's Regulations and Orders (Q.R.+ O.) 15.01, made pursuant the National Defence Act.
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> 16. Item 5(d) of Q.R.+ O. 15.01 is a category under "Reasons for Release" headed "Not Advantageously Employable". The "Special Instructions" incorporated as part of Item 5(d) of Q.R.+ O. 15.01 indicate that this item:
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> > "applies to the release of an officer or man because of an inherent lack of ability or aptitude to meet military classification or trade standards, or who is unable to adapt to military life; or who, either wholly or chiefly because of the conditions of military life or other factors beyond his control, develops personal weaknesses or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces."
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> 17. On the 11th of February, 1987 CFAO 19-20 was modified to provide that if a member of the Canadian Forces refuses to take a release under Item 5(d) of Q.R.+O. 15.01 then that member will be retained "with career restrictions" in the Canadian Forces while the policy is being reviewed. As a career restricted officer the Plaintiff would have been ineligible for promotion,

> conversion of her present terms of service, posting outside the geographic area or transfer to the Reserve Force. In addition she would have been ineligible for further qualification courses or training except that required for her to carry out restricted employment.

While her release from the Forces because of engaging in homosexual activities was under consideration, a separate investigation was initiated with respect to the plaintiff's security clearance. This was initiated because it was believed the plaintiff accessed and reviewed a classified report and divulged information regarding the contents of the report, contrary to security procedures. On April 4, 1989 a security clearance review board recommended that, because of a demonstrated disregard for security regulations and apparent strong loyalty to members of the homosexual community, the plaintiff be denied any level of security clearance. This recommendation was approved on April 17 and on April 20 the plaintiff was advised that her security clearance had been revoked. On May 25 a career review board was convened to consider the effect of this decision on the plaintiff's career and it recommended that she be released from the Canadian Forces since she was not employable because of the loss of her security clearance, a recommendation approved on June 16, 1989. No action was taken directly in relation to this recommendation since the plaintiff was then in the process of being released pursuant to the Canadian Forces interim policy.

On June 8, 1989 the plaintiff, in writing, indicated her acceptance of release from the Canadian Forces but noted

> the inability of the CF to clearly define an equitable policy on homosexuality, and the decision to invoke 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.

The plaintiff was released from the Armed Forces on August 20, 1989. About a month prior to her release she was promoted to the rank of Lieutenant with a retro-active pay increase effective May, 1988, when she ought to have been promoted.

This review of the facts I draw from the pleadings. In the Statement of Claim filed in the action the plaintiff claimed general damages, punitive or exemplary damages and declaratory relief. Three declarations were sought, first, that the plaintiff's rights as provided in the *Charter* and in particular, subsections 2(b) and (d) and subsection 15(1) and section 7 have been denied by the defendant; secondly, that the defendant's policies and practices with respect to homosexuality and homosexuals in the Canadian Armed Forces are contrary to the *Charter*; and thirdly, that the defendant is to adopt and carry out policies and practices which do not discriminate against homosexuals in the Canadian Armed Forces.

By the Statement of Defence filed March 21, 1990, on behalf of the defendant Her Majesty the Queen, the Deputy Attorney General of Canada admits that the Canadian Forces are subject to the requirements of the *Canadian Charter of Rights and Freedoms, 1982*. He denies that the Forces' interim policy and actions infringe the plaintiff's rights and freedoms pursuant to those sections of the *Charter* identified by the plaintiff, and submits that in the alternative if the Forces' policy and actions have infringed the plaintiff's rights and freedoms pursuant to the *Charter*, then "they constitute a reasonable limit which is demonstrably justified in a free and democratic society under s. 1 of the Charter".

In April 1992, trial of the action was scheduled, on the joint application of counsel, to commence October 26, 1992, and it was expected to last some 15 days. In September 1992, counsel for the plaintiff filed a Notice of Constitutional Question, indicating that the plaintiff intended to question the constitutional validity of an administrative order of the Canadian Forces, and also of section 39 of the *Canada Evidence Act* under which it was said the defendant had withheld disclosure of material relevant to this action on the

basis of Cabinet privilege. That notice was addressed to the Attorney General of Ontario, the Attorney General of Canada and to counsel for the defendant, Her Majesty the Queen.

One week before trial was scheduled to commence counsel for the parties advised the Court that they expected this action would be settled on agreed terms, which it was proposed would not become part of the record except for a judgment which might include declaratory relief. Arrangements were made for counsel to meet with me on October 27. The previous afternoon a proposed draft judgment was submitted to me with a covering letter indicating that the terms of the draft judgment were agreed upon.

The Court convened on October 27, in open court, with counsel for the parties and members of the public in attendance. Counsel advised me formally that issues between the parties had been settled on terms that it was agreed would not be part of the public record of the Court, except for a judgment, the terms of which were agreed on between the parties and which was submitted to the Court. The draft judgment as presented made no reference to consent of the parties or to their agreement to settle matters between them. I raised with counsel whether it would be appropriate to insert in the judgment reference to consent of the parties, a reference I would ordinarily include where the parties requested a judgment on agreed terms. After consultation between themselves, I was advised by each of counsel that it was appropriate the judgment be signed in the form in which it had been presented, which reflected the terms of a part of the settlement between them. I considered the matter briefly and then signed the judgment as presented, without making reference to consent of the parties.

The judgment as signed provides as follows:

> This Court doth order and adjudge that the said plaintiff shall be granted by the Court:
>
> (a) A declaration that the plaintiff's rights, as provided for in the Canadian Charter of Rights and Freedoms ("the Charter") and in particular s. 15(1) thereof, have been denied by the defendant; and
>
> (b) A declaration that the defendant's policy and any interim policies that have evolved regarding the service of homosexuals in the Canadian Armed Forces are contrary to the Charter.

By its terms the judgment grants to the plaintiff two declarations. The first is that her rights under the *Charter*, in particular s. 15(1) have been denied by the defendant. The second goes beyond the rights claimed by the plaintiff and declares the defendant's policies regarding service of homosexuals in the Canadian Armed Forces to be contrary to the *Charter*. I note that both declarations are within the scope of somewhat wider declaratory orders sought as relief by the plaintiff's Statement of Claim.

It should be understood that this judgment binds the parties only, and then only in relation to the issues as they were raised in this action and settled by the terms of the judgment as agreed upon. Legally the declarations included have no effect for any other claims by other parties. This is, of course, the result of any judgment rendered, whether or not that be at the request of both parties or expressed to be on their consent, though this may not always be understood by the interested observer.

The manner in which the claims here raised were resolved leaves open for debate an issue of policy. In the ordinary course of settlement of issues that are the subject of litigation between private parties the court called upon to play a role in that settlement by pronouncing a judgment on consent of the parties does not look beyond the terms of judgment agreed upon, provided the relief granted is within the scope of that prayed for in pleadings and might have been granted after trial of the action. If that is the case, the court does

not have any duty to question a consent by the parties to the judgment, even where the Crown is one of the parties represented by its legal advisors (*Galway v. M.N.R.*, [1974] 1 F.C. 600 (C.A.), reconsidering [1974] 1 F.C. 593 (C.A.)). Rule 340 of this Court's Rules provides that where there is an attorney or solicitor on the record for the defendant, no judgment shall be given by consent unless the consent of the defendant is given by that attorney or solicitor. That Rule was met on this occasion with the joint submission of counsel for both parties that judgment be granted in the terms agreed upon between them. The only other limitation on possible judgments on consent, apparent from some of the jurisprudence of this Court, concerns consent judgments against the Crown for the payment of money, including judgments in relation to the amount of compensation to be paid under the *Expropriation Act*, where cases suggest that at the very least the Court should be satisfied that the facts and the law warrant the conclusion represented by the judgment (See, e.g. *Elliott v. The Queen* (1979), 17 L.C.R. 97 (F.C.T.D.); *R. v. Stevenson Constr. Co.*, [1979] C.T.C. 86, 79 D.T.C. 5044, 24 N.R. 390 (F.C.A.); *Brougham Sand & Gravel Limited v. The Queen*, [1977] 1 F.C. 655, 11 L.C.R. 316 (T.D.)).

In an action for a declaration and other relief against federal government officers, where counsel jointly submitted a proposed consent judgment for a declaration that a long standing renewable contract concluded by a Minister of the Crown, and an order in council approving that agreement, were invalid as beyond the statutory authority of the Minister and the Governor in Council, I ordered that detailed written submissions of counsel for the Crown that supported the conclusion set out in the judgment be signed and filed as admissions. In that case the application for judgment was pursuant to Rule 341, providing for such an application in respect of any matter upon any admission in the pleadings or other documents filed in the Court. Because of the terms of that Rule and because the contract in

question was between the Minister and a third party, who had notice but was not represented at the hearing, it seemed to me important that the Court's record be complete by filed admissions on behalf of the respondents that supported the conclusions of the judgment granted on consent (*Canadian Parks and Wilderness Society v. Superintendent of Wood Buffalo National Park et al.*, (Unreported, Court file T-272-92, June 12, 1992)).

That case involved an issue of public law. So also does this case, but here the issue concerns the *Canadian Charter of Rights and Freedoms*. The process in this case and the judgment now rendered resolve difficult issues on which opinion among members of the public appears deeply divided, essentially on the basis of a decision made by the executive branch of government in relation to a claim by one citizen. There is no decision of Parliament to be assessed. There is no considered decision by this Court after adjudication of facts and argument in relation to the *Charter*. Whether the process here followed is appropriate in resolving *Charter* issues, even though the resolution and the judgment rendered are technically binding only for the benefit of the plaintiff, is an issue open for debate that may yet require appropriate refinement.

In *Muldoon and Teitlebaum v. Canada* (1988), 21 F.T.R. 154, the applicants sought a declaration that the prohibition against voting by judges included in the *Canada Elections Act* was of no force and effect in light of section 3 of the *Charter*. The Deputy Attorney General on behalf of Her Majesty admitted all facts alleged and conceded that the prohibition was not defensible under section 1 of the *Charter* and that the plaintiffs were entitled to the declaration sought. Mr. Justice Walsh granted declaratory relief sought after raising and discussing issues that, in his view, were relevant. He concluded (at p. 158 21 F.T.R.):

> . . .the granting of declaratory relief is discretionary. It should not, however, lightly be refused when there is agreement between the parties that it should be granted unless the court finds that to do so, would not be justified by the facts or would constitute a miscarriage of justice. I cannot so find on the facts before me in the present case. It could well have been decided either way had there been a full contestation.

Of course, the *Charter* issue in that case differs from those raised in this one. In *Muldoon* the issue was whether an express statutory prohibition from voting by judges appointed by the Governor in Council was valid in light of section 3 of the *Charter* which provides that "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly...". Here the policies and actions taken under them which give rise to the plaintiff's claims for relief are not directly dealt with by express words of the *Charter*, in particular subsection 15(1) which provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

There are recent decisions in this Court and others which deal with treatment of persons with an admitted homosexual orientation differently from others, under federal laws, in light of subsection 15(1) of the *Charter*. In *Veysey v. Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321, (1989) 29 F.T.R. 74 (T.D.), Mr. Justice Dubé held that refusal to accord visiting privileges to the homosexual partner of a prisoner under a Private Family Visiting Program established by a Commissioner's Directive for the Penitentiary Service was an infringement of equality rights as a result of discrimination on a ground analogous to those prohibited under subsection 15(1) of the *Charter*. That refusal infringed the applicant's rights under subsection 15(1) in a manner not established as permissible within section 1 of the *Charter*. On appeal the relief granted, *certiorari* and *mandamus*, was upheld and the appeal dismissed, on other grounds. In its Reasons the Court of Appeal noted that counsel for the appellant had formally advised that the

Attorney General of Canada took the position that sexual orientation is a ground covered by section 15 of the *Charter*, an admission not made before the trial judge. (*Veysey v. Correctional Service of Canada* (1990), 109 N.R. 300 at 304 (F.C.A.).)

In *Canada (Attorney General) v. Mossop*, [1991] 1 F.C. 18 (C.A.) (leave granted to appeal, Jan. 25, 1991, S.C.C. Bulletin p. 157 No. 23145), the Court of Appeal set aside a decision of a tribunal appointed under the *Canadian Human Rights Act* which had found that failure to accord bereavement leave to a person in a continuing homosexual relationship on the same basis as provided to a person in a heterosexual spousal relationship constituted discrimination proscribed in relation to "family status" under that *Act*. The Court declined to consider that limiting "family status" as excluding homosexual relationships, constituted discrimination prohibited under the *Act*, which did not expressly prohibit discrimination on grounds of sexual orientation. Assuming (without deciding this issue) that discrimination on the basis of sexual orientation was prohibited under subsection 15(1) of the *Charter*, the Court found this would not permit reading into the *Human Rights Act* such a proscription which that *Act* did not include.

In *Egan v. Canada*, [1992] 1 F.C. 687 (T.D.) Mr. Justice Martin dismissed an application for a declaration that the *Old Age Security Act*, was unconstitutional. Its limitation of a spouse's allowance to a person of the opposite sex living with another if the two have publicly represented themselves as husband and wife, which was found to exclude persons living in a continuing homosexual relationship as well as other persons living together, was found not to be discriminatory on the basis of sex or sexual orientation within subsection 15(1). Martin J. found that *Act* did not infringe the

plaintiffs' subsection 15(1) rights for it was not discriminatory within the meaning of subsection 15(1).

In *Neilsen v. Canada (Human Rights Commission)*, [1992] 2 F.C. 561 (T.D.) Mr. Justice Muldoon declined to issue orders in the nature of *certiorari* and *mandamus* in relation to action by the Human Rights Commission to suspend investigation or hearing of a complaint of discrimination in employment on the grounds of sex, sexual orientation, marital status and family status. The Commission had held action on the complaint pending determination by the Supreme Court of Canada in *Mossop, supra,* whether the Commission's jurisdiction should be interpreted to proscribe discrimination on grounds of sexual orientation. The *Canadian Human Rights Act* did not, and does not now, expressly prohibit discrimination in employment on grounds of sexual orientation. The relief sought required the reading into, or interpretation of the *Act* as including such a prohibition, a step Muldoon J. declined.

Of particular significance in relation to the judgment here rendered is the decision of the Ontario Court of Appeal in *Haig v. Canada* (1992), 9 O.R. (3d) 495 (Ont. C.A.), decided August 6, 1992. That case concerned the application of the same interim policy of the Canadian Armed Forces as in issue in the action of Ms. Douglas. There the motions judge had allowed an application and granted a declaration that the "absence of sexual orientation from the list of proscribed grounds of discrimination in subsection 3(1) of the *Canadian Human Rights Act* is discriminatory as being contrary to the guarantee of equal benefit of the law set out in section 15 of the *Charter*" (*Haig v. Canada* (1991), 5 O.R. (3d) 245 at 248 (Ont. Gen.Div.) per McDonald J.). On appeal, counsel for the Crown conceded that sexual orientation is an analogous ground to those expressly set out in subsection

15(1) of the *Charter*. The Court of Appeal held that the omission of sexual orientation as a proscribed ground of discrimination under subsection 3(1) of the *Canadian Human Rights Act*, and the resulting failure to provide an avenue for redress, with the possible inference from the omission that discriminatory treatment based on sexual orientation is acceptable, created an effect of discrimination contrary to subsection 15(1) of the *Charter*. The Crown disavowed reliance on section 1 of the *Charter* to support the *Human Rights Act* as enacted. In light of *Schachter v. Canada* (1992), 10 C.R.R. (2d) 1 (S.C.C.) the Court of Appeal found that the appropriate remedy was reading in, which it directed by a declaration that the *Act* be interpreted and applied as though it included sexual orientation as a proscribed ground of discrimination. In effect the Ontario Court of Appeal reached a result that the Federal Court of Appeal declined to reach in *Mossop, supra,* and Muldoon J. declined to reach in *Neilsen, supra*. While I have noted that the same policy of the Canadian Armed Forces in question in *Haig* is the basis of the action by Ms. Douglas, the issues in *Haig* concerned the *Canadian Human Rights Act* which was not raised by the pleadings in this case.

In my view the evolving jurisprudence relating to subsection 15(1) of the *Charter* as it applies to rights claimed by persons of a homosexual or lesbian orientation is by no means settled. In the circumstances of this case, had the trial been held, the Court might have concluded on the basis of the evidence and argument that the relief included in the judgment, rendered on the joint request of the parties, was warranted. Thus, on the basis of facts admitted in the pleadings, evidence adduced at trial, and argument, the Court might well have been persuaded to exercise its discretion to grant the first of the declarations included in the judgment granted, concerning the plaintiff's rights in light of subsection 15(1) of the *Charter*. While the exercise of discretion to grant the second of the declarations might have required more

persuasive argument, for that declaration deals with general policies of the defendant within the Canadian Armed Forces and not merely with the plaintiff's rights as affected by the application of those policies, since the general application of those policies in light of the *Charter* was clearly in issue, the second of the declarations would have been within the Court's discretion to grant after trial, had it been held.

In these circumstances, on the basic facts here admitted, if the plaintiff were successful after trial of the issues, the declarations as granted by the judgment herein are, in my view, supportable in the current state of evolving jurisprudence.

The question of the appropriate role of the executive branch of government, represented by the Attorney General of Canada, in the resolution of *Charter* issues raised in litigation, with particular regard to consenting to judgment, is left for consideration in a case where evolving jurisprudence is even less definitive of the rights in issue, and the judgment sought is more questionable than, in my view, is the case in this action.

OTTAWA, Ontario

December 1, 1992.

W. Andrew MacKay

JUDGE