Federal Court  Cour fédérale

Date: 20160413

Docket: T-1853-15

Citation: 2016 FC 412

BETWEEN:

PRIVATE (RET'D) CORY D. WAGNER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

LAFRENIÈRE P.

[1] This is a motion on behalf of the Respondent pursuant to Rule 369 of the *Federal Courts Rules* for an order to strike the Affidavit of Michel W. Drapeau in its entirety, or in the alternative, striking such parts as seems just to the Court.

[2] By way of brief background, the Applicant filed a Notice of Application on November 3, 2015, seeking judicial review of a decision dated September 25, 2015 of the Chief of Defence Staff, as the Final Authority in the Canadian Forces Grievance System (Final Authority). The decision dismissed the Applicant's grievance with respect to his

compulsory release from the Canadian Armed Forces (CAF) pursuant to article 15.01 of the Queen's Regulations and Orders [QR&Os] under Item 2 – Unsatisfactory Conduct. The Applicant seeks an order quashing the decision and directing the Final Authority to grant him an "honourable release" pursuant to article 15.01 of the QR&Os.

[3] On January 29, 2016, the Applicant filed proof of service of the Applicant's two affidavits served in support of the application - the Applicant's affidavit sworn on January 28, 2016 and the affidavit of Michel W. Drapeau sworn on January 26, 2016 (Drapeau Affidavit). The Respondent filed proof of service of the Respondent's Rule 307 affidavit on February 26, 2016. The Respondent subsequently brought the present motion to strike the Drapeau Affidavit in its entirety or, alternatively, portions thereof.

[4] A preliminary issue to be determined is whether the motion to strike the affidavit should be dealt with in advance of the hearing. Part 5 of the *Federal Courts Rules*, which governs proceedings brought by way of application, does not contain any provision authorizing the striking out of affidavits filed in applications by way of interlocutory motion. Although the Court has a discretionary power to strike affidavits, that power must be exercised sparingly. It is only in exceptional circumstances, where prejudice is demonstrated and the evidence is obviously irrelevant, that this type of motion may be justified: *Canadian Tire Corp v PS Part Source Inc*, 2001 FCA 8 (CanLII).

[5] I conclude that an advance ruling on the issue of admissibility of the Drapeau Affidavit is warranted as the matter is fairly clear-cut and obvious.

[6] The Applicant submits that the Drapeau Affidavit addresses the adverse practical consequences of a dishonourable discharge of a Canadian Forces member, and addresses the arcane workings of military law and policy with respect to compulsory release from service of a member as a dishonourable discharge. According to the Applicant, the primary purpose of the affidavit is to assist the Court in assessing the truth and reliability of the reasons given by the Final Authority for rejecting the Applicant's argument that assigning him a 2(a) release item (dishonourable discharge) fatally compromises his future, including his employability.

[7] Assuming for the purpose of this motion that Mr. Drapeau is an expert in military law, it remains that his interpretation of legislation is not the proper subject of expert evidence. On its face, the first purpose of the Drapeau Affidavit is to set out and interpret certain provisions of the *Code of Service Discipline*, the *National Defence Act* and the QR&Os. The second purpose is to opine about the legal and practical effect of release from the military "that is not honourable." In *Eco-Zone Engineering Ltd. v. Grand Falls - Windsor (Town),* 2000 NFCA 21 (CanLII), 2000 NFCA 21 (*Eco-Zone*), the Newfoundland Court of Appeal held that it was "the long accepted view that courts do not accept opinion evidence on questions of domestic law (as opposed to foreign law)."

[8] Mr. Drapeau's opinion of the practical consequences of legislation is also inadmissible for two reasons. First, the general rule is that evidence that could have been placed before the administrative decision-maker, here the Final Authority, is not admissible before the reviewing court: *Connolly v Canada (Attorney General),* 2014 FCA 294 (CanLII), 466 NR 44 at paragraph 7. I note that the Applicant filed an affidavit setting out difficulties he experienced in

securing employment after he was released on September 18, 2013. Presumably the impact of a dishonourable discharge personally on the Applicant was presented to the Final Authority before he reached his decision. There is no indication that the Final Authority had the benefit of any expert evidence.

[9] Second, and more importantly, the Federal Court of Appeal in *Brandon (City) v Canada*, 2010 FCA 244 (CanLII), citing with approval the *Eco-Zone* decision, confirmed at par. 27 that "the legal effect of domestic legislation is not a matter of evidence: it is the Court's role to interpret the legislation." Both decisions stand for the principle that courts do not accept expert evidence on the ultimate issue which is for the court to decide.

[10] The statements made by Mr. Drapeau consist of inadmissible legal opinion and argument that ought properly be the subject of legal argument, not evidence. Being substantially in agreement with the written representations filed on behalf of the Respondent, I conclude that striking the affidavit in advance of the hearing would serve the interests of justice and judicial economy. The parties should not be wasting time and resources in cross-examination that will ultimately prove ineffective and in preparing memoranda of fact and law based on plainly inadmissible evidence.

[11] The Drapeau Affidavit shall accordingly be struck in its entirety.

[12] As for the costs of the motion, I note that the Respondent delayed in bringing the present motion to strike the Drapeau Affidavit and only did so after complying with Rule 307 of the *Federal Courts Rules*. Although costs should generally follow the event, I agree with the Applicant that the underlying application raises important issues of disenfranchisement and poverty law. In the circumstances, I conclude that each party should bear their own costs of the motion.

THIS COURT ORDERS that:

1. The motion is granted.

2. The affidavit of Michel W. Drapeau sworn on January 26, 2016 is struck out in its entirety.

3. The parties are granted an extension of time to April 29, 2016 to complete cross-examinations, if any.

4. The Applicant shall serve and file the Applicant's Record within 20 days of completion of cross-examinations, or the expiration of the time for doing so, whichever is earlier.

5. There shall be no order as to costs of this motion.

"Roger R. Lafrenière"
Prothonotary

Vancouver, British Columbia
April 13, 2016

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1853-15
STYLE OF CAUSE:	PRIVATE (RET'D) CORY D. WAGNER v THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369

REASONS FOR ORDER:	LAFRENIÈRE P.
DATED:	APRIL 13, 2016

WRITTEN REPRESENTATIONS BY:

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