

Date: 20080326

Docket: A-585-07

Citation: 2008 FCA 111

Present: SHARLOW J.A.

BETWEEN:

ROBERT ANDREW McBRIDE

Appellant

and

MINISTER OF NATIONAL DEFENCE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 26, 2008.

REASONS FOR ORDER BY:

SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The appellant Robert Andrew McBride seeks an order determining the contents of the appeal book. The appeal is from an order of Justice Barnes of the Federal Court, dismissing Mr. McBride's motion for an order restraining the respondent Minister of National Defence from releasing Mr. McBride from the Canadian Forces. Justice Barnes did not issue separate reasons for his order.

[2] The parties disagree on whether the appeal book should contain the memoranda of fact and law submitted to Justice Barnes. Mr. McBride wants them included in order to support his submission that counsel for the Minister made incorrect factual statements that influenced or may have influenced Justice Barnes. Counsel for the Minister denies making any incorrect factual statements, and argues that any challenge to the factual conclusions underlying the order under appeal will turn on the evidence before Justice Barnes, not the submissions of counsel.

[3] Normally, in an appeal from a decision of the Federal Court, the appeal book does not contain memoranda of fact and law submitted by the parties in the Federal Court because the disposition of the appeal depends on the evidence and the applicable legal principles. It is only in exceptional circumstances that it is relevant in an appeal to know what was argued by the parties in the court below. Such exceptional circumstances may exist if one of the parties knowingly misled the court. Counsel for Mr. McBride argues that this is what happened in this case. Counsel for the Minister argues the contrary.

[4] In these circumstances, it seems to be that the question of the relevance of the memoranda of fact and law should be deferred to the panel disposing of the appeal. I will make an order permitting the memoranda of fact and law to be included in the appeal book, without prejudice to the right of the Minister to argue that they are not relevant to the issues on appeal or that they are not dispositive.

[5] Both parties are seeking the costs of this motion in any event of the cause. In my view, the costs of the motion should be deferred to the panel disposing of the appeal. The parties may address the costs of this motion in their memoranda of fact and law in the appeal.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-585-07

STYLE OF CAUSE: ROBERT ANDREW McBRIDE
v.
MINISTER OF NATIONAL
DEFENCE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: SHARLOW J.A.

DATED: March 26, 2008

WRITTEN REPRESENTATIONS BY:

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V. Anderson FOR THE RESPONDENT

SOLICITORS OF RECORD:

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