

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110511**

**Docket: A-112-11**

**Citation: 2011 FCA 162**

**Present: SHARLOW J.A.**

**BETWEEN:**

**LIEUTENANT-COLONEL R. D. McILROY**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 11, 2011.

**REASONS FOR ORDER BY:**

**SHARLOW J.A.**

Federal Court  
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**REASONS FOR ORDER**

**SHARLOW J.A.**

[1] The appellant Lieutenant-Colonel McIlroy is appealing the dismissal of his application for judicial review of the decision of the Chief of the Defence Staff denying his application for redress of grievance (2011 FC 149). The parties have agreed on the contents of the appeal book, except for two items that Lieutenant-Colonel McIlroy wishes to include over the objections of the respondent, the Attorney General of Canada (the "Crown"). Before me is a motion to determine whether the two disputed items should be included in the appeal book.

[2] One of the disputed items is the affidavit of Brigadier General Robert P. Alden (retired) sworn April 17, 2009 (the "Alden Affidavit"), which was included in Lieutenant-Colonel McIlroy's

application record in the Federal Court. The other is the motion record of the Crown filed in the Federal Court in support of its motion to strike the Alden Affidavit from the Federal Court record in whole or in part.

[3] The Crown's motion to strike the Alden Affidavit was heard with the application for judicial review, and was granted as part of the final judgment for reasons that are set out in paragraphs 49 to 51 of the reasons for judgment:

[49] The Applicant argued the application before me without reference to the Alden Affidavit.

[50] Accordingly, an order will be made allowing the Respondent's motion to strike the Alden Affidavit because it was not necessary for the disposition of this application.

[51] However, the order will be made without prejudice to the Applicant's ability, if so advised, to seek leave to file the Alden Affidavit as fresh evidence on appeal.

[4] One of the many grounds of appeal alleged in the notice of appeal is that the judge erred in striking the Alden affidavit on the basis that it was "not necessary" when its contents are in fact relevant, admissible, and necessary to fully appreciate the military background and context of the matters at issue.

[5] The Crown argues that the Alden Affidavit cannot be relevant to the appeal because it was not before the Chief of the Defence Staff when he made the decision under review, and because the judge did not consider it. These objections ignore the fact that one of the grounds of appeal is that

the judge was wrong in law in striking the Alden Affidavit. That ground of appeal cannot be fairly assessed by this Court without considering the Alden Affidavit.

[6] If, as the Crown suggests, the facts stated in the Alden Affidavit were not before the Chief of the Defence Staff when he made his decision, that is a point that might be argued in support of the judge's decision to strike the Alden Affidavit from the record. However, it cannot be used to stop Lieutenant-Colonel McIlroy from submitting in this Court that the decision to strike the Alden Affidavit was wrong in law.

[7] The Crown argues that Lieutenant-Colonel McIlroy cannot now contend that the Alden Affidavit was admissible and necessary for a fair determination of his application for judicial review because he failed to commence a timely appeal of the decision to strike the Alden Affidavit. That argument is based on the premise that the decision on the motion to strike was an interlocutory judgment. That premise is plainly wrong, and the argument cannot succeed.

[8] The decision to grant the Crown's motion to strike is not an interlocutory judgment – it was not made before the hearing of the application for judicial review as part of the resolution of a pre-hearing dispute. Clearly the Crown would have preferred to have its motion to strike dealt with as a preliminary matter, but that is not how the case unfolded in the Federal Court. Indeed, the Crown brought an interlocutory motion to strike the affidavit but that motion was dismissed by Prothonotary Milczynski without prejudice to the right of the Crown to bring the same motion before the judge hearing the application for judicial review. The Crown's appeal of Prothonotary

Milczynski's decision was dismissed by Chief Justice Lutfy, with costs of \$2,500 payable by the Crown forthwith. That decision was not appealed.

[9] The Crown exercised its right to bring the motion to strike before the judge, so that the decision to grant the Crown's motion was necessarily part of the final judgment. The final judgment was properly appealed by Lieutenant-Colonel McIlroy, including the part of the final judgment striking the Alden Affidavit.

[10] I conclude that the appeal books should contain the Alden Affidavit and the motion record of the Crown filed in the Federal Court in support of its motion to strike the Alden Affidavit. An order will be made accordingly. The appellant is entitled to his costs of this motion in any event of the cause.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-112-11

**STYLE OF CAUSE:** LIEUTENANT-COLONEL R. D.  
MCILROY v. ATTORNEY  
GENERAL OF CANADA

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** SHARLOW J.A.

**DATED:** May 11, 2011

**WRITTEN REPRESENTATIONS BY:**

Lloyd Hoffer

FOR THE APPELLANT

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Stewart Phillips

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