**COURT MARTIAL**

**Citation:** *R. v. Edmunds*, 2016 CM 3008

**Date:** 20160526
**Docket:** 201450

General Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen, Respondent**

- and -

**Master Corporal N.S. Edmunds, Applicant**

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

---

**REASONS ON APPLICATION MADE BY THE ACCUSED FOR AN ALLEGED VIOLATION OF SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ABUSE OF PROCESS**

(Orally)

## INTRODUCTION

[1] Master Corporal Edmunds is charged with 15 service offences punishable under paragraph 130(1)(*a*) of the *National Defence Act* (*NDA*). Eight of them are for an offence for breach of trust by a public officer, contrary to section 122 of the *Criminal Code* and seven others are for fraud contrary to section 380 of the *Criminal Code*. It is alleged that those offences would have been committed at or near Petawawa, Ontario, during the month of March, April, June 2011 and a breach of trust in September 2012 while the accused performed the duty of pharmacy technician.

[2] This preliminary motion is brought by way of an application made under the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) subparagraph 112.05(5) (*e*) as a question of law or mixed law and fact to be determined by the

military judge presiding at this General Court Martial. More specifically, Master Corporal Edmunds is requesting from the presiding military judge, at this General Court Martial, to stay the proceedings pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* as a remedy to an alleged abuse of process by the prosecution and a breach of his right under sections 7, 11(*b*) and 11(*d*) of the *Charter*.

[3] Master Corporal Edmunds is claiming that the manner the investigation was made and the prosecution was conducted in relation with the charges before this court would shock the conscience of the community, including the military community, and is so detrimental to the proper administration of justice that it warrants judicial intervention by it by way of a stay of the proceedings on all charges, as those facts being an issue to be considered falling under the residual category of rights under section 7 of the *Charter*.

[4] In addition, he is suggesting to the Court that the overall time to proceed with the current matter before this Court is such that it would make his trial unfair contrary to his right under subparagraph 11(*d*) of the *Charter*, and since the laying of the charges before this Court, his right to be tried within a reasonable time would have been denied, in accordance with subsection 11(*b*) of the *Charter*.

## THE EVIDENCE

[5] This application's hearing started on 3 May 2016 and ended on 16 May 2016, for which nine days of hearings were required. During these proceedings, a total of thirteen witnesses were considered by the court:

(a) one witness, Dr. Hirst, provided, in addition to his testimony as the treating psychiatrist of the applicant, an expert opinion during the hearing on the effects of the current court martial proceedings on Master Corporal Edmunds' treatment of post-traumatic stress disorder and depression;

(b) four ordinary witnesses were also heard: Major Lacharité, Mrs Jamieson, Captain Ives and Mr Murray; and

(c) the testimony of eight witnesses heard during the disclosure application was transferred, with the agreement and concurrence of the respondent, to the present hearing: Sergeant Lagler, Sergeant Dalton, Captain Torso, Master Warrant Officer Gallant, Captain Patton, Captain Lawson, Mr Beaulieu and Master Corporal Partridge.

[6] Thirty-three exhibits were introduced during the hearing, such as emails, invoices, policies, assessments of treatment and minutes of proceedings from a previous court martial.

[7] Also, an admission was made by the prosecution to the effect that the invoices marked as Exhibit M1-30 in these proceedings and shown to Major Lacharité during his testimony were the same as Exhibit M1-28.

[8] The Court took judicial notice of the facts in issues under Rule 15 of the *Military Rules of Evidence*, and of the content of the Judge Advocate General Policy Directive on Charge Screening Policy (Exhibit M1-33), the Annual Report of the Director of Military Prosecutions for the year 2013-2014 (Exhibit M1-31) and the year 2014-2015 (Exhibit M1-32) pursuant to Rule 16 of the *Military Rules of Evidence*.

## FACTS

[9] The applicant adduced evidence to provide a context to his application. Master Corporal Edmunds was a medical technician that was put temporarily on administrative duties because of some physical limitations. He was tasked to the pharmacy of the base where he had, among other things, the financial responsibility of ordering the necessary goods for the pharmacy.

[10] Captain Willox, the Pharmacist Officer, had the financial authority to confirm the supply of those goods and that the price was reasonable in order to proceed with their payment to the supplier.

[11] In July 2011, Captain Willox made a complaint to the military police because his signature would have been forged in order to proceed with the payment of two invoices for combat gauze supplied by a company named "Tactical First Response". He found out about those two invoices because somebody suspected that because of the two amounts paid for the goods, the supplier was trying to proceed with contract splitting in order to avoid some other financial requirements for staying a supplier of the goods to the Canadian Forces.

[12] The investigation, assigned to Master Corporal Partridge, was completed during the fall of 2011 and it revealed the following facts:

(a) Master Corporal Edmunds was the sole owner of the company called "Tactical First Response";

(b) there was only one supplier for combat gauze and it was not Tactical First Response;

(c) Master Corporal Edmunds requested the combat gauze and confirmed with his own signature that they were received; and

(d) a cheque was issued in order to pay Tactical First Response.

[13] In June 2012, charges were laid against Master Corporal Edmunds in relation with two transactions reflected by the two invoices.

[14] In October 2012, he was released from the Canadian Armed Forces for medical reasons. On that same month, the charges were referred by the referral authority to the Director of Military Prosecutions (DMP). Major Lacharité, a prosecutor, was assigned to the file by the Deputy Director Military Prosecutions (DDMP), Lieutenant-Colonel Lindstein. Considering the matter involved, which is fraud in excess of $5,000, DDMP also had the authority in the file for final disposition of the case.

[15] In November 2012, one week prior to the preferral of charges, Major Lacharité requested an additional investigation. He wanted to know, despite it was not necessary for him to make up his mind regarding the reasonable prospect of conviction he had on the matter, if the cheques issued for the payment of the two invoices were deposited in a bank account and if the money was withdrawn. He wanted also to know who proceeded with the cheque steps if it was confirmed that those steps were taken. No deadline was provided to the investigator and other than DDMP, nobody else was informed of that request. Mainly, Major Lacharité was looking for this information for improving the evidence on sentence.

[16] The charge sheet was signed by Major Lacharité on 9 November 2012. One charge of fraud, two charges of forgery and four charges of making a false entry in a document were preferred on 15 November 2012 against Master Corporal Edmunds.

[17] Lieutenant-Colonel Berntsen was assigned to Master Corporal Edmunds as defence counsel. On 9 January 2013, a plea agreement and a joint submission on sentence were reached by both parties.

[18] On 17 January 2013, a convening order for a Standing Court Martial was issued. Previously, because he made no choice about the type of court martial, a General Court Martial was convened. However, with the consent of the prosecution, Master Corporal Edmunds was able to request to be tried by a Standing Court Martial, which was reflected on the convening order. The trial date was set for 13 February 2013.

[19] On 8 February 2013, Major Lacharité, the prosecutor in the matter, received additional information he requested from the investigator, Master Corporal Partridge. He was able to confirm that a cheque fitting the amount paid for one of the invoices was deposited in the bank account of Tactical First Response. However, he also received information that other cheques issued by the Federal Government from February to June 2011 were also deposited in the same account in April, May and June 2011.

[20] Major Lacharité, further to discovering about this new information on other potential transactions made by Master Corporal Edmunds, did three things:

(a) He strongly suggested by email that the investigative responsibilities on this matter be transferred from the military police (MP) detachment investigation section in Petawawa to the National Investigation Service (NIS). Mainly, he relied on the fact that the total amount involved, which

was $38,500 instead of the $8,500 he was dealing with, made it a major fraud case calling for such a transfer. The request was denied later by the NIS.

(b) He verbally informed defence counsel about the new information he had just received and wanted to disclose it to his colleague, but was precluded from doing so for technical reasons before 12 February where he could do it in person with a hard copy.

(c) He made sure that the new potential transactions revealed by this new information were not included in the period identified in the particulars of the fraud charge on the charge sheet to be put before the convened court martial.

[21] On 12 February 2013, the day prior to trial, counsel met. Defence counsel informed Major Lacharité that the agreement on plea and sentence was rescinded and that he would request an adjournment for reassessing the whole matter with his client in light of the new information he had just received. The prosecutor concurred with this approach and considered that the adjournment would provide time to investigate those new transactions.

[22] On 13 February 2013, the military judge presiding at that court martial granted the adjournment requested by defence and for which the prosecution concurred, considering that it would benefit both parties in the circumstances and the proceedings were adjourned until 2 April 2013.

[23] On 11 March 2013, the defence counsel approached Major Lacharité to inquire about the possibility for his client to change the type of court martial again in the circumstances. While not opposed to such a request, the prosecutor raised that he would like to consult with DDMP who has the authority to final disposition in the matter. On 20 March 2013, he informed defence counsel that prosecution would not consent to the request made by his client to change the type of trial.

[24] On 2 April 2013, a date was determined to hear a preliminary matter raised by defence, which was on 17 June 2013, and the trial itself was set to proceed on 12 August 2013.

[25] During the month of April 2013, while investigating about the new transactions, the investigator was unable to locate the invoices related to the cheques deposited in the bank account of Tactical First Response. He then requested the support of the Directorate of Special Examinations and Inquiries (DSEI) because of its expertise in the investigation of mismanagement issues and administrative irregularities; however, he did not receive a positive response immediately. At the same time, Master Corporal Ressor took over the investigation from Master Corporal Partridge.

[26] Between 30 May and 4 June 2013, the prosecutor got in a debate with the investigator in order to obtain information about the current investigation on the new transactions revealed in February 2013. While on one hand he told defence counsel that this information would be irrelevant to the case before the court martial, he qualified it as probably relevant while exchanging with the investigator on the same topic. On 5 June 2013, the investigator provided an interim investigation report that was disclosed to Master Corporal Edmunds.

[27] On 17 June 2013, the military judge heard the application made by Master Corporal Edmunds in order to review the decision made by the prosecution to not consent to the request made by the accused to make a re-election on the type of trial from a Standing Court Martial to a General Court Martial.

[28] On 19 July 2013, the military judge concluded that Master Corporal Edmunds was fully informed when he exercised his right to re-elect on the first time he did so and that the disclosure made about the new transactions did not change substantially the case to be met by him. In addition, the military judge concluded that the accused did not demonstrate the necessity to review the actions of the prosecutor from an abuse of process perspective. He then denied the application.

[29] One week prior to trial, defence counsel inquired to the prosecutor about his position on the overall matter, which would include the transactions subject to charges before the court martial and the transactions under investigation. He replied by writing "that at this stage, I haven't received, or seriously expect to receive, any evidence that could form the basis of additional charges".

[30] The day after, an email exchange occurred between defence counsel and the prosecutor about the admissibility of some evidence for the trial. The prosecutor took the opportunity to raise the issue of settlement on the basis of the plea agreement rescinded in February by defence counsel.

[31] On 7 August 2013, the prosecutor asked by email to defence counsel if the court should be informed that the matter would proceed by way of a guilty plea.

[32] On the day of the trial, on 12 August 2013, the disclosure application made previously by Master Corporal Edmunds was withdrawn, and he proceeded with an application about the constitutionality of paragraph 130(1)(*a*) of the *NDA*. This application was dismissed by the military judge.

[33] Major Lacharité told this court that just before or at the time of the trial, defence counsel alluded to the possibility of asking the court to consider the new transactions investigated as services offences for the purpose of sentence, as allowed by section 194 of the *NDA*; however, such thing was never mentioned during court.

[34] Then, the prosecutor withdrew charges 2 to 7 on the charge sheet and Master Corporal Edmunds pleaded guilty to the first charge, which was the fraud charge.

[35] A hearing took place on sentence and the military judge imposed on the offender a punishment of imprisonment for a period of 30 days; Master Corporal Edmunds served his sentence.

[36] During the month of October 2013, Master Corporal Dalton took over the investigation from Master Corporal Ressor. At that point, nothing had come back from DSEI.

[37] On Friday, 13 December 2013, Master Corporal Dalton contacted Major Lacharité about the investigation and her intent to close the file, not having any positive development with it. Despite not being her legal adviser, but still being a prosecutor within the DMP organization, he knew about the case and he encouraged her to persevere.

[38] Sometime later, Corporal Dalton was contacted by DSEI and was directed to a representative of Defence Resource Management Information System (DRMIS). DRMIS is the system used by the Canadian Armed Forces members and contractors to transact the business of supporting activities. It is the materiel and financial system of record. Then, every transaction made by Tactical First Response with the pharmacy should have been reflected in that system.

[39] During the month of March 2014, Master Corporal Dalton met with Mr Murray, a person working at DRMIS' help desk, and he provided her with information about the transactions under investigation. The investigator then informed Major Lacharité about what was found and he congratulated her for her tenacity.

[40] On 28 April 2014, the investigation on the other transactions was concluded.

[41] In May 2014, an exchange occurred between the legal advisor for Canadian Forces Base Petawawa and the prosecution. The issue was the way charges for the court martial were drafted. Essentially, the understanding of the prosecutor, Major Samson, was that Major Lacharité was careful in not including the new transactions discovered at the time when the charges were preferred.

[42] New charges were laid against Master Corporal Edmunds on 9 June 2014 in relation with the result of the investigation on the new transactions.

[43] As a matter of follow-up, the prosecutor, Major Samson, inquired on 5 August 2014 about the file and requested a copy of the Record of Disciplinary Proceedings (RDP) to the legal advisor.

[44] On 17 September 2014, the investigation report was disclosed to the prosecution. Probably when the matter was sent by the referral authority to the DMP, the investigation report was again disclosed to the prosecution in November 2014.

[45] On 14 November 2014, the charge sheet currently before this court was signed by the prosecutor, Major Samson, and the charges were preferred on 19 November 2014.

[46] On 24 November 2014, Major Lacharité confirmed to the prosecutor assigned to the file, Major Samson, that defence counsel raised with him at the time of the court martial in August 2013 the possibility of asking the court to consider the new transactions investigated as service offences for the purpose of sentence, as allowed by section 194 of the *NDA*. He also informed the new prosecutor assigned to the file about the fact that he deliberately drafted the charges at the time to allow other suspected fraudulent transactions to be dealt with by way of different charges, if the case may be.

[47] Lieutenant-Colonel Berntsen was assigned again as defence counsel for Master Corporal Edmunds. He then pressed the prosecution to get the earliest possible date for trial. Further to discussions, considering the availability of counsel, the judicial availability and the fact that this matter had to be set for a period of two weeks because it was a General Court Martial, a convening order was issued on 15 December 2014 ordering Master Corporal Edmunds to appear before a General Court Martial presided by Military Judge Gibson on 6 July 2015.

[48] Then, a new judge was assigned to the case on 7 April 2015 because of the appointment of Military Judge Gibson as Superior Court of Justice in Ontario in February 2015. Four pretrial teleconferences were held on 14 April, 11 May, 4 and 15 June 2015. During those teleconferences, the order in which the applications would be heard and their status, the scheduling of the hearing for the preliminary matters and the main trial, and the issue of disclosure were discussed.

[49] As mentioned in the convening order, the parties appeared before this General Court Martial on the morning of 6 July 2015 and the proceedings went as follows:

(a) The court dealt with the disclosure application on 6 to 8 July 2015, 15 and 16 July 2015, 10 to 13 November 2015, 17 and 19 November 2015. A decision was delivered by the court on this application on 26 November 2015, considering that the prosecution objected to some information being disclosed to the accused because of its relevancy or privileges claimed. The application was granted in part. Additional disclosure was provided by the prosecution throughout those dates. On 15 July 2015, the defence counsel was provided with five thick binders of documents for which he requested an adjournment. The last item disclosed in this matter was provided in early April 2016.

(b) The court dealt with an application raising an objection to the military judge presiding at the court martial and to declare a mistrial. The application was dismissed by the court in August 2015.

(c) The court also dealt with a plea in bar application because the accused claimed that he was previously found guilty of a charge before a court martial or a substantially similar charge arising out of the facts that give rise to the charges before this court. The court dismissed the application on 25 November 2015.

(d) The current application hearing on abuse of process started on 3 May 2016 and ended on 16 May 2016, for which nine days of hearing were required.

**ANALYSIS**

[50] I would like first to discuss the duration of the proceedings and the impact on the rights of the accused in light of the *Charter*. It is alleged that the fraud occurred between the end of March and June 2011. The discovery of those transactions occurred in February 2013 and the investigation about them was closed in April 2014. The charges were laid in June 2014 and preferred in November 2014. A trial date was set in December 2014 for 6 July 2015.

[51] Essentially, the applicant raised the issue in relation to his right to life, liberty and security under section 7 of the *Charter* in order for the court to consider at the same time the impact, on his rights, of the delay prior to and since the laying of the charges that are before this Court.

[52] I would say that a very similar matter was dealt with by the Court Martial Appeal Court (CMAC) in *R. v. Langlois*, 2001 CMAC 3. As stated by the CMAC, the burden is on the applicant to demonstrate that he has been deprived of his right to life, liberty or security. As the CMAC concluded, the right of Captain Langlois to life and liberty were not at stake during the period prior to the laying of the charges as is the case here for the applicant. Reality is that the matter was discussed between the applicant and the prosecution at the time of his first trial, that he was aware that there was an ongoing investigation on the matter but he did not adduce any evidence that would demonstrate to this court that his right to life or liberty was triggered for the purpose of the analysis of a violation under section 7 of the *Charter*.

[53] In addition, as mentioned by the CMAC in *Langlois*, the right of the applicant to security must be considered as if the act allegedly committed by the government had a serious and profound effect on his psychological integrity. It is the conclusion of the Court that such demonstration was not made by the applicant.

[54] As indicated by the CMAC in that decision, the pre-charge delay may be considered with other factors in order for the court to assess the conduct of the prosecution in this matter from an abuse of process perspective. Then, it is my understanding that this court may use the pre-charge delay in the context of its analysis of an abuse of process by the prosecution.

[55] However, the applicant failed to demonstrate that his right to life, liberty and security was triggered by the facts of this case on the issue of pre-charge delay.

[56] Now, on the issue of the right of the accused to be tried within a reasonable time in accordance with subsection 11(*b*) of the *Charter*, as established by the CMAC in *R. v. LeGresley*, 2008 CMAC 2, the court must first assess if the delay between the time the charges were laid and the trial took place would warrant an inquiry of it.

[57] In this matter, the charges were laid on 9 June 2014. The parties set a date in December 2014 on agreement for a trial on 6 July 2015. This 13 months delay does not appear, to the Court, as exceptional in the circumstances of this case. First, the accused agreed to the date of trial and there is no evidence that he made further steps in order to have the matter set sooner. It is true that he requested the earliest possible date in the context of the prosecution, the judicial and its own availability, but there is nothing in the evidence that would lead the court to conclude that such date was decided against his own will or could have been set sooner than the month of July 2015.

[58] The additional delay since the beginning of this court martial to today appears to the court departing from the original delay since the laying of the charges as unexceptional. The applicant raised a number of valid issues to be dealt with through different applications, which seems to be normal in the circumstances of this case.

[59] Then, it is the conclusion of this Court that the applicant failed to demonstrate that the delay is exceptional in the circumstances, leading it to the opinion that the situation does not call for an analysis by this Court of the delay under subsection 11(*b*) of the *Charter*.

[60] I would like to add that the matter of double jeopardy was addressed by the court in the context of the plea in bar application made previously by the applicant, and as such, it does not require any other analysis.

[61] Other matters raised by the applicant, such as the manner which the disclosure was conducted, which was dealt with previously by the Court in the context of an application on that specific issue, or the impact on the fairness of the hearing or the ability to make full answer and defence, lead the Court to conclude that, accordingly, what the applicant is arguing is that the circumstances of this case are such that it calls for an analysis under the residual category of abuse of process under section 7 of the *Charter*.

ABUSE OF PROCESS

[62] The law on the ability of the court martial to review the exercise of prosecutorial discretion by the DMP and his representatives in the context of an alleged abuse of process by the prosecution was clearly articulated in the CMAC decision of *R. v. Wehmeier*, 2014 CMAC 5, paragraphs 26 to 35.

[63] Essentially, a court should not interfere with prosecutorial discretion unless the applicant met the evidentiary burden to allow the court to do so in the context of an abuse of process. Only then, the court would be permitted to enter into analysis to determine if such exercise by the prosecution affected the fairness of the trial or undermined the integrity of the military justice system. If the court concludes to an abuse of process by the prosecution, an appropriate remedy shall be determined by the court. It is only in the clearest of cases that a stay of the proceedings would be imposed.

[64] Accordingly, the issues to be decided by the court are as follows:

(a) Does the matter the applicant asked to be reviewed by the court fall within the scope of prosecutorial discretion or is it a matter of tactics and conduct before the court?

(b) Has the applicant met the necessary evidentiary threshold in order to justify an inquiry by the court into the propriety of the prosecution's decision?

(c) If the matter is one about the exercise of prosecutorial discretion, has such conduct affected the fairness of the trial or contravened fundamental notions of justice, thus undermined the integrity of the judicial system?

(d) If the court concludes to an abuse of process by the prosecution, what is the appropriate remedy?

[65] If the Court understands correctly, the applicant would like the court to review the decision of the prosecution to proceed with the current charges before this Court, while he already had a previous court martial that dealt with a similar matter.

[66] It is the conclusion of the Court that such decision is one by the prosecution about a matter being brought before a court martial and constitutes the exercise of prosecutorial discretion by the DMP and his representative as suggested by the prosecution.

[67] Such decision is reviewable only as an abuse of process. Then, has the applicant met the necessary evidentiary threshold in order to justify the court to enter into the inquiry of the decision made by the prosecution?

[68] At the very beginning of the hearing on the application for abuse of process, the applicant put before the court the following facts:

(a) Master Corporal Edmunds was released from the Canadian Armed Forces in October 2012 (testimony of Dr. Hirst and Exhibit M1-6).

(b) According to the testimony of Master Corporal Partridge heard during the disclosure application and transferred at the beginning of the actual *voir dire*, the prosecution was able, in February 2013, to have a reasonable suspicion that the additional transactions found further to the request for additional investigation were fraudulent because it knew that:

i. Master Corporal Edmunds was the sole owner of Tactical First Response;

ii. the cheques made to Tactical First Response were deposited in the account of the same company between the end of March and June 2011;

iii. there was only one authorized dealer for supplying combat gauze to the pharmacy and it was not Tactical First Response;

iv. nobody heard about Tactical First Response before the existence of those transactions; and

v. the transactions for which Master Corporal Edmunds pleaded guilty were different than those additional ones found by the investigator.

(c) In August 2013, Master Corporal Edmunds appeared before a court martial and pleaded guilty to a charge of fraud covering the period from 4 April to 5 May 2011 (Notice of Application to Admit Similar Fact Evidence, Exhibit M1-3) produced at the beginning of his hearing.

[69] Then, it is the conclusion of this Court that the evidence adduced at the beginning of this hearing clearly established that the prosecution knew about additional fraudulent transactions allegedly made by the applicant, while he was already dealing with the same type of charge related to two transactions included in the same time frame as the new transactions discovered. Despite this knowledge, the prosecution made the decision to proceed with the ongoing trial and to deal later with other potential charges, exposing Master Corporal Edmunds to undergo two trials instead of one for the same matter and to potentially serve two sentences instead of one, putting potentially at stake his right to liberty under section 7 of the *Charter*.

[70] The Court concludes that the applicant met the necessary evidentiary threshold in order to justify an inquiry by the Court into the propriety of the prosecution's decision in the circumstances of this case. At that stage, it appears that the prosecution did not pay much attention to the consequence of dealing with two trials instead of one while it was in possession of sufficient information to assess if it would be more beneficial for the military justice system, which would include the accused, to proceed only with the overall fraud composed of a multiplicity of similar transactions.

[71] The inquiry into the prosecution's decision revealed a number of issues. Concerning the investigation itself, it was found that:

(a) The investigator limited himself to the bank account of the accused in his search of additional information and he had to come back with a second production order that revealed the new transactions, adding a delay to the discovery of the information.

(b) Rigid administrative requirements resulted in the opening of a second investigation file about this matter of fraud involving the same suspect, further to the discovery of new information after the first investigation file was considered completed. Essentially, the information was transferred from the first to the second investigation file on the matter, the complainant was the prosecutor for a while, which led to more confusion on the part of the applicant when he wanted to understand how the investigation was conducted.

(c) Within a year, three different lead investigators were tasked on the file. The lack of familiarization with the financial system made them dependent on other people to find the proper information. As a matter of fact, the investigators looked for the original invoices for the transactions for about three years, when it took recently two days for the officer pharmacist to find them in a box kept at the unit.

(d) The filing of information related to the investigation and the note-taking was sometimes inappropriate to the extent that no email or note was kept, in order to reflect how the request for additional investigation was handled.

(e) Despite the fact that the prosecutor strongly suggested that the National Investigation Service (NIS) take over from the MP detachment at Canadian Forces Base Petawawa the responsibility of investigating a major fraud case because of its expertise in the matter, the request was denied.

[72] About the prosecution, the Court concludes:

(a) About the disclosure:

i. During the first trial, the prosecution had no legal obligation to disclose to the accused in the case, what it qualified irrelevant information, which was the information obtained about new suspicious transactions. The unusual disclosure of an ongoing investigation also put the prosecution in a difficult position. At the end, the Court confirmed that the new disclosure was unrelated with the matter before the Court.

ii. The disclosure during the actual trial also had its own issues:

1. A lack of understanding about the issue raised before the court on the abuse of process ended up in some delay to provide the information.

2. The understanding of the legal concept regarding relevancy and privileges resulted in many documents being redacted in a way that resulted in the court resolving the matter.

3. The prosecution faced a situation that while it was respecting its obligation to disclose information to the accused, it had to disclose at different moments throughout these proceedings information as recent as April 2016. When requested, the court provided the necessary adjournment to the defense counsel in order to deal with the information he received in a proper manner.

4. More than once, the prosecution had to request adjournments in order to deal with information inadvertently disclosed to the accused, adding some delay to the proceedings.

(b) About the conduct of the matter by the prosecution, the lack of experience of Major Lacharité with litigation matters led him to make a number of decisions that expressed confusion more than anything else in the conduct of the overall matter:

i. He was called to the Bar in 2012, then dealing with one of his first files on his own.

ii. He made a request for additional investigation without providing any deadline and without clear reasons for doing so. If the information was unnecessary for him to have a reasonable prospect of conviction on the matter, why was he requesting it prior to the signature of the charges and without any deadline? Why he did not comply with the DMP policy on the matter, especially in the context where he was new in the job? He did not keep a copy, in the file, of his request for additional information and he did not inform the usual person identified in the DMP policy.

iii. He did not keep much information about his exchanges with the defense counsel on plea negotiation as required by the DMP policy.

iv. He candidly admitted that he did not know what to do with the information received on 8 February 2013 about the new transactions.

v. He represented, on one hand, that the overall matter was a major fraud case and should be treated as such by the NIS, while he also told the defense counsel, on the other hand, that the information about the new transactions was irrelevant, and took the same position before the court.

vi. He did not respond straightforwardly and clearly to the defense counsel in August 2013 when the latter asked him about his position on the settlement of the overall matter of fraud. Essentially, his answer was ambiguous and did not clearly state the position of the prosecution about the conduct and settlement of the overall matter of fraud.

vii. Despite that he did not seriously expect to receive any evidence that could form the basis of additional charges, he did not hesitate to encourage the investigator to persevere in the matter in order to find relevant information that could form the basis of charges.

viii. He made sure that the charges for the first trial would not preclude the prosecution to proceed with other charges of fraud allegedly committed in about the same time frame.

ix. There was no mentoring or close supervision made towards him, despite his lack of experience in litigation.

[73] Finally, the unit involvement revealed a troubling matter. While from a legal perspective, it was recognized that the preferral of charges by the prosecution may cure some issues coming from the dealing with the Record of Disciplinary Proceedings (RDP) (see *R. v. Couture*, 2008 CMAC 6), the laying authority for the charges before this Court, Master Warrant Officer Gallant, told the Court that he never reviewed and simply signed the RDP. Essentially, the Court understood that he never had an actual and reasonable belief that Master Corporal Edmunds committed the offences written on the RDP. However, it sounds like the matter was treated by the unit as a letter put in the mail, nothing else.

[74] Essentially, the Court understands that the conduct of the prosecution about the matter before this Court was led by the fact that the investigation started while there was an ongoing trial dealing with other transactions of the same nature, that the same

investigation was delayed by the fact that the relevant invoices were untraceable, which made the actual matter a separate one from the one dealt with during the court martial in August 2013, and obviously delaying the dealing of the charges before this Court.

[75] Mainly, the prosecution made the decision to write the charges for the first trial in a way that would allow it dealing with any other fraudulent transactions that would be revealed by the new investigation.

[76] The fact that Master Corporal Edmunds would face two trials for charges of the same nature allegedly committed during the same time frame, and would expose him to the fact that he may have to serve two sentences of incarceration at two different times did not seem to be, at any moment, a concern for the prosecution.

[77] It is clear for the Court that the prosecution was more interested in having all the transactions prosecuted, no matter what would have been the number of courts martial necessary to deal with the matter, which would explain the ambiguous approach taken by prosecutors, instead of using the proper mechanism in order to respect the right of the accused to liberty, avoiding him to be exposed to more than one trial in relation to the same type of matter.

[78] In addition, the prosecution did not have any hesitation in coming with a notice of application in order to declare the evidence related to the two transactions dealt with before the court martial in August 2013, as admissible evidence for proving the fraud charges related to similar transactions before this Court. While nothing precludes the prosecution to do so, it demonstrates that Master Corporal Edmunds exposed himself to the fact that his guilty plea on the fraud charge could be used against him later.

[79] The prosecution never acted maliciously or in bad faith in dealing with the overall matter of fraud concerning Master Corporal Edmunds. I would add that the professionalism of Major Lacharité was not even at stake in this matter. His situation would have required a better mentoring about the role and function of a prosecutor in order to provide him a better understanding of that quasi-judicial role attached to the prosecution.

[80] However, the unbalanced approach of the prosecution disclosed by the evidence in this matter leads the Court to conclude that the prosecution's conduct was egregious and seriously compromised the integrity of the military justice system.

[81] When the prosecution is dealing with former members of the Canadian Armed Forces, who are still accountable for their acts while they were with the Canadian Armed Forces, social notions of fair play and decency would require giving consideration on the impact on such person subject to the Code of Service Discipline while dealing with circumstances as those presented to this Court about Master Corporal Edmunds.

[82] In summary, the rigid approach taken by the investigative authorities and their incapacity to deal properly with the research of the information, combined with the ambiguous and opportunistic approach taken by the prosecution about the major fraud case involving Master Corporal Edmunds, made the decision of the prosecution to deal with the charges before this court an abuse of process in the circumstances.

[83] Now, what about the remedy? In *R. v. Babos*, 2014 SCC 16 at paragraph 32, the Supreme Court of Canada said on this specific issue:

> The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[84] From the Court’s perspective, the prejudice to the integrity of the military justice system would not be manifested, perpetuated or aggravated with the conduct of this trial. In short, the fact that the prosecution ended up with proceeding with two trials to deal with the matter of fraud against the accused won't result in such thing. There is a clear social interest to proceed with this type of matter. The integrity of the staff in the management of public funds is essential and the fact to proceed on an allegation of fraud would be justified from a societal interest perspective.

[85] Mainly, Master Corporal Edmunds is exposed to potential incarceration if he is found guilty of a charge before this Court. That being said, the fact that the trial proceeds won't expose him to this specific prejudice. It is once he would be found guilty of any charge that the prejudice would appear as being relevant.

[86] Then, it is the conclusion of the Court that an alternative remedy exists in order to deal with the matter properly, which is by mitigating the sentence.

[87] The impact of the fact that the accused could have contemplated the possibility of asking the Court to consider the new transactions investigated as services offences for the purpose of sentence, as allowed by section 194 of the *NDA* during his court martial in August 2013, is unknown to this day. It could be seen as a missed opportunity or a chance taken by the accused to have the matter under investigation at the time not litigated.

[88] However, if the applicant is found guilty by this Court of any charge, it would have to consider this fact as a factor on sentence. Reality is that it may have been possible for Master Corporal Edmunds to potentially avoid the commission of such abuse by the prosecution in applying section 194 of the *NDA*.

**FOR THESE REASONS, THE COURT THEN:**

[89] **GRANTS** the application.

[90] **DECLARES** that the decision of the prosecution to proceed with the current charges before this Court against the accused, while he already had a previous court martial that dealt with a similar matter, is an abuse of process under the residual category caught by section 7 of the *Charter*.

[91] **RESERVES** its decision about the remedy by mitigating the sentence, if the trial reaches that step.

---

**Counsel:**

The Director of Military Prosecutions as represented by Major A.C. Samson and Captain L. Langlois

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Corporal N.S. Edmunds