



COURT MARTIAL

Citation: *R. v. Edmunds*, 2015 CM 3023

Date: 20151126

Docket: 201450

General Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Master Corporal N.S. Edmunds, Applicant

- and -

Her Majesty the Queen, Respondent

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

DECISION ON PLEA IN BAR

(Orally)

[1] Master Corporal Edmunds is charged for offences punishable pursuant to section 130 of the *National Defence Act*, which are seven charges laid under section 380 of the *Criminal Code* for fraud and eight charges laid under section 122 of the *Criminal Code* for breach of trust by a public officer.

[2] It is alleged that those offences occurred between the months of March and June 2011 and in September 2012, at or near Petawawa, Ontario.

[3] The accused, Master Corporal Edmunds, objects to the trial being proceeded with through subparagraph 112.05(5)(b) and subparagraph 112.24(1)(c) of the *Queen's Regulations and Orders* (QR&O) because he's claiming that he was previously found guilty of a charge before a court or a substantially similar charge arising out of the facts that give rise to the charges before this Court.

[4] As a matter of remedy, Master Corporal Edmunds asks that the proceedings be terminated.

[5] The evidence heard for the purpose of this application include: 25 documents, and more specifically, the minutes of proceedings of the previous court martial; the charge sheet and the exhibits, such as the invoices; evidence on which the prosecution is relying on to support the charges before this court martial; and, an agreed statement of facts among other things. There's also the testimony of Master Corporal Reesor, one of the investigators involved in this matter.

The Facts

[6] The facts are as follows:

- (a) A plea of guilty was accepted and recorded by a previous court martial held on 12 August 2013 about a charge of fraud that would have occurred between 4 April and 5 May 2011 for an amount of \$8,515 by submitting false sales invoices payable to Tactical First Response;
- (b) Master Corporal Edmunds was convicted on 14 August 2013 to 30 days' imprisonment;
- (c) The first investigation led to those charges, which was one count of fraud, two counts of forgery and four counts of false entry in a document;
- (d) After the charges were preferred in November 2012 regarding the first court martial, additional information was received by the investigator regarding additional amounts deposited in a bank account. The second investigation started in February 2013 about those transactions;
- (e) The first trial was set to take place in February 2013; however, it was adjourned in order to deal with new information forming the basis for the second investigation;
- (f) The information about the second investigation regarding additional transactions was known by the prosecution and disclosed to the accused in June 2013;
- (g) The matter regarding the first court martial was dealt with in August 2013 without referring to other transactions raised in the second investigation. So there were no new counts and there was also no dealing pursuant to section 194 of the *National Defence Act*, which allows a court to consider any similar offences without entering a plea regarding those offences when imposing a sentence;

- (h) The second investigation dealt with a situation where there were no existing invoices related to payment;
- (i) The matter about the evidence for the second investigation concluded in March 2014 and the investigation concluded in April 2014;
- (j) The matter regarding the evidence of the absence of invoices came to a final conclusion in March 2014 and the investigation was concluded in April 2014;
- (k) The charges for the matter before this Court were laid in June 2014. The charge sheet was signed on 14 November 2014 and preferred on 19 November 2014. The Court was convened on 20 April 2015 for a trial date on 6 July 2015;
- (l) With respect to the charges before this Court, the main elements of those charges are different dates and the fact of causing a cheque made payable to Tactical First Response, a company owned by the accused; and
- (m) The main elements of the charge of breach of trust by a public officer are being a pharmacy technician of the Canadian Armed Forces, and failing to report a conflict of interest.

[7] The accused's position is that the plea in bar of *autrefois acquit* and *autrefois convict* must succeed because:

- (a) he has been found guilty by a service tribunal, a court martial, on a charge of having committed that offence and has been punished in accordance with the sentence referring to the fraud charge;
- (b) he has been found guilty in respect of an offence or any other substantially similar offence arising out of the facts that gave rise to the offence before this Court; and
- (c) the second set of charges before this Court must be seen as a continuum because the previous charge and charges before the Court are part of the same set of facts and refer to the same matter.

[8] The position of the prosecution is that this application must be dismissed because:

- (a) the criteria for that special plea are not met;
- (b) the charges of fraud, according to the prosecution, are not the same:
 - i. there's a different approach in the evidence with the invoices;

- ii. the fraud for the first trial covered a period of time, a specific period of time, which is different than the charges of fraud before this Court that are very specific in the date for the commission of each alleged offence; and
 - iii. also it would involve different and separate transactions.
- (c) According to the prosecution, the charges of breach of trust are not included in the first set of charges that were before the previous court martial. They are different in nature and the essential elements are also different; and
- (d) the position of the prosecution is that there is no factual and legal nexus that will allow this Court to grant the application.

Analysis

[9] Subparagraph 112.24(1)(c) of the QR&O provides that:

An accused may plead in bar of trial that:

...

the accused was previously found guilty or not guilty of the charge before the court or a substantially similar charge arising out of the facts that gave rise to the charge before the court.

Essentially this subparagraph is referring to section 66 of the *National Defence Act* where the plea in bar of trial of *autrefois acquit* and *autrefois convict* is articulated or specified.

[10] Subsection 66(1) of the *National Defence Act* reads as follows:

A person may not be tried or tried again in respect of an offence or any other substantially similar offence arising out of the facts that gave rise to the offence if, while subject to the Code of Service Discipline in respect of that offence, or if, while liable to be charged, dealt with and tried under the Code in respect of that offence, the person

(a) has been found not guilty by a service tribunal, civil court or court of a foreign state on a charge of having committed that offence; or

(b) has been found guilty by a service tribunal, civil court or court of a foreign state on a charge of having committed that offence and has been punished in accordance with the sentence.

[11] I reviewed case law in a military justice context that would be relevant to this matter. What I found is that the Court Martial Appeal Court addressed the issue in at least five decisions, but always in the context involving a previous conviction before a

civil tribunal compared to a conviction or charges laid before a court martial. So basically, the main issue was comparing convictions from the tribunal in a different jurisdiction, I would say, compared to a court martial. It was in that context that it was discussed in the most recent decision of *Moriarty*. The reference to section 66 of the *National Defence Act* by the Supreme Court of Canada was made in that fashion, meaning that where there's a conviction by a civil tribunal having jurisdiction on criminal matters and the same matter comes before a court martial, then this means that this plea of bar of *autrefois acquit* and *autrefois convict* is available.

[12] What I'm facing here is a bit different as a matter of dynamic. It doesn't change the substance at play, but the context is a previous court martial which dealt with some charges and a second court martial dealing with the same type of charges. The only decision that has been found has been presented to me, nobody discussed that, it was given to me yesterday and it is the Judge Dutil decision in *R. v. Fraser*, 2002 CM 18. At that time there was no publication on the Office of Chief Military Judge website, so it's a publisher who made that decision available.

[13] I read that decision and, in that matter, Judge Dutil was facing as a matter of context, it was not about the same charges but he was facing the very same issue. And I think at paragraph 13 he captured the essence of what is this special plea. And instead of trying to word my thoughts, I would like to quote this specific paragraph to which I totally agree with:

The specialty of *autrefois acquit* or *autrefois convict* is also found in sections 607 to 609 of the *Criminal Code*. Whether it is found in the *Criminal Code*, the *National Defence Act* or another statute, the plea of *autrefois acquit* or *convict* is part of a more broader legal principle that no person shall be put in jeopardy twice for the same matter. This principle constitutes one of the basic doctrines of criminal law. This basic doctrine has been enshrined as a constitutional right in section 11(h) of the *Charter*. The concept of double jeopardy is wider than the rules preventing an accused from being tried or punished twice for the same offence arising out from the same facts and circumstances. Thus, double jeopardy is a principle of general application encompassing the pleas of *autrefois acquit* and *convict* and the doctrines of issue estoppel, double punishment for the same offence and multiple punishment for same delict. The doctrine of double jeopardy encompassing the special pleas of *autrefois acquit* and *autrefois convict* is based on the rationale that where an accused has been previously acquitted or convicted the matter is *res judicata* in the wider sense of a matter adjudged and it would be unfair to have vexed an accused by putting him in jeopardy of a second prosecution.

For me, he expressed the idea of what is the plea in bar of trial under section 66 of the *National Defence Act*.

[14] On the same matter, which is the plea in bar of trial of *autrefois acquit* and *autrefois convict*, Justice McLachlin for the Supreme Court of Canada put in simple wording what is the issue to be decided, especially in *R. v. Van Rassel*, (1990) 1 S.C.R. 235 at paragraph 21:

Despite the technical form of the relevant sections of the *Criminal Code*, the substantive point is a simple one: could the accused have been convicted at the first trial

of the offence with which he is now charged? If the differences between the charges at the first and second trials are such that it must be concluded that the charges are different in nature, the plea of *autrefois acquit* is not appropriate. On the other hand, the plea will apply if, despite the differences between the earlier and the present charges, the offences are the same. [Emphasis in original.]

[15] The substantive issue under the *Criminal Code* and the *National Defence Act* regarding this plea is the same, as I previously decided in this matter in *R. v. Edmunds*, 2016 CM 11, and also as expressed by Judge Dutil in *R. v. Fraser* at paragraph 16. I went a bit beyond that and mentioned in my decision that the *Criminal Code* provisions cannot find any application in the circumstances because of the existence of section 66 addressing the same issue.

[16] I reviewed the evidence and all the evidence put to me and I considered the law and I came to the conclusion that the charges before the Court don't rely on the same set of facts or continuum in the circumstances of this case. From my perspective, each count is separate and different factual transactions, and each of them is triggered by a different act. This perspective that I'm taking was confirmed by an Ontario Court of Appeal decision in *R. v. Turmel*, 92 O.A.C. 215, at paragraph 37:

What is clear, in my view, is that multiple prosecutions under the same statutory provision are permitted if each prosecution arises from a different physical act. An accused can be charged twice, for the same offence, if the charges arise from separate transactions. What is equally clear is that if an accused is convicted with respect to the first transaction, he or she cannot plead *autrefois convict* when charged with the second. What should be equally clear on principle is that if an accused is acquitted with respect to the first transaction, he or she cannot plead *autrefois acquit* when charged with the second.

[17] Clearly the accused has demonstrated that he was found guilty by a service tribunal on a charge of having committed fraud and he has been punished. That part has been proven. But regarding the substantially similar offence arising out of the facts, that's why I came with the conclusion that things are not arising from the facts or the same facts.

[18] Clearly the period covered in the first court martial by the count of fraud does not encompass transactions covered by the charges before this Court. Each matter is different because it was initiated separately. And, from my perspective, I conclude that a breach of trust is clearly not covered by the fraud charge in the first court martial.

[19] When I use the analysis mentioned by McLachlin J., I come to the conclusion that the accused could have been convicted at the first trial of the offences with which he is now charged before this Court, because the charges are not the same as the ones at the first trial, even being of the same nature, because they are referring to different transactions. The dates are different and the manner in which the fraud is alleged to have been committed is different on each charge.

[20] I would like to specify that the decision does not address the behaviour of the prosecution. And when I talk about the prosecution, it's not just the prosecutors, but all

the actors involved in the investigation stage, the laying of the charges and the prosecution of the case.

[21] So, in that sense, this decision does not address the behaviour of the prosecution about the way to proceed in the matter. The decision is limited to the double jeopardy with the narrow view regarding the nature of the charge in the first court martial and the matter addressed by charges before this Court.

FOR THESE REASONS, THE COURT:

[22] **DISMISSES** the application regarding a plea in bar of trial of autrefois acquit and autrefois convict.

Counsel:

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

The Director of Military Prosecutions as represented by Major A.C. Samson, for the
Respondent