COURT MARTIAL

Citation: *R. v. Edmunds*, 2015 CM 3011

Date: 20150820
Docket: 201450

General Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario

Between:

Her Majesty the Queen

- and -

Master Corporal N.S. Edmunds, Accused

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

REASONS FOR THE DECISION ON AN OBJECTION TO THE MILITARY JUDGE

(Orally)

[1] Master Corporal Edmunds presented two days ago his application concerning an objection to the judge. A notice in writing concerning this matter was received by the office of the Court Martial Administrator on 20 July 2015.

[2] Essentially, Master Corporal Edmunds is claiming that some of the comments and interventions I made during the hearing of two preliminary matters concerning this General Court Martial, which are a disclosure application and an application for further particulars, and the manner in which I have managed conferences in chambers could raise, for an informed and reasonable observer, a reasonable apprehension of bias about the military judge presiding at this court martial.

[3] Master Corporal Edmunds is charged with 17 service offences punishable under paragraph 130(1)(a) of the *National Defence Act*. Nine of them are for an offence of breach of trust by a public officer, contrary to section 122 of the *Criminal Code* and eight 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, province of Ontario, during the months of March, April, June and September 2011.

[4] As indicated on the convening order, Master Corporal Edmunds appeared before this General Court Martial on the morning of 6 July 2015. Prior to that point, four pre-trial conferences were held over the phone on 14 April, 11 May, 4 and 15 June 2015. During those conferences, 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.

[5] On 6, 7 and 8 July 2015, I heard, in Petawawa, the application for disclosure presented by the accused. I held three meetings in chambers with counsel to discuss trial management issues. The first meeting was held just prior to starting the trial. I confirmed in which order the five applications would be heard, and the state and the length for the hearing of each of them. I also tried to confirm the trial schedule, considering that two weeks in July were planned to deal with preliminary matters in the absence of the panel and that two additional weeks in November were planned for the hearing of the evidence in the main trial. I also asked counsel to identify disclosure issues at that point and I assessed, with their assistance, the length for the hearing of that sole application.

[6] I was told by defence counsel during that meeting that Master Corporal Edmunds had issues with such meetings in his absence. I reassured defence counsel about the purpose of that kind of meeting in chambers, and I told him that I would provide a summary in open court on which counsel would have the opportunity to comment and provide any additional information.

[7] On 6 July 2015, at the very beginning of the trial, I made a summary of the meeting held in chambers in open court and I explained to Master Corporal Edmunds the purpose of it, which was for trial management. I also invited counsel to comment on my summary of that meeting.

[8] Later in the afternoon, I held a second meeting in chambers where defence counsel reiterated the fact that his client was suspicious of such meetings held in his absence and for which there was no recording. I then invited defence counsel to bring his client in chambers in order to attend that meeting, which he did. The main issue discussed was the introduction of a great number of classified documents, for which the prosecutor suggested using a binder she had prepared and gathering most of the documents defence counsel and her intended to use during that application. She had to check that binder to make sure all documents were declassified and disclose it to defence counsel in order to have him check and approve it. Then, it was understood that I would have to adjourn the proceedings to the next day, which I did.

[9] I then held a third meeting in chambers on 8 July 2015 in the afternoon without the presence of Master Corporal Edmunds. I was told by his counsel that his client wanted to attend and had issues regarding the fact that there was no recording.

Essentially, during the testimony of a witness called by Master Corporal Edmunds, which is Captain Tarso, I had to rule on an objection made by the prosecutor regarding a question on the existence of a unit investigation report. In the absence of the witness, I then discussed in the courtroom with counsel the nature of the objection, which led me to comment on fact that in the context of a disclosure application, the applicant must know what he is looking for to avoid any fishing expedition. Essentially, I told defence counsel that I cannot allow such an application to proceed if it becomes an opportunity to seek any information for which he does not have any reason to suspect the existence of it.

[10] I also got into a lengthy discussion with the prosecutor concerning the nature of the disclosure application and what seems to be the purpose of it. Then, the prosecutor told the court that she had not considered the disclosure issue in the context of the abuse of process application made by Master Corporal Edmunds and would be ready to reconsider her position on that issue.

[11] I then proceeded with a meeting in chambers to get information on how long it would take the prosecutor to proceed with the disclosure and what would be the impact on the scheduling for the hearing of other applications to be heard. I came back in court and provided details of that meeting. Proceedings were adjourned for a week. I would like to add that none of the meetings in chambers were recorded.

[12] We reassembled on 15 July 2015 at the Asticou courtroom in Gatineau, which was done with the agreement of both parties. At that point, the prosecutor disclosed to defence counsel a number of binders. It was agreed at that point that defence counsel would need to go through those binders to find out what would be his position regarding the disclosure application. The proceedings were adjourned to the next day.

[13] On 16 July 2015, defence counsel declared that he was satisfied with the disclosure and that the debate in the context of the disclosure application would then be limited to the access to redacted portions of documents he received or to those for which the prosecution claimed privileges. I then agreed on a schedule with counsel for the submission of written arguments before the next date in court. On a suggestion made by counsel, I then proceeded with the hearing of the application for particulars made by Master Corporal Edmunds.

[14] As evidence, defence counsel introduced the written notice for the application and the charge sheet. Then I turned to prosecution to know if she had any evidence she would like to adduce on the application. She informed the court that she would like to introduce the “will say”, which is the document sent by the prosecution to the accused to inform the latter of any witness whom it is proposed to call and of the purpose for which a witness will be called and of the nature of the proposed evidence of that witness. Also, she told the court that she wanted to introduce two investigation reports disclosed to the accused in order to support her argument that the particulars on the eight fraud charges on the charge sheet were adequate for the accused to properly prepare his defence.

[15] Defence counsel objected to those documents being introduced because the prosecution was precluded to do so in accordance with the Military Rules of Evidence. He was provided previously a short adjournment in order to review his position in light of the comments and legal references made by the prosecution. A second adjournment was provided to the defence counsel in order for him to take knowledge of some case law provided by the prosecution. He was then allowed to comment on those cases. I invited the prosecutor to comment on those cases in light of her position regarding the authority for the court to assess the sufficiency of particulars in the context of the information disclosed to the accused.

[16] Then the prosecution reiterated her position that the particulars on the fraud charges were clear enough as they were for the accused to properly prepare a defence. The defence counsel told the court that he had a totally opposite view on this question and that the court needed to assess these particulars without reviewing the disclosure.

[17] Instead of ruling on the admissibility of the documents, I then expressed my view that considering only the particulars of each charge of fraud, I did not see in what way it would not allow the accused to properly prepare a defence. In different words, I expressed the view that without considering the fact that the accused received or not any other information, on its face, the particulars for each charge of fraud seemed adequate to allow the accused to prepare a defence. I then invited defence counsel to articulate his arguments regarding the insufficiency of the particulars.

[18] An exchange followed with defence counsel and I, and I allowed the prosecutor to provide comments on that issue. I asked defence counsel if he wanted to reply to his colleague, to which he declined. I then provided the reasons for my decision and dismissed the application. I adjourned the proceedings to 18 August 2015.

[19] On 18 August 2015, I opened a *voir dire* in order to proceed with the current application.

[20] It is alleged by defence counsel that during the hearing of the application for particulars, I expressed the fact that I had made up my mind on the issue prior to providing him an opportunity to make submissions on it. In addition, it is alleged that I entered the fray through some interventions and comments I made, reflecting partiality or reflecting bias.

[21] In addition, it is alleged that by holding meetings in chambers without recording and twice without the presence of the accused, I contravened section 650 of the *Criminal Code* which specifically provides that an accused shall be present in court during the whole of his trial.

[22] On this issue of meeting in chambers, it is also alleged that the right of the accused to a public hearing by an impartial tribunal was violated contrary to paragraph 11(d) of the *Canadian Charter of Rights and Freedom* and that his right to life, liberty

and security were violated contrary to section 7 of the *Charter* because some principles of fundamental justice, such as being present for the whole of his trial and openness, were not respected. As a result, defence counsel would like to have a replacement judge appointed or that a mistrial be declared.

[23] The test to determine if the comments and interventions of a judge has raised a reasonable apprehension of bias is "whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias" (see *Miglin v. Miglin*, 2003 SCC 24 at paragraph 26 and also *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paragraph 111).

[24] The onus is on the applicant to demonstrate bias (*R. v. S. (R.D.)* at paragraph 144). Then, it belongs to Master Corporal Edmunds to prove that there is a real likelihood of bias; mere suspicion is not enough. In short, it belongs to him to displace the presumption of judicial integrity and impartiality as reflected in the oath taken by each military judge before commencing the duties of office.

[25] As noted by the Supreme Court of Canada in *R. v. S. (R.D.)*at paragraph 105:

> … bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

[26] In the same decision, the attitude that must be disclosed by a judge is described in those terms at paragraph 120:

> Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.

[27] However, it is also recognized that the judge's role is not limited to a mere arbitrator or a referee in a trial (see *R. v. Felderhof*, 2003 CanLII 37346 (ON CA) at paragraph 40 and *R. c. Auclair*, 2013 QCCA 671 at paragraph 55, appeal to SCC dismissed at 2014 SCC 6). A trial judge has a duty to manage the trial process, balancing fairness to the parties as well as the efficient and orderly discharge of the court process. Management involves control, direction and administration in the conduct of a trial. This power, settled within a broad discretion, relates to the entirety of the trial proceeding, extending beyond the scope of pre-trial case management rules.

[28] First, as I mentioned during the hearing on this application, I used the term "fishing expedition" in the courtroom in order to remind defence counsel that a disclosure application has some limit and cannot be used as a discovery tool when there is no reason to substantiate such action. It was said to defence counsel as a gentle reminder made in the context of an examination-in-chief of his witness, Captain Tarso, on 8 July 2015. I may have used such terms during the meeting in chambers that

followed my intervention, but for the same purpose. My comment was not to qualify the work or attitude of defence counsel but to illustrate that even such a procedure has its own limits. It is then my conclusion that an informed and reasonable person aware of all relevant circumstances would have concluded that my conduct did not give rise to a reasonable apprehension of bias.

[29] Defence counsel also identified to me four comments and interventions I made during the hearing on the application for particulars that would raise a reasonable apprehension of bias.

[30] First, he pointed to a comment I made regarding the fact that on its face, I did not see any problem with the particulars and invited him to make comments that may make me read or see those particulars differently. As I exposed earlier in this decision, the context is self-explanatory. Defence counsel wanted me to assess the particulars for each charge without considering the information disclosed. I said to him that in that manner, at that point of the proceedings, I did not see any problem with the particulars and I would like him to identify to me his issues in that context that may make me see things differently. I heard from prosecution, allowed defence counsel to reply, and provided my decision.

[31] The excerpt of the conversation we had is as follows:

> "DEFENCE COUNSEL: The disclosure is, though, inadequate to answer those questions that are necessary to make a defence. My point at this stage, though, is that Your Honour needs to assess these particulars without reviewing the disclosure yourself.
>
> MILITARY JUDGE: But—so if I assess particulars at this point, my decision is that it's adequate when I read them."

[32] At that point, defence counsel had closed its case on the hearing, and he asked me to read the particulars without considering any information he may have received, to which I replied that I did not see what the problem was with the particulars at that stage because they appeared to me as adequate.

[33] I am of the opinion that an informed and reasonable person aware of all relevant circumstances would have concluded that my conduct did not give rise to a reasonable apprehension of bias. In fact, I did what I was invited to do by the defence counsel: read the particulars without considering any further information. I provided an opportunity to counsel to give comments regarding such an observation and provided, after, reasons for my decision.

[34] The issue was not predetermined. The extensive exchanges I had with defence counsel for a long time in order to understand his position, while I clearly told him that I had difficulty understanding the rationale for it, because the particulars appeared as being clear enough to allow his client to prepare a defence, do reflect the fact that I gave

him a full opportunity to establish his point before making any decision, as I did for the prosecution.

[35] Defence counsel identified three other excerpts where he alleged that I entered the fray, providing assistance to prosecution, which would result in raising a concern about bias. I listened to those excerpts. Other than trying to clarify the position of the prosecution on my authority to consider, or not, disclosure provided to the accused and to clarify to what extent such disclosure was received by the accused regarding the "will say" and the investigation reports, considering the nature of the application, I do not see how those actions would lead an informed and reasonable person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, to conclude that my conduct gives rise to a reasonable apprehension of bias.

[36] Finally, defence counsel raised the fact that I made no ruling concerning his objection to the introduction of documents by the prosecution during the hearing on the application for particulars. Essentially, the applicant's case was closed and while the prosecution was trying to adduce evidence on its own case, defence counsel objected to the admissibility of it. I did not rule on the issue because I then considered the application without it, as suggested by defence counsel. This change in the way to proceed was explained clearly to him and the prosecutor: the particulars on the charges of fraud appeared to be clear enough to me to allow his client to present a defence without considering the disclosure he received. I then invited counsel to provide submissions on this issue and I provided reasons for my decision.

[37] The way I conducted the application for particulars does not constitute a reason to recuse myself. I did change the course of the proceedings at some point by avoiding a long debate on the admissibility of some documents while the applicant wanted me to consider his application without those documents. This change did not cause any prejudice to the applicant, shortened the debate, and made me consider the matter as the applicant wanted me to do it. To me, objectively, an informed and reasonable person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that my conduct did not give rise to a reasonable apprehension of bias.

[38] Concerning section 650 of the *Criminal Code*, I cannot see how this provision would apply in the context of a court martial. Defence counsel was unable to identify any provision under the *National Defence Act* or its relevant regulation that would allow this court to give effect to such section. As a matter of principle, a person subject to the Code of Service Discipline shall be present in court during the whole of his or her trial. As a matter of fact, no court martial may start without the accused being brought before the court. The military judge presiding at the court martial has authority to issue a warrant for arrest if the accused, having appeared before the court martial, fails to attend before it as required, but there is no equivalent to section 650 of the *Criminal Code* in the Code of Service Discipline. Consequently, this court has not contravened section 650 of the *Criminal Code*.

[39] Informal discussions in chambers between the military judge presiding at a court martial and counsel are a tool used for case management by the judge and the parties during the trial in order to conduct it in a diligent and efficient manner. It helps to determine the length of the trial, anticipate problematic issues that may occur and reassess proper scheduling. Nothing in relation to the determination of the guilt of an accused is discussed during such meetings. It may happen on the request of the judge or the parties. The purpose is to make easier the conduct of the trial.

[40] As concluded by the Quebec Appeal Court in its decision of *R. v. Taillefer*, 1989 CarswellQue 190 at paragraph 25, I am of the opinion that such discussions, despite that they occur in the course of the court martial, are not part of the trial itself unless it involves the vital interest of the accused. As confirmed by the Ontario Court of Appeal in *R. v. Simon*, 263 C.C.C. (3d) 59, at paragraph 117:

> Discussions in chambers can be part of the "trial" for s. 650(1) purposes: *Hertrich* at p. 539; *R. v. Laws* (1998), 128 C.C.C. (3d) 516 (Ont. C.A.), at p. 521; *R. v. James* (2009), 244 C.C.C. (3d) 330 (Ont. C.A.), at para. 17. But not every in chambers discussion is part of the trial for the purposes of s. 650(1), especially if the discussion is of a preliminary nature, does not involve any final determination and is recounted in open court in the presence of the accused: *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at p. 31*; R. v. Chaudhary*, [1988] O.J. No. 1857, 7 W.C.B.(2d) 105 (C.A.), at para. 3.

[41] Considering that three in chambers discussions occurred so far in this trial, that the accused attended the second one, and that no vital interest of the accused was discussed or even alleged by defence counsel, I then conclude that those discussions were not part of the trial and I would find it difficult to see how they would be subject to an analysis as a violation of section 7 of the *Charter*, especially in the context of items such as the presence of the accused at this trial and openness of the court. As a matter of fact, those latter items have not been found as being principles of fundamental justice, despite the fact that they are fundamental values to our criminal justice system.

[42] Finally, concerning the violation of the right of the accused to a public hearing by an impartial tribunal contrary to subsection 11(d) of the *Charter*, I would say that considering my conclusion on the discussions in chambers as not being part of the trial, then the issue of a public hearing is not involved anymore.

[43] Concerning the issue related to an impartial tribunal, I would say that the existence of a mechanism such as the one articulated at article 112.14 of the *Queen's Regulation and Orders for the Canadian Forces* allowing a party to object to the military judge presiding at the court martial, I must conclude that the existence of such a process ensures the respect of that right for an accused.

FOR THESE REASONS, THE COURT THEN:

[44] **DISMISSES** the objection to the military judge made by the accused.

Counsel:

The Director of Military Prosecutions as represented by Major A.-C. Samson.

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