



## COURT MARTIAL

**Citation:** *R. v. Edmunds*, 2017 CM 3011

**Date:** 20170109

**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.

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### **REASONS ON APPLICATION MADE BY THE ACCUSED FOR THE ADMISSIBILITY OF UNOFFICIAL CONFESSION**

(Orally)

[1] Master Corporal Edmunds is charged with 15 service offences punishable under paragraph 130(1)(a) of the *National Defence Act*. 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 was brought on 26 May 2016 by the applicant by way of a notice in writing made under the *Queen's Regulations and Orders for the Canadian Forces* 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 military judge to hear and determine, in the absence of the members of the court martial panel, about the

admissibility of an unofficial statement made by him during an interview with the military police investigator on the early morning of 6 December 2011 at the Military Police Detachment in Petawawa. The hearing on this application took place on 26 and 27 May 2016.

[3] The evidence on the application, heard in a *voir dire* that I opened, consisted of:

- (a) the testimony heard of Master Corporal Partridge;
- (b) Exhibit VD9-1, a video recording of the statement provided by Master Corporal Edmunds on 6 December 2011;
- (c) Exhibit VD9-2, a copy of a written statement provided by Master Corporal Edmunds on 6 December 2011; and
- (d) the judicial notice taken by the Court of the facts in issues under Rule 15 of the *Military Rules of Evidence*.

[4] The statements of an accused have two aspects, as is the case with most of the evidence submitted by the prosecution: admissibility under the rules of evidence and exclusion under the *Charter*. These two aspects are often confused with each other. The burden of establishing admissibility is on the prosecution. The burden of establishing that admissible evidence should be excluded is on the defence.

[5] In order to establish the admissibility of the statement of an accused to a person in authority, the prosecution must demonstrate, beyond a reasonable doubt that it was made voluntarily. In order to have an admissible statement excluded, the defence must prove, on a balance of probabilities, first, that it was obtained in violation of a *Charter*'s right and, second, that its admissibility would bring the administration of justice into disrepute.

[6] If it is true that these are two different issues, in terms of both the evidentiary and the persuasive burden, and if this is kept in mind, much confusion will be avoided. For the purposes of the present *voir dire*, I will deal solely with the admissibility of the oral and written statement made by Master Corporal Edmunds on 6 December 2011 under section 42 of the *Military Rules of Evidence* and under the common law rule.

[7] As explained by Hugessen J.A. of the Court Martial Appeal Court in *R. v. Laflamme*, CMAC-342, the *Military Rules of Evidence* were adopted by the Governor in Council and must be applied in a court martial because they have force of law.

[8] However, in my opinion, if there is a rule of evidence on the same principle and it is more favourable to the accused, the Court must consider using that rule.

[9] The essence of section 42 of the *Military Rules of Evidence* is the same as that of the common law rule defined by the Supreme Court of Canada in *R. v. Oickle*, [2000] 2

SCR 3. However, this Supreme Court of Canada decision lists a number of factors that are not currently contained in section 42 of the *Military Rules of Evidence*, such as the operating mind requirement and police trickery. The situation at bar requires the Court to apply the factors outlined in *Oickle*, as they reflect the most favourable situation to the accused when considering the admissibility of an unofficial confession.

[10] *Oickle* holds that in order for most statements made to a person in authority to be admissible, the prosecution must establish beyond a reasonable doubt in light of all of the circumstances that the will of the accused has not been overborne by things such as inducements, oppressive circumstances, or the lack of an operating mind. In addition, there must not be police trickery that unfairly denies the accused his or her right to silence.

[11] It is important to remember that no statement by an accused to a person in authority is admissible as an integral part of the evidence filed by the prosecution or for the purpose of cross-examining the accused unless the voluntariness of the statement is demonstrated beyond a reasonable doubt.

[12] A statement is voluntary only if it was not made under the influence of fear of prejudice or hope of advantage induced by promises held out by a person in authority and if it was made by an operating mind. This rule is founded on the desire to prevent convictions based on confessions of questionable reliability and to dissuade any coercive tactics by the State.

[13] When applying the common law confessions rule, one must be mindful of its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes, as stated by Iacobucci J. on behalf of the majority at paragraph 33 in *Oickle*.

[14] The voluntariness of a statement is determined almost entirely by context. Because of the variety and the complex interplay of circumstances that can vitiate voluntariness, assessing whether a statement is voluntary is governed by guidelines rather than by rules. The judge must consider all of the circumstances surrounding the statement and ask whether they raise a reasonable doubt as to its voluntariness. As stated in *Oickle* at paragraphs 47 to 71, the relevant factors the judge must consider include the following:

- (a) threats or promises;
- (b) oppression;
- (c) operating mind; and
- (d) other police trickery.

[15] In the present *voir dire*, counsel for the prosecution does not contest that the accused made his statement to a person in authority. A person in authority is any person whom the accused reasonably believes to be acting on behalf of the State and to be able

to influence the course of the investigation or trial. This definition contains both objective and subjective aspects. It usually applies to persons involved in the arrest, detention, examination or prosecution of the accused. They hold conventional positions of authority, working as uniformed police officers and prison guards, for example, and are persons in authority simply because of their status. In the present case, Master Corporal Edmunds was interrogated by a military police officer as part of an investigation because he was suspected of fraud. A *voir dire* is therefore clearly required in this case, and the accused did not waive his right to a *voir dire*. On the contrary, he explicitly requested it.

[16] At this stage, it would be appropriate for me to provide a summary of the circumstances relevant to this matter.

[17] Master Corporal Partridge, a military police member and investigator, requested Master Corporal Edmunds' unit to tell the latter that he had to show up for an interview at the Military Police Detachment at the Canadian Forces Base Petawawa on 5 December 2011. It appears that Master Corporal Edmunds was ordered to show up by his chain of command accordingly.

[18] On 5 December 2011, around 7 p.m., Master Corporal Edmunds was interviewed by Master Corporal Partridge at the Military Police Detachment for about two to three hours because he was suspected of having committed a fraud. Master Corporal Edmunds was told by the investigator early in the interview that he was known that he was ordered to show up but that he considered that he was there on his own free will and that he could leave the interview room at any time he felt like it.

[19] Sometime after the interview ended, the investigator informed, by email, Master Corporal Edmunds' unit that he came to meet him on that evening.

[20] On the early morning of 6 December 2011, around 2 a.m., which is some four hours after the interview, Master Corporal Edmunds came back to the detachment on his own will. He indicated to the investigator that he wanted to make a written statement regarding the fraud case.

[21] As qualified by the investigator, it was a subsequent interview that took place at that time. After having provided to Master Corporal Edmunds his right to retain and instruct counsel without delay and the usual caution statement about the fact that he had no obligation to say anything, Master Corporal Edmunds wrote a statement on 6 December 2011 where he confessed having committed fraud. He clearly indicated to the investigator that he was acting contrary to what the military defence counsel did suggest earlier to him but that he wanted this over and done with it.

[22] Then, the investigator proceeded with a review of his statement and he asked additional questions arising from what was written by Master Corporal Edmunds. The second interview lasted overall about 40 minutes.

[23] Before proceeding with the factors' analysis in order to determine voluntariness of Master Corporal Edmunds' written and oral statement made during the second interview of 6 December 2011, I am still concerned by the fact that maybe all the circumstances were not put before the Court in order for me to make a decision on that issue.

[24] As said by Judge Arnold from the British Columbia Provincial Court in *R. v. Guilbride*, [2003] B.C.J. No. 1736, at paragraph 50, the prosecution is obliged to give sufficient details of the circumstances surrounding the taking of the statement and the actual taking of the statement itself to satisfy the trial judge beyond a reasonable doubt that it was voluntarily made. Inherent in such an approach is that the court must have evidence before it on the statement *voir dire* that provides a sufficient record of what was said by whom, where, when and in what context. The court may then assess the likelihood of inducements, threats, or coercive behaviour that may constitute an inducement, and finding an absence of same, may conclude that the prosecution has proved voluntariness beyond a reasonable doubt.

[25] It is true that the Court knows enough about the circumstances surrounding the actual taking of the statement on 6 December 2011. In itself, it does appear that Master Corporal Edmunds was not the subject of any inducements, threats, or coercive behaviour from the investigator that may constitute an inducement, that he had the necessary operating mind and that there was no police trickery.

[26] However, it clearly appears to the Court that the interview under scrutiny of Master Corporal Edmunds was the second part of an interview that has started earlier on the exact same matter. Clearly, as defined by the investigator himself, this subsequent interview made some four hours after the first one by the same investigator, clearly indicates that it was the continuity of what happened during the first interview on 5 December 2011.

[27] From the evidence, the Court knows that the written and oral statements provided by the accused during the subsequent interview made some hours after the first one with the same investigator, is likely related to what happened during the first interview. However, nothing was provided regarding the circumstances of the first interview other than the duration of it, when, where, why it took place and who conducted it.

[28] In the absence of those essential details about how things took place during the first interview that would have allowed the Court to assess the whole circumstances and help it to better understand what led Master Corporal Edmunds to provide written and oral statements after the first interview conducted by the investigator some hours earlier, it is difficult for the Court to assess properly if there is an absence of any inducements, threats, or coercive behaviour in order for it to conclude that the prosecution has proved voluntariness beyond a reasonable doubt concerning the substance and the provision of written and oral statements by Master Corporal Edmunds.

[29] Here, the issue is not about the accuracy of what was said by Master Corporal Edmunds and what he put in his written statement in comparison to what he said during both interviews, which is a matter of weight to be determined further by the trier of facts. It concerns the fact that to give sufficient details of the circumstances of the overall interview, which include the first and second interviews conducted by the same investigator on the same night, that led Master Corporal Edmunds to make a written and oral statement that would allow the Court to determine the voluntariness issue about admissibility, considering the close proximity of both interviews.

[30] Considering the absence of those details, the Court is not satisfied that the prosecution has proved beyond a reasonable doubt that Master Corporal Edmunds' written and oral statements made on 6 December 2011 was made voluntarily.

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

[31] **DECLARES** that Master Corporal Edmunds' written and oral statements made on 6 December 2011 are not admissible in this trial.

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**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