COURT MARTIAL

Citation: *R. v. Derival*, 2018 CM 4006

Date: 20180315
Docket: 201760

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

Prosecutor
and
Responding Party

- and -

Leading Seaman K. Derival

Accused
and
Moving Party

Before: Commander J.B.M. Pelletier, M.J.

RULING ON RESPONDENT'S MOTION TO QUASH AN APPLICATION SEEKING A CONSTITUTIONAL REMEDY FOR VIOLATION OF RIGHTS GUARANTEED UNDER SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

[1] In a revised notice of application dated 7 February 2018, supported by written arguments, the applicant, Leading Seaman Derival, asks the Court to find that sections 23(1) and 90 of the *National Defence Act* (*NDA*) violate his right to liberty protected by section 7 of the *Canadian Charter of Rights and Freedoms* and that charges 1 and 2 alleging that he was absent without leave contrary to section 90 of the *NDA* be stayed.

[2] Reacting to the application, the respondent prosecution filed a motion asking that the application be summarily dismissed, arguing that the lack of factual and legal foundation makes it frivolous and without any prospect of success.

[3] Generally, the applicant alleges that sections 23(1) and 90 together create a scheme by which he, as any other member of the Regular Force, is deprived of his right to liberty by being required to serve in the Canadian Armed Forces (CAF) until lawfully released at the discretion of the State as provided by section 23 of the *NDA* and by being obliged to be at a given place at a given time for duty unless on leave approved by the State. As these legislative provisions limit his physical movement as in "going to places where the rest of the public is free to roam", it is argued that they violate his liberty as what has been described as a free-standing *Charter* right. When not sheltered by a declaration pursuant to section 33 of the *Charter*, such violations are not in accordance with the principle of fundamental justice and, therefore, can only be saved by an analysis under section 1 of the *Charter*, the evidence of which is to be presented by the prosecution.

[4] No evidence was adduced in support of the application, other than the charge sheet preferred against Leading Seaman Derival. The applicant relies on the relevant legislative provisions in support of his argument. In written argument, the applicant refers to a number of legal authorities, none of which provide direct support to the various steps of his argument, which he readily qualified as "novel" and untested.

[5] The lack of legal support does not necessarily make an argument frivolous. Counsel can raise novel concepts. Yet, the obligation remains to substantiate the argument in fact and/or in law. When an argument does not benefit from any connection with recognized legal principles or is in direct contradiction with legal principles recognized in legislation or jurisprudence, it risks being considered frivolous and be summarily dismissed as there is no basis on which the application could succeed.

[6] The first step in arguing a violation under section 7 of the *Charter* is for an applicant to demonstrate a deprivation of liberty. Here, the applicant does not elaborate in writing on the alleged deprivation of his liberty but rather makes an assumption that such deprivation is obvious. Yet, the obligation to serve until released found in section 23 of the *NDA* does not constitute a full-time physical restriction on members of the CAF. Not only can they be granted leave for periods of time that may vary from vacations to extended periods of leave without pay as provided for in chapter 16 of the *Queen's Regulations & Orders for the Canadian Forces*, the everyday life of most members of the CAF employed in Canada consists of a workday of eight or so hours before and after which they are free to roam about. Despite this, section 90 of the *NDA* sanctions an absence from a place of duty without authority or leave.

[7] Applying this reality to the legal test relevant to the notion of liberty under section 7 of the *Charter*, the applicant provides no argument as to how the operation of sections 23(1) and 90 of the *NDA* may be equated to the legal principle of freedom from physical restraint that he alleges. Nor does he argue how these provisions could be

equated to a statutory duty to submit to any procedure or do anything that could be equated or associated with a deprivation of liberty attracting the requirement to apply the rules of fundamental justice. The applicant refers to the decision in *Blencoe v. B.C. (Human Rights Commission),* [2000] 2 S.C.R. 307, which first extended the reach of section 7 in ruling that liberty is engaged when state compulsions or prohibitions affect important and fundamental life choices. Yet, the applicant does not mention in written or oral arguments what fundamental life choices of members of the CAF are affected by the application of sections 23(1) and 90 of the *NDA* to them. It is acknowledged, however, that membership in the CAF, hence the application of sections 23(1) and 90 to a specific person, is the result of the choice of that person to join the CAF in the first place.

[8] Based on deficiencies in arguments, orally and in writing, by the applicant and in light of the legal landscape as I understand it, revealing a careful and measured application by courts of the notion of liberty of the person in the context of section 7 of the *Charter*, I have to conclude that the applicant has failed to show any basis upon which I could find that the liberty of Leading Seaman Derival was engaged by the sole application of sections 23(1) and 90 of the *NDA* to him. As there is no basis to find that the applicant's liberty has been violated, the primary argument of the applicant alleging breach of a "freestanding constitutional right" cannot possibly succeed.

[9] In written argument, the applicant states he does not rely on the fact that section 90 of the *NDA* can lead to a period of imprisonment as the section itself directly restricts the physical liberty of the applicant. This position is acknowledged, but it remains that the possibility of imprisonment in section 90 engages liberty interests. This is sufficient to trigger *Charter*, section 7 scrutiny.

[10] I therefore must comment on the second step that an applicant is required to fulfil in arguing a breach of section 7 of the *Charter*, namely to demonstrate that the deprivation of liberty alleged is not in accordance with the principles of fundamental justice.

[11] The applicant's main argument, qualified as a "free-standing constitutional right", has not been identified or suggested by the Supreme Court of Canada (SCC) at paragraph 145 of the decision of *R. v. Malmo-Levine*, 2003 SCC 74 as argued by the applicant. In fact, in expressly rejecting the "pleasure principle" argued by Mr. Malmo-Levine, Gonthier and Binnie JJ for the majority clearly stated that a violation of a section 7 right must first be established before a court is to enter into any free-standing inquiry as to whether the right balance was struck between individual and societal interests (paragraph 96) or whether the pleasure of the many should not be curtailed by the harm to the few (paragraph 101). Therefore, the novel argument suggested by the applicant is not only unsupported in law, it is contrary to accepted legal principles. The applicant's argument has the effect of collapsing the two steps required to establish a violation of section 7 into one, an idea rejected by the SCC. Therefore, that novel argument cannot provide a basis on which his application could succeed.

[12] This conclusion is also directly applicable to the applicant's alternative argument, to the effect that sections 23(1) and 90 of the *NDA* violate the principles of fundamental justice as they constitute legislation of which the objective, albeit rationally connected, is grossly disproportionate to its effects by definition, as it violates a "free-standing constitutional right."

[13] The applicant has not offered any other argument to support the claim that sections 23(1) and 90 of the *NDA* would be grossly disproportionate to the state interest under the recognized test for gross disproportionality in *Malmo-Levine*. Having submitted, in quoting the SCC in *R. v. Moriarity*, 2015 SCC 55, that the purpose of those provisions is the same as the purpose of the Code of Service Discipline, even if *NDA*, section 23(1) is not part of the Code, the applicant concedes that the purpose of the impugned provisions are rationally connected to their effects. In the notice of application, it is alleged that the state interest being addressed by section 23(1) is the maintenance of sufficient personnel numbers in the CAF and that the state interest being addressed by section 90 is to motivate CAF members to attend to their duty. Yet, the applicant adduces no evidence of legislative intent or legislative facts in support of this statement of state interest. He also offers no evidence of adverse effects beyond the loss of freedom to roam alleged at the outset in his argument as to restriction of liberty. Yet, the effects of these dispositions may vary. For instance, a right to release is provided for in section 30 of the *NDA*. A release on request is available to members wishing to leave the CAF, even if a status of active service or a state of emergency may restrict opportunities to obtain a release. The power to issue orders may create a situation where the liberty of some members of the CAF is entirely different than others. No evidence is offered on any of these nuances. The applicant's counsel simply argued orally that, in modern times, a legislative provision forcing someone to remain with an employer until permitted to leave, combined with another provision creating a penal offence to sanction something so minor as being late or absent from work is grossly disproportionate.

[14] In light of this, the application is a bare invitation to review the wisdom of the legislative policy adopted in successive versions of the *NDA* as it pertains to the offence of absence without leave. It could be argued that the same invitation was made to the SCC in *Malmo-Levine* and a minority of two judges would have struck down that law. Yet, in that case, the court had facts to rely on in weighing government policy on the criminalization of marihuana. No such facts are before me in this case.

[15] In the circumstances, I am left to conclude that there is, on the present record before me, no basis on which this application could succeed. The application must, therefore, be summarily dismissed.

FOR THESE REASONS:

[16] The prosecution's motion to quash is granted.

Counsel:

The Director of Military Prosecutions as represented by Major M.E. Leblond, Prosecutor and Counsel for the Responding Party

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Leading Seaman K. Derival, the Accused and Moving Party