



COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2017

Date: 20190813

Docket: 201914

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

**Prosecutor
and
Responding Party**

- and -

Petty Officer 1st Class B.L. Alix

**Accused
and
Moving Party**

Before: Commander S.M. Sukstorf, M.J.

**DECISION ON PROSECUTION'S MOTION TO SUMMARILY DISMISS
ACCUSED'S APPLICATION SEEKING REDRESS UNDER SUBSECTION
24(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS FOR
BREACH OF RIGHTS GUARANTEED UNDER SECTIONS 7 AND 11(d)**

(Orally)

Introduction and background

[1] On 13 March, 2019, the prosecution preferred two charges. The first charge was for conduct to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act (NDA)*, while the second charge was for drunkenness, contrary

to section 97 of the *NDA*. The charges arose from an alleged incident that took place at the Chief and Petty Officers' Mess at Canadian Force Base (CFB) Esquimalt on or about 26 October 2018.

[2] On 18 July 2019, pursuant to section 187 of the *NDA* and article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Petty Officer 1st Class Alix brought a notice of application seeking a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* as remedy for an alleged infringement of a violation of his *Charter* rights as guaranteed by section 7 and paragraph 11(d) of the *Charter*.

[3] On 25 July 2019, the respondent filed its own notice of motion with the Office of the Chief Military Judge to summarily dismiss and its response to Petty Officer Alix's notice of application.

[4] On 29 July 2009, Petty Officer 1st Class Alix filed with the Office of the Chief Military Judge, a response to the prosecution's notice of motion and on 12 August, he filed an Addendum to the Reply.

[5] Prior to the Court hearing the motion to summarily dismiss the accused's application, the prosecution withdrew the charge of drunkenness which left one remaining charge contrary to section 129 of the *NDA* for conduct to the prejudice of good order and discipline.

Issue

[6] The Court must decide whether to allow evidence and argument on the accused's notice of application seeking a stay of proceedings under subsection 24(1) of the *Charter* for an alleged violation of the accused's section 7 and paragraph 11(d) rights.

Evidence

[7] The evidence adduced on this application is composed of the following:

- (a) Exhibit PP1-1 - Convening Order dated 6 May 2019;
- (b) Exhibit PP1-2 - Charge Sheet dated 13 March 2019;
- (c) Exhibit PP1-3 - Defence notice of application, dated 18 July 2019;
- (d) Exhibit PP1-4 - Prosecution's notice of motion to dismiss defence's application and response, dated 24 July 2019;
- (e) Exhibit PP1-5 – Defence's Reply to The Director of Military Prosecution's (DMP) response, dated 25 July 2019; and

- (f) Exhibit PP1-6 – Addendum, dated 29 August 2019 filed by the defence in reply to the DMP Response.

[8] In assessing whether to summarily dismiss all or portions of the accused's notice of application, as requested by the prosecution, the Court reviewed the evidence and the case law relied upon by counsel, and considered their oral submissions.

Positions of the parties on the accused's application for abuse of process

Accused

[9] The accused seeks a declaration that:

- (a) specific conduct by the DMP amounted to:
 - i. a violation of Petty Officer 1st Class Alix's section 7 *Charter* rights to not be deprived of liberty and security except in accordance with the principles of fundamental justice;
 - ii. a violation of Petty Officer 1st Class Alix's paragraph 11(d) *Charter* rights to a fair trial; and
 - iii. an abuse of process.
- (b) specific conduct of the Assistant Judge Advocate General (Pacific) (AJAG Pacific) amounts to:
 - i. a violation of Petty Officer 1st Class Alix's section 7 *Charter* rights to not be deprived of liberty and security except in accordance with the principles of fundamental justice;
 - ii. a violation of Petty Officer 1st Class Alix's paragraph 11(d) *Charter* rights to a fair trial; and
 - iii. an abuse of process
- (c) certain conduct of Petty Officer 1st Class Alix's chain of command amounts to:
 - i. a violation of Petty Officer 1st Class Alix's section 7 *Charter* rights to not be deprived of liberty and security except in accordance with the principles of fundamental justice;
 - ii. a violation of Petty Officer 1st Class Alix's paragraph 11(d) *Charter* rights to a fair trial; and

- iii. an abuse of process

[10] In his application, the accused alleges the following:

- (a) objectionable conduct from the DMP amounted to the exercise of prosecutorial authority in an unfair manner:
 - i. by objecting to defence counsel directly contacting a witness;
 - ii. by objecting to defence counsel ordering a potential witness to respond to questions from defence prior to trial; and
 - iii. by encouraging the chain of command to hinder the ability of defence counsel to obtain information from potential witnesses.
- (b) objectionable conduct with respect to AJAG Pacific, as follows:
 - i. by objecting to defence counsel ordering a witness to respond to questions from defence counsel prior to trial and allegedly suggesting such conduct would be contrary to law society protocol and in violation of his defence counsel duties; and
 - ii. by discouraging counsel from ordering a witness to respond to questions from defence counsel prior to trial, by suggesting such conduct may be in violation of the public office held by defence counsel, thus inferring that criminal liability may arise.
- (c) objectionable conduct with respect to the chain of command allegedly occurred:
 - i. by encouraging a potential witness not to respond to questions from defence counsel in advance of trial; and
 - ii. while conducting a unit disciplinary investigation (UDI), they did not advise a member, from whom information was sought, that their involvement in the UDI was voluntary.

Prosecution's response to the abuse of process application from the accused and notice of motion

[11] In its response of 25 July 2019, in addition to responding to the accused's application, the prosecution seeks an order dismissing Petty Officer 1st Class Alix's application that alleges abuse of process.

[12] The prosecution argued that the accused failed in his notice of application to refer to any evidence that his defence counsel was unable to speak with a witness and submits that his assertion is based merely on speculation and assumption. The prosecution submitted that the accused received a will-say statement that included all the email addresses of the witnesses, all of whom are military members with their work telephone numbers accessible through the Defence Wide Access Network (DWAN).

[13] The prosecutor broke the allegations down into two separate categories:

- (a) in the first category, which involved the allegations of AJAG Pacific and DMP that there was some evidence, being emails to support that there had been communication between the parties on whether or not a witness may or may not be ordered to answer the questions of defence counsel; and
- (b) in the second category, there was the claim regarding interference or undue influence of the chain of command directing a witness or witnesses not to answer the questions of the defence, for which there was no evidence provided. The prosecution alleged that absent any evidence, this claim amounted to nothing more than pure speculation.

Court's assessment of the prosecution's notice of motion seeking the Court to dismiss the accused's application

[14] Under preliminary proceedings and prior to the plea, the Court heard the prosecution's motion for an order to dismiss the accused's application related to the alleged abuse of process.

[15] In support of its motion requesting the Court summarily dismiss the accused's abuse of process application, the prosecution relied upon paragraph 38 of *R. v. Cody*, 2017 SCC 31, where the Supreme Court of Canada (SCC) stated:

[38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss applications and requests the moment it becomes apparent they are frivolous (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

Reasonable prospect of success

[16] In considering the prosecution's motion for the Court to summarily dismiss the accused's application, the accused bears the onus of advancing the evidentiary foundation for his application. Although the burden on the accused is actually quite low, it does require the accused to present sufficient factual foundation and legal argument to show that his application has a reasonable prospect of success.

[17] As such and pursuant to the direction provided by the SCC, this Court asked the accused to summarize the evidence it anticipated eliciting in the *voir dire*, which he did. It was noted that he listed a number of witnesses that were not included in his notice of application.

[18] The common-law test for a motion to strike was laid out by the SCC in *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 17 as follows:

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success.

[19] In short, in assessing whether the Court may summarily dismiss all or portions of the accused's application, the facts and grounds relied upon by the accused in his notice (Exhibit PP1-3) as well as the verbal and written submissions must be assumed to be true.

[20] In her oral submissions, the prosecution addressed the above *Cody* test and distinguished the evidence and allegations into the two distinct categories set out above. In the first category, the prosecutor contended that the evidence suggests that the AJAG Pacific and DMP only objected to defence counsel "ordering" witnesses to speak to him and did not ever actively discouraged witnesses from speaking with him. In her oral submissions, she argued that the prosecution has a role to play in weighing privacy rights of complainants and witnesses and it was merely fulfilling this role.

[21] The prosecution further argued that the allegation regarding the improper conduct of AJAG Pacific does not reveal an issue at law, but merely reflects conversation and disagreement about the law.

[22] With respect to the second category, the prosecution further argued that the accused's notice does not reference any evidence, provide witness names or a summary of how he intends to establish that the accused's chain of command dissuaded witnesses from speaking with defence counsel. Although I agree with the prosecution that there was little evidence provided in the accused's notice of application, in his oral submissions, defence counsel provided the names of witnesses he intends to call and some of the reasons why he expects that they would proffer evidence to assist to support the allegation of improper conduct by the chain of command. He stated that during the application itself, he will present evidence focussed on the actions of and decisions made by the various statutory actors.

[23] In particular, defence counsel referred to the change in the established behaviour of Chief Petty Officer 1st Class Conlon. Defence counsel noted that Chief Petty Officer 1st Class Conlon had always willingly communicated with him, and often served as the first point of contact with witnesses and his sudden refusal to provide notes from individuals or respond to his queries was a departure from their previously established protocol. Additionally, Corporal Newport, who was originally a prosecution witness whom the defence counsel believes has key information, has now refused to participate.

Analysis

[24] The Court's analysis focused primarily on a narrow issue of whether or not there was any improper influence on witnesses or interference that may have frustrated the accused's preparation to make full answer and defence. The two issues that flowed were as follows:

- (a) is there some evidence, believed to be true of improper influence by the chain of command or the AJAG, or DMP to discourage witnesses from answering questions from defence counsel?
- (b) If so, was there prejudice to the accused's defence that flowed from the improper influence such that it amounted to a breach of Petty Officer Alix's *Charter* rights?

Law

[25] Section 7 of the *Charter* reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11(d) of the *Charter* reads as follows:

11. Any person charged with an offence has the right

...

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[26] As *Létourneau J.A.* points out in the Court Martial Appeal Court (CMAC) decision of *R. v. Larocque*, 2001 CMAC 2, a three-step analysis exists in determining whether an accused's right under section 7 of the *Charter* has been breached:

[10] Section 7 of the *Charter* is breached when the right to liberty and security of the person has been infringed and this infringement occurred in violation of the principles of

fundamental justice. The analysis is a three-step one: determining whether there was a deprivation of this right, identifying and defining the principles of fundamental justice at issue and determining whether the deprivation has occurred in accordance with these principles: *R. v. White*, [1999] 2 S.C.R. 417, at page 438.

Abuse of process

[27] Abuse of process can fall within two categories:

- (a) cases where the state conduct compromises the fairness of an accused's trial (main category); and
- (b) cases where the state conduct creates no threat to the fairness but risks undermining the integrity of the judicial process (the residual category).

(See : *R. v. Babos*, 2014 SCC 16, paragraph 31 and Hoegg J.A. in *R. v. Hunt*, 2016 NLCA 61 recognizing *R. v. O'Connor* [1995] 4 S.C.R. 411).

[28] In essence, the general conduct by the chain of command would fall under “state conduct” while conduct of the prosecution and chain of command as key decision-makers in the military justice system could be assessed in the “residual category” as described by L'Heureux-Dubé J. in *O'Connor* at paragraphs 73 at page 463:

[T]he panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a matter as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[29] As referred to by the prosecution in written submissions, in the case of *Hunt*, Hoegg J.A. acknowledged that the SCC (recognized in *R. v. Jewitt*, [1985] 2 S.C.R. 128) accepted that a trial judge has discretion to stay proceedings for abuse of process where compelling an accused to stand trial would violate the fundamental principles of justice that underlie the community's sense of fair play and decency through oppressive or vexatious proceedings.

[30] In her final submissions, the prosecution conceded that if there was evidence of undue influence from the chain of command on witnesses by interfering or discouraging their voluntary participation with defence, it would be a serious matter.

[31] The defence counsel position that he is entitled to order witnesses to speak to him for full answer and defence was not considered by the court. Further, the court found no evidence to merit the court hearing those portions of the application that relate to alleged improper conduct of either DMP or the AJAG Pacific.

[32] However, based on the facts presented by the accused, without conducting the three-step test set out above *R. v. White*, [1999] 2 S.C.R. 417, at page 438, as relied upon by Létourneau J.A. in *Larocque*) to determine whether the accused's section 7 rights were breached contrary to the principles of fundamental justice, the Court finds

that the accused has submitted some evidence with respect to the chain of command, if presumed to be true, meets the threshold of a reasonable prospect of success in a section 7 application.

[33] Although the accused has a reasonable prospect of success in proving a violation of his section 7 rights, the alleged abuse of process, alone, may still not be sufficient to justify a stay of proceedings. However, the test at this stage is whether the applicant has presented “some evidence”.

FOR THESE REASONS, THE COURT:

[34] **GRANTS IN PART** the prosecutor’s motion to dismiss the accused’s application for abuse of process.

[35] **STRIKES OUT** allegations set out in paragraphs 11, 12, 13, 14 and 15 of the accused’s notice of application.

[36] **PERMITS** the accused to canvass the allegations at paragraphs 16 and 17 of his notice of application

Counsel:

The Director of Military Prosecutions as represented by Lieutenant(N) J.M. Besner

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Petty Officer
1st Class B.L. Alix