COURT MARTIAL

Citation: *R. v. McGregor*, 2018 CM 4023

Date: 20180913
Docket: 201826

Standing Court Martial

Canadian Forces Base Esquimalt
Esquimalt, British Columbia, Canada

Between:

Corporal C.R. McGregor, Applicant

- and -

Her Majesty the Queen, Respondent

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the persons referred to in the charge sheet as "C.R.", "K.G." and "M.S." shall not be published in any document or broadcast or transmitted in any way.

RULING ON PRELIMINARY APPLICATION FOR EXCLUSION OF EVIDENCE

(Orally)

Introduction

[1] Proceedings of this Standing Court Martial began at Canadian Forces Base Esquimalt on 10 September 2018 for the trial of Corporal McGregor on seven charges. Five of those are laid under section 130 of the *National Defence Act* (*NDA*) including one charge of sexual assault, two charges of voyeurism and two charges for possession

of a device for surreptitious interception of private communication. The other two charges are laid in the alternative, for disgraceful conduct and for conduct to the prejudice of good order and discipline under sections 97 and 129 of the *NDA*, alleging interception of private communication between two persons.

[2] Prior to pleading to the charges and in conformity with a notice sent on 1 August 2018, counsel for Corporal McGregor submitted a preliminary application seeking an order to the effect that that evidence seized from the accused's residence of Alexandria, Virginia, on 16 February 2017 be excluded under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* as that evidence was allegedly obtained in violation of Corporal McGregor's rights under sections 7 and 8 of the *Charter*.

[3] The prosecution, respondent in this application, submitted that the *Charter* was not applicable to the search conducted on the territory of the United States of America, in application of the test in *R. v. Hape*, 2007 SCC 26. As the admission of this evidence, obtained in compliance with U.S. law, would not render the trial unfair, the respondent argues that the application must be dismissed. In fact, the prosecution has applied orally for this application to be summarily dismissed on the basis that it had no reasonable chances of success. I refused to do so on the basis that the statement of the case in the written material submitted to my attention suggested that the evidence to be presented in support of the application would reveal facts that are significantly different from those in *Hape* and, therefore, could lead to a different outcome. As it turns out, the facts in this case are quite unique and indeed very different from those in *Hape*.

Facts

Evidence

[4] The Court has been informed of the facts of this case through the testimony of two investigators from Canadian Forces National Investigation Service (CFNIS) who took part in the search of the applicant's residence on 16 February 2017: Sergeant Partridge, who was in charge of the investigation, and Lieutenant(N) Rioux who was involved in the search after having been called in to assist as a subject-matter expert in computer forensics. A number of documents were also introduced as exhibits, mainly by consent. Those were:

(a) The original search warrant from the Commonwealth of Virginia authorized by Adam Willard, Magistrate, on the basis of an affidavit in support sworn by Detective Sang Pak of the Alexandria Police Department (ADP), including, as attachment, the affidavit in support and the property inventory filled out by Detective Pak after the search and seizure had been completed (Exhibit M2-3).

(b) An affidavit from the Assistant Commonwealth's Attorney Sean Sherlock, as to the state of the law in Virginia, essentially to the effect that Virginia law, as amended in 2015, is to the effect that any search

warrant authorizing the seizure of a computer or other device containing electronic or digital information is deemed to include not only the search and seizure of the physical component of the device, but also the electronic or digital information contained therein (Exhibit M2-4).

(c) A letter from the commanding officer of the CFNIS dated 10 February 2017, in which he requests that the Head of Mission at the Canadian Embassy in Washington temporarily waive the diplomatic protection afforded to the place of residence of Corporal McGregor to allow for local foreign police force to gain entry and enable his investigators to assume investigative jurisdiction over the evidence believed to be inside (Exhibit M2-6).

(d) A letter dated 13 February 2013 from the commander of Canadian Defence Liaison Staff (CDLS) (Washington) forwarding the letter from the Commanding Officer of the CFNIS to the Deputy Head of Mission at the Embassy and requesting his support to obtain the waiving of the diplomatic protection afforded to Corporal McGregor's place of residence (Exhibit M2-7).

(e) A diplomatic note from the Embassy of Canada dated 14 February 2017 to the US Department of State informing that the CFNIS is cooperating with local authorities in Virginia and are seeking a search warrant to enter Corporal McGregor's staff quarters. Consequently, the Embassy is waiving the inviolability of Corporal McGregor's private residence as well as his papers, correspondence and property under article 30 of the Vienna Convention on Diplomatic Relations, as well as his immunity from the criminal jurisdiction of the USA to the limited extent necessary to allow the court of jurisdiction to issue the warrant required for the exclusive purpose of executing a search warrant for the purpose of the CFNIS investigation (Exhibit M2-5).

Sequence of events

[5] The followings are the facts that have been proven to my satisfaction, which I enumerate in chronological order for ease of reference.

(a) On 28 January 2017, K.G., a member of the Canadian Armed Forces (CAF) serving with the CDLS (Washington) discovers what appeared to be two audio recording devices in her and her partner's bedroom. Listening to the content, they identify what they believe to be the voice of Corporal McGregor. By inquiring about the devices they found on the Web, they come upon a suggested item sold on a website as a spy camera clock, recognizing that Corporal McGregor has an exact same clock in his washroom at home. K.D. has used that washroom on multiple occasions.

(b) On 30 January 2017, a complaint is made by K.D. to her chain of command at CDLS (Washington). The CFNIS is contacted on 1 February 2017.

(c) On 2 February 2017, Sergeant (then Master Corporal) Partridge, from the CFNIS in Ottawa is assigned as lead investigator in relation to the complaint. He arrives in Washington the next day with his partner, Leading Seaman McLaughlin. They meet the complainant K.D. shortly thereafter. They are shown text messages from K.D.'s phone in which a person she identifies as Corporal McGregor is attempting to apologize and explain his actions regarding the recording equipment. They also obtain the two devices she had found in her bedroom. Being unfamiliar with these devices, they request that Lieutenant(N) Rioux travels to Washington to assist. Shortly after his arrival at a hotel in Washington, Lieutenant(N) Rioux extracts the information from the two devices found in K.G.'s bedroom using the specialized equipment he had brought from Canada with him. He also obtains copies of the text messages from K.D.'s phone.

(d) Prior to 8 February 2017, Sergeant Partridge concludes, following consultation with his CFNIS chain of command and legal advisors, that he cannot obtain a search warrant under Canadian law to search the residence of Corporal McGregor in Alexandria, Virginia, either on the basis of the *Criminal Code* or section 273.3 of the *NDA*. He contacts the Royal Canadian Mounted Police liaison officer at the Canadian Embassy and is placed in communication with a police officer from the ADP. Sergeant Partridge testified that the more formal mutual legal assistance process was considered, but dismissed as too time consuming in the circumstances.

(e) On 8 February 2017, the three CFNIS investigators present in Washington meet with members of the ADP to discuss the case, specifically provide their grounds to search Corporal McGregor's residence and obtain their assistance in obtaining a search warrant under Virginia laws. The ADP readily agrees to assist and a detective is assigned to the case. Verifications are made with the complainants and a record is kept. Ultimately, the Virginia police report was provided to Sergeant Partridge and included in his CFNIS report.

(f) Subsequent to that meeting, Sergeant Partridge is informed by members of the ADP that in order for the warrant to be executed, the diplomatic immunity of Corporal McGregor's residence would have to be lifted. Sergeant Partridge obtains the assistance of his chain of command in Ottawa to get the diplomatic immunity lifted, leading to the release of

the letter at Exhibit M2-6 by his commanding officer on 10 February 2017.

(g) On 14 February 2017, the diplomatic immunity is officially lifted by the release of the Diplomatic Note at Exhibit M2-5.

(h) On 16 February 2017, the search of Corporal McGregor's residence takes place following a preparatory meeting at the ADP. Members of the ADP knocked, breached the unanswered door and secured the premises before inviting the three CFNIS members into the residence. From that point, Sergeant Partridge testified that this had become a CFNIS investigation, even if US personnel were on site to assist in the search. Sergeant Partridge said that his understanding was and remains that Canadian law applied to his actions as police officer from that point as Canada had jurisdiction under Article VII of the North Atlantic Treaty Organization Status of Forces Agreement (*NATO SOFA*). Lieutenant(N) Rioux testified that he was also of the view that this was a Canadian investigation from the point US officers had secured the residence after entry. He said he was set up in the kitchen, assisted by a US officer, and was receiving various items of computer equipment brought by the personnel conducting the search. Using their equipment, he and the US officer assisting him performed on-site preview or triage of the storage devices obtained for the purpose, as he explained, of not overseizing so that there would not be undue inconvenience to the person targeted by the search and no excessive seizure of material that would require detailed forensic analysis afterwards. To perform the screening, he used his knowledge of what was targeted in the warrant as well as his knowledge of the case. For instance, a file or folder named after a complainant would attract his attention. He also looked for images as he was investigating voyeurism. Once an item of interest was discovered in the preview or triage, the physical support on which the file was found was placed aside for seizure. Items which did not reveal any file were not seized. At one point in the day, however, a decision was made to leave the premises. He did not have the opportunity to preview some items brought to him so those were seized without being triaged first. Lieutenant(N) Rioux testified that a file containing video of what could constitute a sexual assault was discovered during the triage as well as a video of cartoon characters apparently under the age of 18 involved in sexual activities.

(i) As officers were about to leave the residence and recovering their equipment and the items seized, they came upon a backpack which one of the officers thought belonged to a colleague. As it turned out, the backpack did not belong to police officers. It contained a number of items that allegedly could be used to intercept private communications

which were seized. These items were not discussed in this application and I infer they are not in issue.

(j) The items seized were bagged and placed in containers. Sergeant Partridge testified that the items remained under his care and control until placed in evidence storage at CFNIS Headquarters, once he was back in Ottawa. However, he did bring all items seized to the ADP to allow Detective Pak to perform the required post-search property inventory.

(k) Sergeant Partridge left Washington for Ottawa sometime after 17 February 2017. The items seized were subsequently the object of Canadian warrants so that an in-depth search could be performed.

Issues

[6] The specific violation alleged by the applicant has been described as twofold. First, it is alleged that in previewing the content of the electronic devices on the scene of the search, CFNIS officers performed a warrantless search as such computer searches were not authorized by specific, prior authorization as provided in *R. v. Vu*, 2013 SCC 60 and were outside of the scope of the very specific lifting of diplomatic immunity. Secondly, it is argued that the warrant issued did not authorize the lawful seizure of the alleged evidence of child pornography and sexual assault.

[7] In order to succeed in this application, the applicant must demonstrate first that the *Charter* applies to the actions of the CFNIS investigators in the circumstances of this case. If the *Charter* does not apply, the evidence can still be excluded if its admission would render the trial unfair. Should the applicant be successful in demonstrating that the *Charter* applies, the applicant must secondly show a violation of his section 8 *Charter* rights to be secured from unreasonable search or seizure. Finally, to be successful in obtaining the exclusion of the evidence, the applicant must demonstrate that the evidence should be excluded as its admission would bring the administration of justice into disrepute, as provided for under subsection 24(2) of the *Charter*.

Analysis

Application of the Charter to the actions of CFNIS investigators

The applicable test

[8] As for the question of whether the *Charter* applied to the actions of CFNIS officers on 16 February 2017, counsel agree that the law applicable is as laid out by a majority of five judges from the Supreme Court of Canada in the *Hape* decision. In reasons of a majority of five judges written by LeBel J., a methodology for determining

whether the *Charter* applies to a foreign investigation has been set out as follows at paragraph 113:

> The first stage is to determine whether the activity in question falls under s. 32(1) such that the *Charter* applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the *Charter* will not apply. The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.

First stage – application of subsection 32(1) of the *Charter*

[9] Turning to the first question at the first stage, there is no contention that members of the CFNIS are state actors.

[10] The second question of the first stage is where things become complicated, as evidenced by the significant efforts LeBel J. deployed in explaining why there was a second component to section 32 and how it should be analyzed. It is precisely this area of LeBel J.'s reasons from which three Supreme Court of Canada justices felt the need to distance themselves, even if they agreed with the result as explained in the dissenting reasons authored by Bastarache J.

[11] The reasons of LeBel J. are also challenging for me as the basic factual situation of both the alleged offender in this case and the details of the alleged offences are such that statements made by LeBel J. in his reasons as it pertains to the exercise by a state of enforcement jurisdiction outside of its borders become, in my respectful view, inaccurate when viewed in the light of the military police enforcing the *NDA* and its Code of Service Discipline in respect of a member of the CAF serving in the USA and suspected of having committed an offence on a complainant who is also a member of the CAF. Indeed, in the case of diplomatic and military personnel abroad, it is possible that a criminal investigation in the territory of another state be within the authority of Parliament if it exercises its enforcement or investigative jurisdiction outside Canada's borders. Parliament can and has also exercised prescriptive jurisdiction to impose extraterritorial obligations on persons subject to the Code of Service Discipline. It has also empowered courts such as this one to exercise adjudicative jurisdiction anywhere in the world in relation to offences committed by persons subject to the Code of Service Discipline. Such exercise of jurisdiction are acceptable limits on the sovereignty of the state on whose territory an alleged offence is committed because they are based on international conventions such as the *Vienna Convention on Diplomatic Relations* or the *NATO SOFA* with whom the host nation has consented and from which it benefits when engaging in its own diplomatic and military activities abroad as a sending state.

[12] At first blush then, the second question of the first stage of the test, in light of the facts of this case, may lead us to conclude that there is indeed an exception to the

principle of sovereignty that could justify the application of the *Charter* to the extraterritorial activities of the state actor, namely CFNIS officers. The exceptions that could be applicable here are found in rules of conventional international law, especially Article 30 of the *Vienna Convention on Diplomatic Relations* and paragraph 3a of Article VII of the *NATO SOFA*.

[13] This could have been one of the cases where the *Charter* would apply to the extraterritorial activities of Canadian police officers. Indeed, the evidence reveals that the CFNIS investigators did not seek permission to travel to the USA to commence and perform investigative activities. As a matter of law, I believe they did not need to ask for such permission or announce their presence. The evidence is to the effect that they fully intended to perform all investigative activities on their own and produce a report that could well result in prosecution before a military tribunal in application of the *NDA*. The police officers testified that they were effectively in charge of the investigation with the full consent of their US counterparts. At no point was a prosecution in the USA envisaged. At all times, the CFNIS investigators intended to and believed they were bound to act in respect of the *Charter*. I believe this is a case where Canadians would expect no less on the part of members of the Canadian military police set out to investigate a crime allegedly committed by a member of the CAF that is intended to be prosecuted and tried before a Canadian military tribunal.

[14] However, there was a problem with the initial plans of CFNIS investigators on the facts of this case and it is the realization that Parliament had not made available to them all of the tools they needed to conduct an essential investigatory step: the search of Corporal McGregor's residence, in which they had grounds to believe they would find the evidence they needed to prove the crimes they were investigating. At that point, it became clear they needed assistance from the local police. Their investigation became a collaborative effort. It has been established as fact that the involvement of Alexandria police officers was limited to providing entry in the residence of Corporal McGregor from which point the CFNIS regained control of all aspects of the investigation, including the decision of what to search and seize, and gained and retained control over things seized until those things were brought back to Canada. However, as a matter of law, the legal umbrella under which CFNIS investigators were present in Corporal McGregor's residence and had the power to search for, examine and seize things, was found in the laws of the Commonwealth of Virginia under which the search warrant authorizing the search was issued.

[15] I believe on different facts that the investigation could have been wholly performed under Canadian law. I also believe Parliament could validly provide a framework by which the residence of a member of its diplomatic or military staff abroad could be searched. However, the facts of this case reveal a significant limit in the authority granted by Parliament with respect to what CFNIS investigators could do. As explained by LeBel J. at paragraph 104 of his reasons, "Canada does not have authority over all matters respecting what the officer may or may not do in the foreign state. Where Canada's authority is limited, so too is the application of the *Charter*."

[16] Even if it could be tempting to engage in further analysis, I must conclude that the law is as set out in that paragraph. Despite some strong reasons supporting the application of the *Charter* to activities of CFNIS investigators in a case like this one, I must conclude that, in law, the *Charter* did not apply to the actions of CFNIS officers when they performed the search of Corporal McGregor and seized items as a result of that search on 16 February 2017.

Second stage – fairness of the trial

[17] As provided for in *Hape*, having concluded that the actions of CFNIS investigators searching Corporal McGregor's residence on 16 February 2017 were not governed by the *Charter*, I must now consider the second stage of the inquiry and determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.

[18] The argument of the applicant's counsel on this point was circular and not convincing as it simply suggested that evidence obtained in violation of *Charter* principles would necessarily render a trial unfair under section 7 of the *Charter*. Respectfully, I believe more is required.

[19] The CFNIS investigators recognized early on the existence of a reasonable expectation of privacy and never considered a warrantless search. They immediately took the necessary steps to obtain a search warrant. The warrant obtained substantially respected Canadian norms in terms of the sufficiency of the grounds contained in the US equivalent of an Information to Obtain (ITO). The sufficiency of these grounds having not been challenged by the applicant for good reasons, I find them to have been entirely sufficient and adequate to support the issuance of the search warrant, even in Canada.

[20] The violations alleged by the applicant are centred on relatively recent jurisprudence recognizing additional steps to be taken in the search and seizure of electronic equipment, given their special nature. It is on that specific point that legislators in the Commonwealth of Virginia have taken another route by amending their law to deem that any search warrant authorizing the seizure of a computer or other device containing electronic or digital information includes not only the authorization to search and seize the physical component of the device, but also the electronic or digital information contained therein. It must be noted that the evidence obtained as a result of the search was discoverable. Indeed, once CFNIS investigators were on Canadian soil with the items seized, they obtained warrants for the in-depth search of the electronic equipment seized.

[21] In light of these facts, I do not see how this trial could be rendered unfair by the admission of this evidence.

Remarks on the existence of a violation and the exclusion of the evidence under subsection 24(2) of the Charter.

[22] Given that the Court has found that the *Charter* did not apply to the actions of CFNIS investigators when they searched Corporal McGregor's Virginia residence and seized a number of items, there is no need to discuss and rule on the other issues that the applicant had to argue to succeed; namely, the existence of a violation of his section 8 *Charter* rights and the demonstration that the evidence should be excluded as its admission would bring the administration of justice into disrepute. Yet, being cognisant of both the controversial nature of the test that ultimately leads me to conclude that the *Charter* did not apply and the unique features of the facts in this case, I wish to briefly provide my views on the existence of a violation and whether exclusion would be appropriate.

[23] The applicant's argument on the issue of an alleged violation makes total abstraction of the foreign context in arguing that the actions of investigators contravened the *Charter*. Respectfully, this is not the right approach as I found that Virginia law applied to the presence and actions of investigators in Corporal McGregor's residence in that state. If I were to have found that the *Charter* applied, it would have been in conformity with the framework proposed by the minority in *Hape*, under the pen of Bastarache J. What he suggested, as explained in paragraph 173 of his reasons, is that the fundamental rights and obligations of Canadian officials working abroad be those defined in the *Charter*. In fact, that is precisely how the CFNIS investigators viewed their obligations and governed their actions in this case. That being said, Bastarache J. went on to state at paragraph 178 that even if the *Charter* applies extraterritorially, the obligations it creates in the circumstances will depend on a number of factors, including the application of foreign laws.

[24] In this case, given that Virginia laws applied to the search of Corporal McGregor's residence in that state, the obligation of CFNIS officers was to follow those laws. There is no evidence before me to suggest that local laws had been breached or that they did not meet fundamental human rights standards. As already suggested in my remarks on the second stage of the *Hape* test, the differences in fundamental rights and protections available under Virginia laws compared with the protection offered by the *Charter* under Canadian law do not raise serious concerns for me. I agree with the views expressed by witnesses to the effect that the grounds they had to seek a search warrant would have been sufficient in Canada as they were in the USA. An examination of the affidavit in support of the request by Detective Pak reveals such to be the case. I also find that the search was conducted reasonably. There was authority in US law for the triage process performed by Lieutenant(N) Rioux before seizing electronic equipment obtained in the search of Corporal McGregor's Virginia residence.

[25] I disagree with the submissions to the effect that the investigators continued to look into files they had no authority to look at under the terms of the warrant, specifically the offences listed therein. Indeed, the evidence is to the effect that the voyeurism and interception allegations required looking at images as well as video and audio files. The discovery of files relating to a potential sexual assault and a cartoon that could be interpreted as child pornography (as it showed characters presumed to be

under 18 engaged in sexual acts) occurred while looking for the types of files specifically sought and authorized. I also disagree with the characterization proposed by the applicant to the effect that, from that point, investigators continued looking for child pornography and sexual assault files. The evidence is to the effect that any device that was assessed to contain potential child pornography and sexual assault files were set aside for seizure and further analysis back in Canada. The triage would then continue, involving other devices, again viewing the images and video and listening to the audio files contained therein. This is a completely different situation than what transpired in the case of *R. v. Jones*, 2011 ONCA 632, where investigators, while looking for files relating to an alleged fraud, inadvertently discovered child pornography and from that point started looking for completely different kinds of files than what was envisaged by their initial warrant without stopping and seeking further authorization. I note that, in *Jones*, the Ontario Court of Appeal intervened to find that, despite the violation, the evidence should have been admitted. On the facts of this case, the files of alleged sexual assault that were found can fall under the plain view doctrine. Furthermore, I find that the evidence does not reveal that the investigators acted in a manner that disregarded the law as set out in *Vu* by performing a triage on some of the equipment obtained. It was obvious for them throughout that further authorizations were required to analyse in detail the devices. They obtained those once in Canada, that is, once they were under a legal framework that required further authorization. Therefore, I conclude that the actions of CFNIS investigators were reasonable in the context.

[26] I wish to state that in reaching this conclusion, I have considered the applicant's argument to the effect that the US warrant somehow exceeded the limited scope of the diplomatic immunity that had been lifted by the Canadian Head of Mission in the Diplomatic Note at Exhibit M2-5. This argument would only be relevant in litigation contesting the actions of US authorities. What is being alleged in this application are violations by Canadian officials whose investigative jurisdiction over Corporal McGregor at the time of the search in question is not contested. Diplomatic immunity cannot be raised to shield the beneficiary of that immunity from actions taken by his or her own country in the presence of clear investigative jurisdiction. I must, respectfully, find that this argument has no merit and cannot be factored into this decision.

[27] I also conclude that the evidence should not be excluded. Even if I were to conclude in a violation and turn to the application of the test prescribed in *R. v. Grant*, 2009 SCC 32, the fact remains that the CFNIS investigators acted in good faith throughout, as evidenced by their efforts in looking for and obtaining valid authority in the form of a US warrant and demonstrating care to limit the impact of the search through screening and conduct of a targeted search that involved a minimum of personal information. Of course, the breach of any *Charter* right would have been serious by virtue of the fact that computers were searched, but in the circumstances it was not at the most serious end of the spectrum. As the accused had a high expectation of privacy in the contents of his computer, the violation had a significant impact on his *Charter*-protected rights. However, the evidence in question appears reliable, was discoverable by procuring subsequent warrants and, on basis of the prosecution's assertion, was extremely important, even crucial, to the prosecution's case. The offences

alleged are very serious. On balance, I find that the exclusion of the evidence would bring the administration of justice into disrepute.

Disposition

FOR THESE REASONS, THE COURT:

[28] **DISMISSES** the application for exclusion of evidence.

Counsel:

Mr D. Hodson, Defence Counsel Services, Counsel for the Applicant, Corporal C.R. McGregor

The Director of Military Prosecutions as represented by Major A. van der Linde and Lieutenant-Commander D. Reeves, Counsel for the Respondent