COURT MARTIAL

Citation: *R. v. Beemer*, 2019 CM 2030

Date: 20191023
Docket: 201907

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Sergeant D.E. Beemer, Applicant

- and -

Her Majesty the Queen, Respondent

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

REASONS FOR DECISION WITH RESPECT TO A DEFENCE APPLICATION TO ADJOURN

(Orally)

Introduction

[1] On 3 October 2019, the Court found Sergeant Beemer guilty of one offence under paragraph 117(f) of the *National Defence Act* (*NDA*), for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *NDA*.

[2] On 2 October 2019, the Chief of Defence Staff (CDS) signed an order designating commanding officers (COs) with respect to officers and non-commissioned members on the strength of the Office of the Chief Military Judge. The order revoked a previous designation order that had been issued on 19 January 2018. It would take several weeks for the 2 October 2019 order to be distributed and defence counsel advised the Court that he received a copy of the order on Friday, 18 October 2019, just

before the commencement of the sentencing hearing scheduled to begin on 21 October 2019.

[3] On Friday, 18 October 2019, defence provided notice that he would submit a motion seeking an adjournment so he could assess the impact of the order on judicial independence and provide representations to this Court.

[4] Defence advised the Court that upon his review of the order, he realized that the order places the military judges under the disciplinary jurisdiction of the executive which is an issue that goes to the heart of the preamble of the *Constitution Act*, 1982 and strikes at the accused's rights under paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* (C*harter*).

[5] Paragraph 11(*d*) provides that:

> 11. Any person charged with an offence has the right
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> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[6] The prosecution strenuously objected to the Court granting an adjournment to hear the defence's motion. He argued that there is nothing new with respect to the order of 2 October 2019, as the order simply updates a similar order that was issued in January 2018. He argued that defence had the opportunity to raise this issue prior to the trial, which he did not do.

Evidence

[7] In this case, counsel for the defence provided the Court with a copy of the 2 October 2018 order in question entitled, "Designation of Commanding Officers with respect to Officers and Non-Commissioned Members on the Strength of the Office of the Chief Military Judge Dept ID 3763, marked Exhibit M1-1 in these proceedings".

[8] The following additional evidence was presented by the prosecution:

(a) Exhibit M1-2 - CDS Designation Order – Designation of Commanding Officers with respect to Officers and Non-Commissioned Members on the Strength of the Office of the Chief Military Judge Dept ID 3763, dated 19 January 2018;

(b) Exhibit M1-3 - CDS Designation Order – Designation of Commanding Officers with respect to Certain Officers on the Strength of the National Defence Headquarters and to the Officers of the Rank of Lieutenant-General/Vice Admiral dated 5 January 2018;

(c) Exhibit M1-4 - Canadian Forces Organization Order (CFOO) 3763 – Office of the Chief Military Judge (CMJ) dated 27 February 08 – (CPROG 3763 271200Z Feb 08);

(d) Exhibit M1-5 – Designation of Commanding Officers with respect to the Service Members Who Are Holding the Rank of Lieutenant-Colonel or Below and Who Are on the Strength of the National Defence Headquarters;

(e) Exhibit M1-6 – Designation of Commanding Officers;

(f) Exhibit M1-7 – Ministerial Organization Order 96-082;

(g) Exhibit M1-8 – *Queen's Regulations and Orders for the Canadian Forces* (QR&O) Chapter 4; and

(h) Exhibit M1-9 – CFOO 0002 – Canadian Forces Support Unit (Ottawa) dated 8 August 2013 – (CPROG 0002 091200Z Aug 13).

[9] The prosecution submitted and provided a copy of an earlier January 2018 order that was similar to the order issued by the CDS on 2 October 2019. He argued strongly that there was nothing new in the order other than it being updated. However, although he presented other similar CFOOs that relate to other CAF organizations, it was noteworthy that the wording provided in the other CFOOs was not similar to the order relevant to military judges. The Court noted that the 19 January 2018 CDS order was the first time a CDS order was issued relevant to military judges.

[10] Furthermore, the Court benefitted from counsel's submissions to support their respective positions on whether or not the Court should consider adjourning this matter as requested by defence to permit it to make representations.

Issue

[11] Decisions on adjournments fall within the discretion of the trial judge; however, this discretion must be exercised judicially. The issue before me is whether this Court should exercise its discretion to adjourn consideration of its decision on sentencing until such time as it can hear the defence's motion.

[12] In deciding this issue, there are three sub-issues that the Court had to review. Without going into the merits of the application, the sub-issues are as follows:

(a) Firstly, do I, as the military judge, possess the requisite discretion to permit a *Charter* challenge, which was submitted after the close of finding and prior to deliberations on sentence? In other words, can I depart from the prescribed order of proceedings set out in the QR&O

article 112.05 and allow hearing and determination of this matter despite its late introduction?

(b) Secondly, is a *Charter* challenge on an alleged infringement of paragraph 11(*d*) of the *Charter* for lack of judicial independence even arguable at the sentencing stage of a court martial?

(c) Thirdly, if it is determined that the Court can permit arguments at the sentencing stage of the proceedings, is there sufficient evidence to support the request for an adjournment?

[13] After proceedings have commenced, and particularly after a finding has been rendered, the defence bears the onus to introduce sufficient evidence upon which the Court can base the exercise of its discretion. It was defence counsel's request that resulted in the motion before the Court.

Is there discretion?

[14] As the prosecution submitted, QR&O article 112.05 sets out a specific order of procedure where challenges on the jurisdiction of the Court are to be raised as pleas in bar of trial, which is before a court martial begins. There are good reasons for this. As Pelletier M.J. concluded in the court martial of *R. v. Simms*, 2015 CM 4007 at paragraph 28:

> Among other things, it has been found that if a pre-trial *Charter* application may result in the termination of the prosecution, then it is in both the state's and the accused's interest to have that issue determined in advance in order to avoid an unnecessary trial.

[15] This same concept is reinforced in civilian criminal law in *R. v. Byron*, 2001 MBCA 81where the Manitoba Court of Appeal found that generally, preliminary motions should be heard and disposed of before or at the commencement of trial. At paragraph 22, the Court found that, "It is not in the best interests of an accused, nor the state's, to go through unnecessary trials."

[16] However, as Pelletier M.J. concluded, judges should not enforce an order of procedure to the detriment of arriving at a proper decision on a substantive issue that affects the interests of the accused. As he found in the case of *Simms*, paragraph 179(1)(d) of the *NDA* provides a court martial with the same powers, rights and privileges as are vested in superior courts of criminal jurisdiction with respect to matters necessary for the due exercise of jurisdiction. I similarly find that I have jurisdiction to determine whether the *Charter* rights of the accused may now be affected as a result of the recent order and to provide the accused with a proper remedy under subsection 24(1) of the *Charter*.

[17] In response to concerns on the timing of the motion, defence noted that the Court must consider the point of discoverability of the alleged *Charter* violation. He argued that he was not aware of the existence of the order until he received a copy via

email on Friday, 18 October 2019, immediately prior to the beginning of the sentencing hearing. The Court was also not aware of the issuance of the order until it was raised by defence as an issue on Friday, 18 October 2019.

[18] The Ontario Court of Appeal found in *R. v. Andrew (S.)* (1992), 60 O.A.C. 324 at paragraph 325 that unless a *Charter* violation is "patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial." As such, I find that based on the submissions of counsel, which I have no reason to challenge, there is precedent to suggest that a court may assess the violation when it is discovered or when it unfolds during the trial.

[19] I am of the view that the exercise of discretion to entertain a *Charter* challenge after a finding has been rendered and prior to the sentencing hearing must only be done based upon a proper evidentiary foundation. It is for this reason I asked counsel to provide some evidence.

[20] In other words, is there an evidentiary basis from which the Court may assess the application and upon which I may exercise my discretion judicially? A sufficient evidentiary basis ensures that the request is not being pursued without merit or is simply a theoretical exercise. It permits this Court to determine whether there is at least some evidence capable of supporting an alleged infringement that would affect the fairness of the sentencing proceeding.

[21] In understanding the underlying purpose of the issuance of the CDS order, I asked counsel to provide copies of similar orders that relate to other senior officers, to which they complied. Upon my review of the various orders, I am of the view that the order related to the military judges was not drafted for nefarious reasons. However, based on the wording that the designated officer may exercise the powers and jurisdiction of a CO with respect to "any disciplinary matter involving a military judge", the order, as currently drafted, is particularly broad and it is very possibly overbroad and worthy of closer review.

[22] Although there is some evidence worthy of consideration, an accused's ability to raise *Charter* issues in sentencing proceedings will depend on the nature of the *Charter* rights violation. In a situation where discoverability of an alleged *Charter* breach is learned at a late juncture, courts have entertained such breaches when the violation is significant and may result in a reduced sentence.

[23] The concepts of independence and impartiality found in paragraph 11(*d*) of the *Charter*, although obviously related, are separate and distinct values or requirements (see *Valente v. The Queen*, [1985] 2 S.C.R. 673 at paragraph 15).

[24] There is an individual as well as an institutional aspect to both impartiality and independence. Defence counsel was clear in that he is not alleging individual bias on

the part of any particular judge, or any member of the executive, but feels compelled to raise the issue as an institutional concern.

[25] During his submissions, defence counsel did not raise objections to the three characteristics of judicial independence understood in jurisprudence to be: security of tenure for its members; financial security for its members, and independence over administrative matters crucial to its judicial functions.

[26] Rather, defence counsel succinctly argued that the critical question is whether military judges are free, and reasonably seen to be free, to perform their judicial roles without interference from the executive, which includes the military chain of command. Defence counsel relied upon the underpinnings of the reasoning provided in the case of *R. v. Généreux*, [1992] 1 S.C.R. 259, which he explained was a similar challenge to the independence of the military judiciary, where the judge advocate, at the time, were part of the executive and appointed by the executive to adjudicate General Courts Martials.

[27] He suggested that the order raises concerns that give rise to a perception that military judges may be influenced by the executive. It is as important for the maintenance of the public's confidence in the impartiality of the courts that the system or the legislative framework does not leave itself open to criticism and gives rise to a reasonable apprehension of bias. If the court martial system loses the respect of the military members and the public, then it will have lost its efficacy.

[28] As the Supreme Court of Canada (SCC) stated in *Généreux*:

> [E]mphasize that an individual who wishes to challenge the independence of a tribunal for the purposes of s. 11(*d*) need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent.

[29] As the SCC stated in *Généreux*, with respect to the case at bar, the question is not whether I acted in a manner that may be characterized as independent and impartial, but the appropriate question is whether the Standing Court Martial, itself, from the objective standpoint of a reasonable and informed person, is perceived as enjoying the essential conditions of judicial independence.

[30] As prosecution submitted, military judges are in a unique position as we are both serving officers in the CAF and accountable under the Code of Service Discipline (CSD), while at the same time, we serve as judges, appointed by the Governor in Council and accountable to a Judicial Inquiry Committee for our judicial conduct.

[31] In order for the CSD to be administered, there is a need for an appropriate procedural mechanism to do so, and the prosecution argued that this is the purpose of the order. Upon the Court’s review of the QR&O referred to by the prosecution and those provisions referenced in the order, it is noted that the appointment of COs for the purposes of exercising jurisdiction with respect to a disciplinary matter is a process by

which charges may be referred to the appropriate CO and ultimately be referred to an officer authorized by the Director of Military Prosecutions (DMP) to prefer charges against an accused person (see section 165 of the *NDA* and QR&O Chapters 108 to 109). The officer appointed by the DMP exercises prosecutorial discretion and remains the gatekeeper before any charges are preferred to proceed to a court martial.

[32] However, in our dual role as officers and members of the judiciary, there must be a dividing line between discipline administered with respect to our judicial functions as a military judge, versus a conduct that may be otherwise contrary to the CSD for which we are liable in our status as officers in the CAF.

[33] In light of this dual role, as military judges and serving officers of the CAF, the coexistence of the two roles implies that an absolute separation from the executive cannot be expected at all times. However, the ultimate question to be answered if this motion is to be heard is: what degree of connection between the executive and military judges is permitted by the *Charter*? Does the order, as written, actually threaten or affect the judicial independence of military judges? The Court heard no argument or evidence that it did.

Does paragraph 11(d) of the Charter apply at sentencing?

[34] However, the next question is whether this issue is appropriately argued at the sentencing stage. On the facts of this case, the prosecution is seeking a custodial sentence which means that the degree of jeopardy that the accused faces is significant. Recognizing that the sentencing process must still be exercised within the framework of the *Charter*, this Court provided defence's request very serious consideration. The Court must consider the fitness of a sentence, and it flows that a sentence cannot be "fit" if it does not respect the fundamental values enshrined in the *Charter*.

[35] In his limited submissions seeking an adjournment, defence was not in a position to challenge the legality of the finding, but his arguments were predicated on the fact that the CDS order subjects military judges to the powers of the executive with respect to "any disciplinary matter." As a result, he argued the court martial has lost jurisdiction for lack of judicial independence. He respectfully requested time to consider this issue and make more fulsome submissions.

[36] The concept of judicial independence is embedded into paragraph 11(*d*) of the *Charter*. Paragraph 11(*d*) aims to protect the innocent in two ways. First, paragraph 11(*d*) guarantees the right of any person charged with an offence to be presumed innocent until proven guilty beyond a reasonable doubt. Second, paragraph 11(*d*) guarantees that the process whereby the guilt of any accused will be proved, will be fair. An essential component of a fair process is that the trier of fact, whether judge or jury, be independent and impartial (see *Dubois v. The Queen*, [1985] 2 S.C.R. 350 at 357, *R. v. Oakes*, [1986] 1 S.C.R. 103 at paragraph 32).

[37] The opening words of section 11 of the *Charter* reads "charged with an offence", suggesting that section 11(*d*) only applies in situations where a person falls within the meaning of this phrase, being "innocent" and prior to a finding of guilt. It is clear the provision only applies to courts and tribunals that determine the guilt of persons charged with criminal offences and a court martial is recognized as such, however, does paragraph 11(*d*) extend to the sentencing phase?

[38] There is mixed jurisprudence as to whether a person in a post-conviction stage of proceedings can be considered "charged with an offence" and more particularly, whether the rights under section 11 have application. This perspective on whether section 11 extends to the sentencing phase, was specifically commented on by a unanimous Supreme Court of Canada in *R. v. MacDougall*, [1998] 3 S.C.R. 45 in the headnote. The Court in that case found:

> Section 11 provides for different forms and levels of protection for each stage of the criminal process. It follows that "charged with an offence" cannot be restricted to a particular phase of the proceedings. Rather, what is required is an interpretation that harmonizes as much as possible all of the subsections of s. 11 and the various rights they provide. Textually, the only feasible interpretation of "charged with an offence" in s. 11 is an expansive one which includes both the pre‑conviction and post‑conviction periods. In the context of s. 11(*b*), the phrase "charged with an offence" is not confined to the period before conviction but also extends to the post‑conviction sentencing stage.

[39] However, in the same decision of *MacDougall*, the SCC specifically stated at paragraph 10 that paragraph 11(*d*) rights apply only from arrest to conviction.

[40] Thus, while certain section 11 rights cannot be enjoyed post-conviction, dependent on the nature of the individual section 11 protections, others may. However, upon a careful view of the jurisprudence, the Court found that the presumption of innocence, which is guaranteed by an independent and impartial tribunal as protected by paragraph 11(*d*) of the *Charter*, does not apply at the sentencing stage of a trial (see also *R. v. Lyons*, [1987] 2 SCR 309 at 353).

[41] The next issue is to assess an offender's right to a sentence passed by an independent and impartial tribunal. When the Court raised this concern with counsel, defence argued that the impartiality is the genesis of justice and that the principles of natural justice require all decision makers to be independent and impartial, which he argues is required at this sentencing stage. He relied upon the *Canadian Bill of Rights*, paragraph 2(*e*) that existed long before the *Charter*. It reads as follows:

> 2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
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> . . .

> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

[42] Upon a review of paragraph 2(*e*) of the *Canadian Bill of Rights*, it is clear that the threshold of "rights and obligations" for invoking the "fair hearing" protection under section 2(*e*) is far broader than the *Charter* threshold of deprivations of life, liberty, and security of the person.

[43] Paragraph 2(*e*) of the *Canadian Bill of Rights* is not ancillary to the "due process" contained in section 1. In other words, it is not necessary to demonstrate the violation of a "fundamental right" in order to invoke the right to a fair hearing; rather, the infringement of any right or obligation is sufficient to trigger the free-standing procedural protections of paragraph 2(*e*). As such, there is no doubt that the sentencing procedure triggers the procedural protections set out in paragraph 2(*e*).

[44] The operation of the "due process" protection under paragraph 1(*a*) of the *Canadian Bill of Rights*, is complimented by paragraph 2(*e*), but they have been held not to be infringed where government acted in accordance with statutory guidelines.

[45] As was recognized in our discussions, the *NDA* was recently updated and provides an extensive statutory regime that prescribes how military judges must approach sentencing. Pragmatically, the operation of the *Canadian Bill of Rights*, is most effective in challenging statutory schemes and decision-making processes to ensure their compliance with the principles of natural justice and the protections of due process. In practice, the best recourse to challenge is to use the statutory scheme of the *Canadian Bill of Rights* to challenge the sentencing procedures as statutorily established within set the *NDA*. It is appreciated that paragraph 2(*e*) does provide protection to an individual from a decision maker who is neither impartial nor independent. Based on the minimum evidence before the Court, when I review the statutory regime of the *NDA* on sentencing, combined with the fact that there was no evidence to suggest that there are procedural flaws with the sentencing process, nor evidence to suggest the court is not impartial, there is not sufficient evidence to consider adjourning the consideration of sentencing.

[46] In summary, I have carefully considered defence counsel's request for an adjournment and considered whether there is a sufficient evidentiary foundation upon which I should judicially exercise my discretion to adjourn the proceedings to permit argument on the issue. Aside from the order that I find raises concern because of its extremely broad scope, there was no additional evidence adduced before me to suggest that the order and its operation within the procedural aspects of the referral of charges, in the context military judges, compromises our ability to perform our judicial roles in the statutory sentencing process without interference from the executive. If the court is expected to rely upon the procedural protection set out in paragraph 2(*e*) of the *Canadian Bill of Rights*, it needs something more than speculation. I appreciate that defence is simply requesting time to present argument on the institutional concerns, but additional evidence to assist the Court in understanding how the order affects the

independence of military judges would have been more helpful at this late stage in the proceedings.

[47] In short, based on the fact that paragraph 11(*d*) rights do not apply at the sentencing stage of a trial, but, even if it did, and the Court did find the order was in violation of judicial independence, based on the evidence provided at this stage, it is not sufficient enough to lead to a reduction in the offender's sentence.

[48] Consequently, the defence's request for an adjournment is denied.

Conclusion

FOR THESE REASONS, THE COURT:

[49] **DENIES** the defence request for a thirty-day adjournment.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois and Captain A. Dhillon

Major A Bolik, Defence Counsel Services, Counsel for Sergeant D.E. Beemer