HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. Stacey*, 2019 CM 3018

Date : 20191115
Docket : 201869

Preliminary Proceeding

Asticou Courtroom
Gatineau, Quebec, Canada

Between :

Captain T.A. Stacey, Applicant

- and -

Her Majesty the Queen, Respondent

Before : Lieutenant-Colonel L.-V. d'Auteuil, D.C.M.J.

REASONS ON APPLICATION BY THE ACCUSED FOR DISCLOSURE

(Orally)

Background

[1] I am dealing with an application for disclosure initially made in this matter and signed on 28 October 2019 and amended twice by the accused's defense counsel on 10 and 13 November 2019 further to the hard work of both counsel to narrow issues regarding this question.

[2] This preliminary proceeding is made pursuant to article 187 of the *Queen's Regulations & Orders for the Canadian Forces* which is an issue of law or mixed law and facts to be decided by the judge assigned to preside at this court martial. Last week, a conference call occurred in order to set a date and set a schedule to hear a preliminary matter. I assigned myself on this file. We started to hear this application on Tuesday 12 November 2019. Along the way, many issues related to disclosure were settled which resulted with few unresolved matters.

[3] As a matter of evidence, I received the notices of application; the initial one along with the amended ones and the Director of Military Prosecutions (DMP) Policy Directive 018/18, Canadian Military Prosecution Service (CMPS) Complaints Policy dated 5 September 2018.

[4] Based on the summary provided by counsel, I have some understanding of the background for this disclosure application. I understand that the charge was laid on 24 April 2018 concerning an incident that allegedly occurred between September 2014 and June 2015. An investigation was conducted by the Canadian Forces National Investigation Service (CFNIS). Once the charge was initially laid, the matter went through the usual legal path, meaning going through the chain of command, and was referred to the DMP where a prosecutor, Major M.L.P.P. Germain, was assigned to proceed with the post-charge review.

[5] I understand from counsel and from the documentation that I was provided with that Major Germain decided not to prefer the charge because there was no public interest. This decision was made in August 2018. It was then communicated to the accused and the complainant. Immediately after, the complainant filed a complaint in writing to the Chief of the Defence Staff (CDS) and the Judge Advocate General (JAG) on two separate occasions, regarding the decision not to prefer a charge by the Director of Military Prosecutions (DMP). The Canadian Military Prosecutions Services (CMPS) Complaint Policy took effect on 5 September 2018.

[6] Lieutenant-Colonel Farris, the Deputy DMP (DDMP), was appointed to conduct a review of the preferral made by Major Germain. Further to that review, Lieutenant-Colonel Farris informed the complainant that the decision had been reversed and a preferral would be made because a reasonable prospect of conviction and public interest to proceed on the charge was present. From the documentation received from Major Germain, Lieutenant-Colonel Farris met with him to make that decision and understand how Major Germain achieved it. What is at the heart of this disclosure application is that the documentation created is mainly related to the review made by Lieutenant-Colonel Farris.

[7] There is no document that exists for the analysis and the decision made by Lieutenant-Colonel Farris. I specifically asked this question. I understand that there is nothing other than what was put in writing to inform the complainant about the decision made to prefer the charge. A charge sheet was signed on 1 November 2018 and the preferral was made on 2 November 2018. An agreement to proceed on a specific schedule was discussed on the phone with counsel in my presence on 8 November 2019. As I mentioned earlier, I heard this application on 12 and 13 November 2019.

[8] The specific issue here is that Captain Stacey is looking for an order to disclose some redacted information on documents disclosed to him. I understand that there was disclosure of the documents under review but some of the information was redacted. The prosecution is claiming that this information cannot be provided to Captain Stacey because of prosecutorial discretion and litigation privilege that would be applicable to

this issue. From the defence's perspective, these privileges are not applicable or if they are applicable, the information could be relevant for the abuse of process application that he intends to present to the Court at a later date.

[9] Changing a decision regarding the preferral of a charge when, on its face, there are no new circumstances and because somebody seems displeased with the decision made is, at first sight, a rare and exceptional event. And from my perspective, with what I have as a matter of evidence, it met the evidentiary threshold to allow a judge to embark on a review for abuse of process of this prosecutorial decision. What I am trying to say here is that Lieutenant-Colonel Berntsen announced that he intends to present an application for abuse of process and he is looking for some information through this disclosure application for that purpose. Clearly he is not going on a fishing expedition here. He has some grounds for doing so. And I have to recognize that first. So this disclosure application has merits. I don't want to say more about the abuse of process application. But on its face, when you look at it, it's a bit similar to what has been decided by the Supreme Court of Canada in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566 when the court says that repudiation of a plea agreement by the prosecution, on its face, is a rare and exceptional event. And I think in that way, for this specific matter, without saying that there's an abuse of process, the prosecution clearly confirmed that it could be seen in this way by me and did not object to the fact that there was some kind of foundation for the accused to proceed with an application for abuse of process. I think this is the exact context here.

Litigation privilege and solicitor-client privilege

[10] Now turning to the privileges. Litigation privilege is a fundamental principle of the administration of justice and central to the Canadian justice system, which would include courts martial. Like solicitor-client privilege, litigation privilege can only be abrogated by a clear, explicit and unequivocal provision to that effect. Communications between a lawyer and third persons are privileged if, at the time of the making of the communication, litigation was commenced or anticipated and the dominant purpose for the communication was for preparing or advice on the litigation. Litigation privilege must be established document by document. To invoke the privilege, counsel or the prosecution must establish two facts for each document over which the privilege is claimed. First, that litigation was ongoing or was reasonably contemplated at the time the document was created and that the dominant purpose of creating the document was to prepare for that litigation.

[11] However, there are some specific exceptions to this privilege. One is the evidence of the claimant's abuse of process and here I refer to the matter of *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at paragraph 41. One of the exceptions to this privilege is that evidence may be provided when a party intends to claim abuse of process.

Prosecutorial discretion

[12] Prosecutorial discretion refers to the discretion exercised by the DMP or his or her representative in matters within his or her authority in relation to the prosecution of service offences. It would include the decision to prefer a charge. For me, to prefer a charge is part of the core of prosecutorial discretion. However, it is recognized by law and by courts that a decision is reviewable only in a case of an abuse of process. This is why it is for the Court to decide if the threshold establishing a reason to proceed with an application for abuse of process is met. Then a reason to make an exception through this application can be made. Therefore, the same exceptions regarding abuse of process could be made for litigation privilege or for prosecutorial discretion.

[13] However, I would say and I would agree with the prosecution that it is not because an abuse of process is claimed that it opens the doors to get access to any kind of information. This information, as proposed by the prosecutor, must be relevant, probative and necessary in relation to the question at stake. And here, the very question is the public interest to proceed. This is the pivotal issue here. It is not the only ground or the only reason, but when you look at the documents and the context, the concern of Captain Stacey is that the decision not to prefer a charge was revised and reversed on the issue of public interest only, which is different from the situation where at some point there was no reasonable prospect of conviction and then, suddenly there is one.

Analysis of documents

[14] Looking at the documents, what I have done is ensured that if any of the privileges claimed by the prosecution apply, the exception can be made but only to the extent that it is related to the issue of public interest. And this is what I have done for each of the documents that are under review and in dispute. So, I will have to proceed with my analysis document by document.

Email dated 9 August 2018 from Major Kerr to Major Germain

[15] When I look at the email from Major Kerr to Major Germain dated 9 August 2018, I come to the conclusion that both privileges apply. However, there is not much detail regarding what has been redacted. There is not much detail relating to the reasonable prospect of conviction or public interest. Clearly it is an opinion that comes from that portion and it is on both privileges, but there is no way to separate one from the other. I do not think it gives more or less information regarding reasonable prospect of conviction because there is no articulate comment regarding it. So from my perspective, this comment goes to the public interest issue and does not jeopardize the other aspect and, as such, it must be disclosed in full. So, the prosecution must disclose the document unredacted.

Notes dated 1 October 2018 of Lieutenant-Colonel Farris

[16] From my understanding, these notes were not taken for the purpose of prosecuting but for reviewing the decision made by Major Germain. So from my perspective, the prosecutorial discretion concept does not apply to that document in that

context. No discretion was used for that. However, from my perspective, considering that the charge before the Court is the same as the one subject to a review at the time, I am of the opinion that the litigation privilege applies because there is an ongoing matter before me, which is the charge considered with the exact same approach. What was reviewed was both the reasonable prospect of conviction and the public interest. So from my perspective, because the matter litigated is before a court and it is the same matter considered in this document, the litigation privilege applies. However, as I mentioned earlier, the exception regarding the abuse of process application on the issue of public interest must also be considered. So, because I consider that such exception must apply, it will be disclosed in full and unredacted by the prosecution.

Notes dated 12 October 2018 of Lieutenant-Colonel Kerr

[17] Again, for the same reason as the previous document, prosecutorial discretion does not apply in this case for the exact same reasons. But, as I said, litigation privilege applies. In this document there is nothing clear about the reasonable prospect of conviction. It is mostly or entirely on the topic of public interest. And, in that way, keeping the litigation privilege in mind, for me what is redacted in this document has to be disclosed. So, the notes will be disclosed unredacted.

Letter dated 19 October 2018 from Major Germain to Lieutenant-Colonel Farris

[18] Again this document was not created for litigation purposes but to understand what was Major Germain's reasoning when he made his decision. However, as I explained previously, litigation privilege applies because what is discussed in this document regarding a reasonable prospect of conviction is still a live issue as the matter is now before a court martial. My decision is to order disclosure of paragraph 28 only. The balance of what is redacted is in relation with the issue of a reasonable prospect of conviction and because the matter is before a court, I do not see it as being relevant for the matter of abuse of process that Captain Stacey intends to present to this Court. So, paragraph 28 only will be disclosed.

Email dated 25 October 2018 from Major Farris to Mrs. Murchison

[19] Again, there is no prosecutorial discretion applying to this document because it was not created or does not discuss anything related to that purpose. Clearly for me, the matter calls for the application of litigation privilege. What is discussed there cannot be disclosed because it goes to the litigation of the matter itself so I will leave it as it is. There is nothing regarding public interest in that document.

Post-charge review dated 9 August 2018 conducted by Major Germain

[20] This document was created to decide if the matter should be proceeded with. Litigation and prosecutorial privileges both apply to this document. However, the exception must apply regarding only public interest. So my intent is to disclose only things not related to reasonable prospect of conviction. That being said, when you look

at the document, paragraphs 1 and 2 must be disclosed. However, paragraphs 3 and 4 will stay redacted because it is the view of the prosecution regarding some matters that is unrelated but related to reasonable prospect of conviction. Paragraphs 8 through 14 will stay redacted so they will not be disclosed. However, what is identified as the title is public interest. Paragraphs 15 to 21 will be disclosed unredacted. The signature block will be unredacted. So this information will be disclosed but the balance of it will stay redacted because, from my perspective, it does not fall within the exception of abuse of process that I identified.

FOR THESE REASONS, THE COURT:

[21] **GRANTS** in part the application made by the accused for disclosure.

[22] **ORDERS** disclosure of the redacted parts of the following documents or portion of documents:

(a) the email dated 9 August 2018 from Major Kerr to Major Germain;

(b) the notes dated 1 October 2018 from Lieutenant-Colonel Farris;

(c) the notes dated 12 October 2018 from Lieutenant-Colonel Kerr;

(d) paragraph 28 of the letter dated 19 October 2018 from Major Germain to Lieutenant-Colonel Farris;

(e) the post-charge review, dated 9 August 2018 made by Major Germain as follows:

i. paragraphs 1, 2, - unredacted;

ii. the title of paragraphs 8, 9, 10, 11, 12, 13, 14, 15;

iv. paragraphs 15, 16, 17, 18, 19, 20, 21; and

v. the signature block.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Captain T.A. Stacey, Applicant

The Director of Military Prosecutions as represented by Lieutenant-Colonel D. Kerr and Major L. Langlois, Counsel for the Respondent