COURT MARTIAL

Citation: *R. v. Bourque*, 2020 CM 2008

Date: 20200710
Docket: 201954

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Major D.G. Bourque, Accused

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

DECISION ON PROSECUTION'S APPLICATION TO QUASH DEFENCE APPLICATION SEEKING AN ORDER PURSUANT TO SECTION 24(1) OF *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR BREACH OF RIGHTS GUARANTEED UNDER SECTION 11(*d*)

(Orally)

[1] On 1 October 2019, the Director of Military Prosecution (DMP) preferred a charge against the accused for an offence contrary to section 129 of the *National Defence Act* (*NDA*). The particulars of the charge allege that on or about 11 April 2019, the accused made comments that devalue females and female members of the Canadian Armed Force (CAF).

[2] On 4 February 2020, the Court Martial Administrator issued a convening order directing that the accused appear before a Standing Court Martial at 0930 hours on the 13th day of July, 2020, on the charge set out in the charge sheet dated 1 October 2019.

[3] On 6 July 2020, the accused filed a Notice of Application pursuant to section 187 of the *NDA* seeking this Court to issue an order pursuant to section 24(1) of the

Canadian Charter of Rights and Freedoms, that the proceedings against the accused be stayed due to the breach of his right to be tried by an independent and impartial tribunal as guaranteed by section 11(*d*) of the *Charter*.

[4] On 8 July 2020, the respondent filed a motion to quash the applicant's paragraph 11(*d*) *Charter* application.

[5] The accused's Notice of Application relates to a 2 October 2019, Chief of the Defence Staff (CDS) Order (Order) that was issued pursuant to section 18.1 of the *NDA* that relates only to military judges. The Order provides the Executive broad jurisdiction over all disciplinary matters related to military judges. It is 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 3963." Paragraph 1b of the Order states, "designate the officer who is, from time to time, appointed to the position of Deputy Vice Chief of the Defence Staff (DVCDS) and who holds a rank not below Major-General/ Rear-Admiral, to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge". It further states, at paragraph 2, "[t]he next superior officer in matters of discipline to whom the VCDS is responsible, when acting as a commanding officer referred to in paragraph (b) (Sic) shall be the Vice Chief of the Defence Staff (VCDS)."

Background

[6] After the CDS Order was issued, it took several weeks to be distributed. Defence counsel in the case of *R.* v. *Beemer*, 2019 CM 2030, advised the Court that he received a copy of the CDS Order on Friday, 18 October 2019, prior to the commencement of a sentencing hearing scheduled to begin on 21 October 2019. On 18 October 2019, defence counsel provided notice that he intended to submit a motion seeking an adjournment so he could assess the impact of the above order on judicial independence. Since the Court had already rendered a verdict in the case of *Beemer*, on 23 October 2019, I denied the request for an adjournment.

[7] On 10 January 2020, Pelletier, M.J. rendered a decision on a similar application to the case at bar, in *R. v. Pett*, 2020 CM 4002. The *ratio decidendi* of the *Pett* decision can be summarized as follows (See *R. v. D'Amico* 2020 CM 2002 at paragraph 42):

(a) Any CDS order (issued by the Executive) that is focused solely on military judges in their function or role as military judges must be found of no force and effect.

(b) Any CDS order that applies to all military members and officers, but in its operation, happens to capture military judges in their role as officers in the CAF, does not present the same risk and systemic concern undermining the independence of military judges.

(c) The CDS Order 2019 conflicts with and undermines the statutory intention set out by parliament in the *NDA* that military judges are to be judged by their judicial peers with respect to their judicial conduct.

(d) The CDS Order 2019 is declared to be of no force and effect.

[8] Following *Pett*, on 21 February 2020, in the case of *D'Amico*, as the presiding Military Judge, I rendered a decision on essentially the same application. I concluded that on its face, the CDS Order was overbroad as it encroached on the jurisdiction of the Military Judges Inquiry Committee who hold exclusive jurisdiction to consider judicial misconduct and to commence an inquiry as to whether a military judge should be removed from office. After an analysis of case law issued by the Supreme Court of Canada (SCC), I concluded that any involvement of the Executive in disciplining military judges for judicial misconduct is unconstitutional as it infringes on an accused's right to a fair trial under section 11(*d*) of the *Charter*. Consequently, I declared the CDS Order to be of no force or effect as it pertains to paragraphs 1(b) and 2 which are applicable to "any disciplinary matter involving a military judge."

[9] Neither the *Pett* nor *D'Amico* decisions suggest impunity for military judges. Both decisions provided proposed short-term solutions for resolving the perceived infringement on an accused's section 11(*d*) *Charter* rights until a longer-term resolution of the issue could be properly examined.

[10] In the *Pett* decision, Pelletier M.J. proposed a pragmatic solution based on existing legislation and policy suggesting that judicial misconduct be resolved in front of the Military Judges Inquiry Committee and that any other misconduct outside of this scope be pursued in civilian criminal courts.

[11] In the *D'Amico* decision, I nuanced Pelletier, M.J.'s proposed solution and intentionally left open the possibility that charges against military judges be pursued at courts martial. I recommended that any disciplinary matter that relates to a military judge's role as a judge needed to be exclusively addressed by the Military Judges Inquiry Committee as set out in the *NDA*. With respect to alleged misconduct that falls outside the military judge's role and unfolds in their role as officers in the CAF, I recommended that the approach adopted by the Court Martial Appeal Court (CMAC) in *R. v. Wehmeier*, 2014 CMAC 5, be applied to military judges. In *Wehmeier*, the CMAC recommended that when pursuing charges against civilians, if there is potential for an accused's *Charter* rights to be infringed, then there is a rebuttable presumption that the charges be pursued in civilian courts. In short, in *D'Amico*, I recommended that in light of the perceived infringement on the accused's 11(*d*) rights, there needs to be a similar rebuttable presumption that any charges that arise from alleged misconduct unrelated to a military judge's judicial role, should be pursued in civilian criminal courts rather than under the military justice system.

[12] I further proposed that to overcome the presumption, the onus is on DMP to come before the Court as soon as charges are laid to justify why the charges must be brought before a court martial rather than before a civilian criminal court. The reason for this was described as follows in the case of *D'Amico*:

> [73] The reason why some direction on the scope of the military prosecution's jurisdiction with respect to military judges is helpful is due to the unique procedural modalities of the military justice process. Unlike civilian criminal courts, based on the military justice's referral and preferral process and the manner upon which courts martial are convened, most cases will not proceed before a judge until very late in the process, which is often on the eve of the *R. v. Jordan* 2016 SCC 27, eighteen-month deadline. Due to the late engagement by the military judiciary, courts martial are left with little flexibility for the judicial consideration of additional options.

[13] On 26 June 2020, d'Auteuil, M.J. heard another similar application to the case at bar, making it the fourth time the same issue has been considered. A decision has not yet been rendered in that matter.

[14] Three days later, on 29 June 2020, d'Auteuil, M.J. heard yet another similar application, for the fifth time. A decision has not yet been rendered in that matter.

[15] The application before this Court is now the sixth time this same application has been heard in some fashion. The reason that courts martial must continually re-hear this issue is because the effect of a finding by a military judge that the Order does not conform to the constitution only permits the judge to refuse to apply it in the case before it. Until the Order is formally cancelled or rescinded, it remains in full force and effect and requires every court martial to separately address this issue when raised.

Positions of the parties

Accused

[16] In his application, the accused submits the following:

(a) Section 11(*d*) of the *Charter* provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(b) Section 11(*d*) relates to the rights of the accused and is not about the status of military judges. However, he asserts that the accused's rights are affected by the objective independence of military judges;

(c) The test as to whether military judges are independent is an objective one (see *Valente v. The Queen* [1985] 2 S.C.R. 673 at paragraph 22);

(d) In determining whether military judges are independent the critical question is whether military judges are free, and reasonably seen to be

free, to perform their adjudicative role without interference, including interference from the executive and legislative branches of government;

(e) The CDS Order referred to above assigns a member of the Executive to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge;

(f) Two distinct courts martial (*D'Amico* and *Pett*) rendered written and published decisions that found that the CDS Order impugns judicial independence;

(g) Counsel for the accused advised the Court that he assumed that after the *D'Amico* decision, the CDS Order would be rescinded;

(h) On 30 June 2020, the accused personally learned that the CDS Order had not been rescinded and remains in force;

(i) In these circumstances, counsel for the accused asserts a reasonable person would not understand why the impugned Order remains in force, after two distinct declarations were made by Military Judges to declare it null and void. He further argued that a rational person would therefore logically question the Court's authority and independence vis-a-vis the Executive; and

(j) Further, he alleges that the institutional background of the military judiciary is insufficient to protect judicial independence given the dual role of military judges.

Prosecution's response to the accused's application and its notice of motion

[17] In its preliminary response to the accused's application, the prosecution seeks an order to dismiss the application. His arguments are summarized as follows:

(a) The application is untimely, and the applicant failed to provide reasonable notice and has not shown cause to justify the failure. The application was served seven days before the date set for the start of the trial. He argues that allowing the application to proceed at this time would seriously jeopardize the prospect of completing this trial within the time frame that was allotted;

(b) He argues that the applicant ought to have been aware that effects of the declarations of invalidity in *Pett* and *D'Amico* were limited only to those cases and consequently, he should have been prepared to raise it earlier if he felt it was an issue. The respondent further asserts that there are no reasons why he could not have provided notice earlier;

(c) In seeking to have the Court dismiss the application, the respondent has relied upon the SCC rulings in *R. v. Jordan*, 2016 SCC 27 (paragraphs 37 and 116) and *R.* v. *Cody*, 2017 SCC 31 where the Court emphasized the requirement for participants of the criminal justice system to "work in concert to achieve speedier trials." Part of this shift, includes "the important role trial judges play in curtailing unnecessary delay and changing courtroom culture."

(d) He argued that the *Queens Regulations and Orders for the Canadian Forces* (QR&O) 112.04 prohibits the hearing of applications that are brought without reasonable notice, unless reasonable cause for the failure is shown by the defaulting party;

(e) Reasonable notice will depend on the circumstances. An applicant claiming a violation of his right must announce his intent as early as possible when he has the proper information (see *R. v. Betts*, 2017 CM 3009 at paragraph 12);

(f) If allowed to proceed, a notice of application given so late, would prevent the completion of a scheduled trial within its allotted timeframe is prima facie unreasonable when trial dates were agreed upon by the parties, months in advance;

(g) Such applications should only be allowed to proceed if the applicant shows cause for the failure to give reasonable notice;

(h) The proposed application would take at least one day of hearing and will involve significant deliberation. Allowing this application to proceed at this time would seriously jeopardize the prospect of completing this trial within the timeframe that was specifically allotted;

(i) Court time is precious and in light of the backlog generated during the COVID-19, it is crucial for parties to do everything they can to minimize delay and prevent unnecessary postponements;

(j) Allowing the application to proceed will inevitably lead to an adjournment of the trial to another full week later this summer or this fall. This will generate undue delay in the case itself and will also adversely impact the military justice system as a whole.

Issue

[18] The Court must decide whether to allow evidence and argument on the accused's notice of application seeking a stay of proceedings based on a breach of the

accused's right to be tried by an independent and impartial tribunal as guaranteed by section 11(*d*) of the *Charter*?

Evidence

[19] 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.

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

[20] The respondent conceded in his submissions that the application is not without merit, confirming that his objection arises strictly from the Applicant's failure to provide reasonable notice. He relies on QR&O 112.04, which reads as follows:

> 112.04 – REQUIREMENT FOR REASONABLE NOTICE – PRELIMINARY APPLICATIONS AND OBJECTIONS
>
> (1) Subject to paragraph (3), an application made under section 187 or 191.1 of the National Defence Act (see article 112.03 – Preliminary Proceedings) or paragraph 112.05(3) or (5) (Procedure to be followed at a Court Martial) may only be heard and determined if reasonable notice in writing is given to the Chief Military Judge or, if a court martial has been convened, the military judge assigned to preside at the court martial and to the opposing party. (18 July 2008)
>
> (2) Notice pursuant to paragraph (1) shall include:
>
> (a) sufficient detail of the nature of the application or objection and of the relief sought to enable the opposing party to respond to it without adjournment;
>
> (b) the documentary, affidavit or other evidence to be used at the hearing of the application; and
>
> (c) an estimate of the length of time required to present the application or objection.
>
> (3) Where notice is not given in accordance with paragraph (1), the judge may permit an application or objection if reasonable cause for the failure to give notice is shown.

[21] Based on QR&O 112.04, this leaves the following questions:

(a) Has reasonable notice been provided in writing to both the military judge assigned to preside at the court martial and to the opposing party?

(b) What is reasonable notice in this case?

(c) Did the accused provide reasonable cause for his failure to give reasonable notice?

[22] Defence argued that given the number of times this issue has been put before courts martial and DMP has dealt with it, it is no longer a novel issue and the prosecution cannot say that they have been taken by surprise. He alleges that prosecution must be aware that as long as the Order continues to be in force, it will continue to be an issue in any contested trial. Defence also provided a summary of his activity and reasons why he provided late notice. In short, he cites the complications of the displacement caused by COVID-19 pandemic and limited communications on the issue as accounting for his delayed notice. He admitted that he was shocked to learn in June 2020 that the Order had not been rescinded as he felt that after the decision in *D'Amico*, it was clear. He further submitted that the accused was not personally advised of the continued existence of the Order until 30 June 2020 and therefore he was not provided his client's instructions until after that date.

[23] The accused further argued that the proper test to be applied when there is a constitutional violation has to be heeded. He referred the Court to paragraph 23 of *R. v. Blom*, 2002 (ON CA):

> [23] Where a party complains of inadequate notice, it is crucial for the trial judge to consider the issue of prejudice: does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented? If there is no real prejudice, inadequate notice should not prevent consideration of the *Charter* application. If the inadequate notice does put the opposing party at a disadvantage, the court must consider whether something less drastic than refusing to consider the *Charter* argument, but still consistent with the goal of achieving "fairness in administration and the elimination of unjustifiable expense and delay", can be done to alleviate that prejudice. If so, that course should be followed in preference to an order refusing to entertain the *Charter* application.

[24] He argued that there are two judicial court martial findings (one is currently not under appeal while the other saw its appeal discontinued) that found that the Order was unconstitutional providing certainty on this fact. Hence, he argued that a clear constitutional violation cannot be ignored as it directly affects the accused's perception of the independence of the court martial and his right to a fair trial.

[25] The Court also reviewed the decisions of *R. v. Jabourou Abdoulkader*, 2019 ONSC 202, *R. c. Cardarelli*, 2017 QCCS 4430 as well as *R. v. Kazman*, 2020 ONCA 22 and notwithstanding the fact that these cases emanate from jurisdictions that are not binding on this Court, the principles enunciated within the decisions provide instructive guidance for courts martial.

[26] In short, coming to a decision as to whether reasonable notice was provided in the circumstances by defence counsel and if not, whether there is reasonable cause for the short notice, the trial court is obliged to consider all relevant circumstances including, in particular, prejudice to the prosecution.

[27] In assessing the issue of prejudice, I must ask myself whether the late notice by defence counsel put the prosecution at some unfair disadvantage in meeting the case

that is being presented. If there is no real prejudice, inadequate notice should not prevent consideration of a *Charter* application.

[28] At this time, this Court's calendar has sufficient flexibility between the months of August to October, 2020. Further, the *Jordan* deadline is not imminent within the available time period.

[29] In view of the factual and legal issues raised by the accused's *Charter* application, it is difficult to see how the accused's late notice causes such significant prejudice to the DMP particularly in light of the judicial precedents that have already confirmed that the CDS Order infringes the accused's *Charter* rights. Further, given the number of times, the prosecution has argued this motion, it has become a relatively routine exercise for them.

[30] If the inadequate notice does put the opposing party at a disadvantage, the Court must consider whether something less drastic than refusing to consider the *Charter* argument, but is still consistent with the goal of achieving "fairness in administration and the elimination of unjustifiable expense and delay", can be done to alleviate that prejudice. If so, that course should be followed in preference to an order refusing to entertain the *Charter* application.

[31] In deciding how to resolve the matter before the Court, as the trial judge, in furtherance of my responsibility to consider less drastic options other than quashing the accused's application, the Court benefited from a discussion on this topic, in Court with counsel. They both provided helpful solutions to the way ahead and I thank counsel for the efforts to help keep this trial on track, while still trying to provide the appropriate relief for the accused.

Decision

[32] The power to quash applications involving constitutional claims, must be exercised cautiously. In a case such as this, when the source of the infringement remains unaddressed, then the Court must assess its merits unless the broader interests of justice clearly demand otherwise. As this is the sixth time this matter has had to be addressed at courts martial, there are indeed broader interests of justice that are at play than simply the currently scheduled date for this court martial.

[33] The prosecution referred the Court to the Ontario Court of Appeal case in *Kazman* that provides persuasive guidance on the court's requirement to also consider the broader administration of justice concerns.

> The trial judge must consider broader administration of justice concerns, including the need to conduct all litigation, including criminal litigation, in a fair, orderly, and efficient manner. It falls to trial judges to decide where the interests of justice lie in each specific case.
>
> [16] The broader administration of justice concerns were placed front and centre in the powerful reasons of the majority in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631,

> at paras. 137-141. Speaking specifically about the constitutional right to a trial within a reasonable time and the litigation that claims based on that right have spawned, Moldaver J. for the majority stressed that all participants in criminal litigation have a joint obligation to work co-operatively to effectively use limited available resources in order to bring cases to completion within a reasonable time: see also *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 1. No one, including self-represented accused, can be allowed to ignore court orders and deadlines while the constitutional clock runs down and valuable court resources are consumed. After *Jordan*, trial judges must engage in proactive case management of criminal trials. Litigants must cooperate in those case management efforts. Appellate courts must support those proactive steps by showing strong deference to case management decisions: *Jordan*, at paras. 138-139.
>
> [17] The trial judge considered many of the leading authorities: see *Kazman* (2016 applications), at paras. 122-127. She was also mindful of the admonition in *Jordan* and *Cody* that the court must expect and demand that all participants in the criminal justice system work cooperatively toward eliminating unnecessary delays and inefficiencies in the trial process.

[34] In considering the broader administration of justice concerns, I cannot ignore the fact that this court martial is considering this issue for the sixth time specifically because of a failure somewhere in the military justice system to give effect to the court orders issued in both *Pett* and *D'Amico*. This complacency comes at a significant cost to the efficiency of the military justice system that can neither be sustained nor tolerated. This is essentially the underpinning of the request set out at paragraph 35 of the accused's notice that reads as follows:

> The judicial restraint expressed by Sukstorf, M.J. and Pelletier M.J. is palpable. However, it appears to have fallen on deaf ears. The *Pett* judgement on the same application as the case at bar, was delivered on 10 January 2020. The D'Amico Judgement on the same application as the case at bar was delivered on 21 February 2020. Since these decisions, the CDS does not appear to have heeded the stern and ubiquitous decisions of our military courts martial. At the time of writing, the Applicant is not aware of any changes to the impugned order despite ample time for the CDS to follow the directions of our military courts martial. The appearance of such a flippant disregard to the concerns expressed by two military judges that have heard these application, together with the principle of judicial comity, and the passage of more than (six) months since the decision in *Pett*, should reasonably demonstrate to this court that the CDS does not appear to have the necessary motivation nor will to address the concern over the erosion of public confidence in the administration of justice in our courts martial.

[35] As I explained to counsel during the proceedings, there is no evidence before the court to suggest that the CDS or his office have refused to recognize the courts' Orders. Further, there is no evidence that they are even aware of the decisions rendered in *Pett* and *D'Amico*. As a result, I feel compelled to extend to the Executive the same accommodation that I am affording to defence counsel in assessing his late submission of notice.

[36] The action required to rescind the Order is not complicated; however when I compare it to the time expended in rehearing this issue repeatedly (after courts martial have already heard the application six times) and considering the amount of resources being expended on the same issue, then I am left with no choice but to conclude that

additional judicial direction is necessary. This issue is not going away until the CDS Order is rescinded. From both a cost and efficiency perspective, it is unreasonable to expect courts martial to continually rehear the same indistinguishable issue for every accused. As the accused submits at paragraph 36 of his notice:

> It seems rather preposterous to expect every accused person to bring this same plea-in-bar for as long as this impugned order exists. Without an appropriate remedy for this ongoing affront to judicial independence, a reasonable and well-informed member of the public, especially a person subject to the CSD, will have grave concerns over institutional bias. It is this type of ideological creep (manifested, in this matter, by the continued existence of the impugned order), that erodes confidence in the independence and impartiality of military judges. This concept of true independence is something Pelletier M.J. in *Pett* recognized.

[37] Allowing this status quo to continue with the continual churn of applications does nothing more than degrade and erode confidence in the entire military justice system. Further, it continues to monopolize significant judicial resources, not to mention the resources of the DMP and Director of Defence Counsel Services (DDCS) thereby impairing the timely administration of military justice. As the court in *Kazman* concluded, a trial judge must also consider how the decision in the case before them affects the entire court calendar in other ways. In fact, this Court must weigh not just how the interests of justice lie in this specific case, but it must also assess whether the impact of a slight delay in this case will help or hinder the overall Court calendar. If this issue is resolved at the earliest opportunity, then it is expected that the recurrence of the same litigious issue will end and both the judiciary and counsel can focus on the priority of the cases before them. There is clearly no utility to permitting the status quo to continue.

[38] As Martineau J. expressed regarding a similar rotational churn of *voir dires* in the case of *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330, "Is this the type of "spectacle" that we want to give to the public and to the litigants of the Code of Service Discipline?"

[39] After careful consideration, I have decided to adjourn the accused's application until Monday, 13 July 2020 at 1330 hours. This provides the CDS's office the required time to rescind its Order. If the CDS Order is rescinded by that time, the court martial will commence relatively on schedule and I will do everything in my power to ensure it finishes on time.

[40] If the CDS Order is not rescinded by Monday, 13 July 2020 at 1330 hours, counsel must be prepared to argue the accused's motion. As part of that motion, the Court will expect relevant evidence to explain or account for why the CDS Order has not yet been rescinded. As officers of the court, and part of both DDCS and DMP who are nestled within the Office of the Judge Advocate General (OJAG), the legal adviser to the Executive, I expect counsel to pass this decision along and seek the appropriate assistance to give effect to this direction.

[41] The decisions in *Pett* and *D'Amico* have confirmed that the CDS Order as currently written infringes the rights of an accused to be tried by an independent tribunal and it is of no force and effect. In rendering legal advice to the Executive, I have full confidence that the legal advisers in the OJAG will fulfil their professional responsibility in rendering legal advice consistent with the current law.

FOR THESE REASONS, THE COURT:

[42] **DISMISSES** the prosecution's motion to dismiss the accused's application.

[43] **ADJOURNS** the start of the accused's court martial until Monday, 13 July 2020 at 1330 hours, permitting time for the CDS Order to be rescinded. If the CDS Order is not rescinded, this Court will hear the accused's Notice of Application at that time.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Colonel D. Martin, Major H. Bernatchez and Major A. Dhillon.

Major B. Tremblay, Defence Counsel Services, Counsel for Major D.G. Bourque