COURT MARTIAL

Citation: *R. v. Reid*, 2022 CM 2001

Date: 20220127
Docket: 202116

Standing Court Martial

Lieutenant-Colonel Philip L. Debney Armoury
Edmonton, Alberta, Canada

Between:

Corporal G. Reid, Applicant

-and-

Her Majesty the Queen, Respondent

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

DECISION ON A DEFENCE MOTION THAT THE PROSECUTION IS BARRED IN THE CALLING OF WITNESSES NOT PREVIOUSLY DISCLOSED IN ITS WILLSAY STATEMENT

(Orally)

Introduction

[1] Prior to the close of the prosecution's case, the prosecution learned that a witness who they believed was previously either unwilling or unavailable to testify was in fact available. The witness, being then-Corporal Goodrunning, is a complainant with respect to the fourth charge before this court martial.

[2] When the prosecution advised the Court and defence counsel that then-Corporal Goodrunning was available to testify, the defence opposed it. Based on a number of arguments,

one of which was that notwithstanding that the prosecution's case was still open, *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 111.11 bars the prosecution from adding additional witnesses to their case after the court martial begins.

[3] QR&O article 111.11 reads as follows:

> Before a trial by court martial commences, the prosecutor shall give reasonable notice to the accused person of the name of any witness that the prosecutor proposes to call at trial.

[4] Today, on 27 January 2021, I heard submissions from both the prosecution and the defence on whether QR&O article 111.11 bars the prosecution from calling a witness without having informed defence counsel prior to the actual start of the court martial. Further, I was also requested to decide whether or not this Court has the jurisdiction to consider such a request.

Position of the parties

Defence

[5] In his written and oral legal argument, defence made the following points:

(a) the prosecution's late notice of its intent to call a witness that was not identified prior to the start of the court martial, exceeds the powers set out at QR&O article 111.11;

(b) the prosecution's request seeks to sidestep the statutory limit imposed on the prosecution by QR&O article 111.11;

(c) QR&O article 111.11 statutorily bars the Court from considering the prosecution's request. In accordance with QR&O article 1.06. the word "shall" is to be interpreted as an "imperative"; and

(d) section 179 of the *NDA* does not provide the Court jurisdiction to make the order sought;

Prosecution

[6] In his oral submissions, the prosecution made the following arguments:

(a) QR&O article 111.11 addresses administrative matters that the prosecution must comply with prior to the start of a court martial. After a court martial has commenced, the appropriate Chapter that applies to the management and process of the court martial proceedings is that of Chapter 112; and

(b) that this court martial has discretionary power pursuant to section 179 of the *National Defence Act* (*NDA*) to decide this issue.

Summary decision

[7] For the reasons that follow, I find that article 111.11 of the QR&O, which is set out in QR&O Chapter 111 under pre-trial administration does not bar the prosecution from calling an additional witness during a court martial while their case is still open. Chapter 112 of the QR&O relates to the procedure to be followed during courts martial and other proceedings before a military judge.

[8] With the enactment of section 179 of the *NDA*, Parliament conferred upon a court martial the legislative authority to exercise the same powers vested in a superior court of criminal jurisdiction in exercising its own inherent jurisdiction. It reads as follows:

> **179** (1) A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to
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> **(a)** the attendance, swearing and examination of witnesses;
>
> **(b)** the production and inspection of documents;
>
> **(c)** the enforcement of its orders; and
>
> **(d)** all other matters necessary or proper for the due exercise of its jurisdiction.

[9] Section 179 of the *NDA* provide the court martial with an inherent power to control its procedure in respect of residual matters that are not dealt with in the *NDA* or its regulations. Neither Chapter 112 of the QR&O nor the *NDA* set out any legal impediments to the exercise of discretion by a military judge on this issue.

Analysis

[10] The QR&O Volume II amplifies the Code of Service Discipline set out at PART III of the *NDA* and is considered the authoritative manual for military law in Canada. It has long been the trend within the Canadian Armed Forces to enact its policy through its regulations such as the QR&O instead of in the primary legislation of the *NDA*. If the QR&O are enacted with regard to a particular issue, the question becomes whether that area governed by the QR&O is such that it forecloses a court martial's exercise of its discretionary powers at section 179 in the same area. The jurisprudence suggests that they can both co-exist in the absence of a direct conflict.

[11] As I explained at length in the court martial decision of *R. v. Machtmes*, 2021 CM 2002, a court martial cannot rely upon the power set out at section 179 of the *NDA* if to do so would conflict with clear legislative provisions. If the legislative intention in the *NDA* is clear and unambiguous, it cannot be overruled by the exercise of judicial discretion under section 179 of the *NDA*.

[12] Parliament can exclude the inherent jurisdiction by clear and precise statutory language indicating the contrary or it may provide some room for the Court to control its own process in a manner that is not contrary to the provisions set out in the *NDA* or the QR&O. This is normally

done through the use of the worlds “shall” or with other clear and unambiguous language that suggests that a trial judge has no discretion.

[13] In this case, the defence argued that the employment of the word “shall” specifically used in QR&O article 111.11 is indicative that there is no discretion for the prosecution to bring forward a new witness after the court martial has commenced and therefore no authority exists for this Court to consider the prosecution’s request.

[14] As I confirmed in *Machtmes*, a court martial can exercise its powers set out at section 179 of the *NDA* even regarding matters that are already regulated by the *NDA* or the QR&O provided it can do so without directly contravening the statutory provisions and the intentions of Parliament.

[15] In other words, the mere fact that there is a provision that clearly and unequivocally sets out pre-trial administration in QR&O article 111.11, does not automatically exclude the application of the Court’s section 179 powers in a different context, more specifically during the actual court martial proceedings.

[16] Consequently, the Court needed to assess whether Parliament intended QR&O article 111.11 to apply only to pre-trial responsibilities or whether it intended that it be more restrictive to limit the prosecution during the actual court martial proceedings. In addition, the Court needed to determine whether the *NDA* and its subordinate legislation, the QR&O have left military judges with any discretionary power to consider this type of request when it unfolds during a court martial itself.

The *NDA*

[17] The *NDA* itself is silent on how such a request by the prosecution that arises during the court martial itself should be handled. I note that in the civilian justice system, the *Criminal Code* is also silent, yet trial judges regularly exercise their discretion relying upon their inherent jurisdiction in managing similar, unique scenarios that unfold during a trial.

[18] It is important to keep in mind that based on its title and description, QR&O Chapter 111 appears to relate exclusively to the convening of courts martial and pre-trial administration. Essentially, Chapter 111 sets out those obligations and tasks required to be fulfilled by the various actors within the military justice system at the pre-trial stage, prior to the matter coming before a military judge.

[19] It is clear that paragraph 179(1)(a) of the *NDA* provides a court martial with the ability to control its own processes with respect to the attendance, swearing and examination of witnesses. As such, an order permitting a witness to testify in the circumstances before this Court is something that could fall within a court’s powers to manage provided that there is no other provision that otherwise excludes the application of the Court’s judicial powers.

[20] In reviewing QR&O article 111.11, as I highlighted in court, it is important to be aware that the current provision very recently replaces an earlier provision of the rule that reads almost

identically in the first paragraph, but that same paragraph is followed by a second paragraph that is similar to the scenario this Court is dealing with. It read as follows:

> **111.11 – ACCUSED TO BE INFORMED OF PROSECUTION WITNESSES**
>
> (1) Before a trial by court martial commences, the prosecutor shall:
>
> a. notify the accused of any witness whom it is proposed to call; and
> b. inform the accused of the purpose for which a witness will be called and of the nature of the proposed evidence of that witness.
>
> (2) Where the prosecutor calls a witness without notifying the accused, the accused shall have the right, after the direct examination of the witness has been completed, to postpone the cross-examination (*see also article 112.62 – Adjournment*).
>
> (3) The prosecutor who does not intend to call a witness referred to in paragraph (1) shall:
>
> a. give the accused reasonable notice, before trial, of that intention; or
> b. if the prosecutor has not given the accused reasonable notice, call the witness for cross-examination if the accused so requests and the witness is available.

[21] Essentially, the earlier version of QR&O article 111.11 proposed a very specific non-discretionary remedy for those circumstances where the prosecution calls a witness without notifying the accused. The fact that both these scenarios co-existed within QR&O article 111.11 suggests that Parliament did not foresee QR&O article 111.11 as a statutory bar to the unplanned calling of a witness that arises during the court martial itself.

[22] It is important to be aware that the procedure to be followed at courts martial and other proceedings before a military judge, are set out clearly in QR&O article 112. In reviewing the *NDA* and QR&O article 112, it is fair to say that there is indeed a void in the statute and regulations in the consideration of these sorts of procedural anomalies.

[23] The general rule with respect to the order of evidence at trial is that the prosecution must introduce all the evidence in its possession upon which it relies on as probative of the guilt of Corporal Reid before closing its case. On the facts of this case, the prosecution has not yet closed its case.

[24] This rule prevents Corporal Reid from being taken by surprise and being deprived of the opportunity to conduct a proper investigation with respect to the evidence adduced against him. This rule also provides a safeguard against the importance of a piece of evidence, by reason of its late introduction, being unduly emphasized or magnified in relation to the other evidence. It is for this reason criminal procedures in all jurisdictions provide a demarcation marking the closure of the prosecution's case.

[25] It is also important to recognize that QR&O article 112.32 provides explicit authority for a military judge or a panel to call, or recall any witness for further questioning. The calling of witnesses by the fact finder is a matter to be left to the military judge's discretion and should be exercised in very rare cases so as to avoid overly interfering with the adversarial nature of the proceedings. However, this authority nonetheless exists. It reads:

112.32 – POWER OF COURT MARTIAL TO CALL AND RECALL WITNESSES

(1) The court martial may, at any time during the presentation of the case for the prosecution and the case for the defence, or at any other time before a finding is made:

(a) recall and question any witness; and

(b) call and question any further witnesses.

(2) Where a witness has been called or recalled, the prosecutor and the accused person may, with the permission of the judge, ask the witness any questions, relative to the answers, that the judge considers proper.

(3) Where a witness has been called or recalled after any closing address, the prosecutor and the accused person shall be given the opportunity to make a further closing address in respect of the evidence adduced.

[26] In this Court's view, Parliament provided authority for myself as a trial judge to call additional witnesses, which is evidence that QR&O article 111.11 does not foreclose the opportunity for witnesses not identified during the pre-trial administration stage to be called after the trial has started.

[27] Although I accept defence's representations that QR&O article 111.11 is focussed on what the prosecution must do and not the military judge, it nonetheless remains informative given military judges and panel members were explicitly provided this authority by Parliament.

[28] Furthermore, during a trial, as the evidence unfolds there is often a requirement for the prosecution to call a rebuttal witness. If one is to take such a strict reading of QR&O article 111.11, then this suggests that the calling of a rebuttal witness would not be permissible. Such a strict reading would put the QR&O in direct conflict with the fundamental rules of criminal procedure and the overall fairness of the trial process.

[29] In summary, I find that despite the language used within QR&O article 111.11 that clearly sets out the disclosure obligations imposed on the prosecution prior to proceeding to trial, there is no specific bar set out within either the *NDA* or within Chapter 112 of the QR&O prohibiting the prosecution from calling a witness not previously disclosed, making further requests or filing applications. In fact, Chapter 112 specifically provides for the filing of additional applications.

[30] Upon a review, it is apparent that the request before the Court falls squarely within this Court's powers set out at section 179 of the *NDA*. Further, after a review of QR&O article 112.32 as well as the previous version of QR&O article 111.11, it is clear that Parliament intended that courts martial to have sufficient authority and discretion to manage their processes to ensure that special circumstances that unfold during a trial are resolved. Consequently, it is clear that the prosecution's request for an additional witness to testify, does not run contrary to the intention of Parliament.

[31] Having decided that the Court has the appropriate jurisdiction to consider whether this witness can testify, the next question then becomes whether the Court should grant the prosecution's request which is the substance of Corporal Reid's argument and then will become the focus of the next application.

Have Corporal Reid's *Charter* rights been breached?

[32] Each request to call a late witness that was not previously identified must necessarily turn on its own facts and circumstances. In the current case, the witness is material to the fourth charge and was previously identified and interviewed during the investigation. Her prior statements were disclosed in the regular disclosure process.

[33] As the Supreme Court of Canada stated at paragraph 13 in *R. v. Levogiannis,* [1993] 4 S.C.R. 475,

> The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.

[34] It is true that the presentation of evidence in court is essential to the truth-seeking function of a court martial, however, I accept the position of the defence that it is not unlimited. For this reason, military judges presiding at courts martial must exercise their powers consistent with the common law while ensuring that an accused's right to a fair trial is appropriately protected.

[35] In summary, a court's decision on whether or not it can permit the prosecution's late witness to testify requires the military judge to strike a fair balance between the interests of the accused and those of the military community. For example, in the consideration of remedies, a military judge must assess the potential remediation of prejudice to the accused and the effect of this late disclosure of the witness on the integrity of the justice system.

[36] However, the prejudice must also be material and not trivial. For example, the exclusion of evidence may be warranted in such cases where the evidence is produced mid-trial after important and irrevocable discussions about the defence have been made by the accused. However, even then, the accused bears the burden of demonstrating how the late disclosure of a witness or piece of evidence would have affected the decisions that were made.

[37] Other factors to be considered include whether the accused is in pre-trial custody and whether any potential delay would significantly prolong that custody or where the Crown has withheld evidence through deliberate misconduct amounting to an abuse of process. In some cases, bearing in mind society's interests in a fair trial, and considering the seriousness of the offence, a subsection 24(1) of the *Charter* exclusion of the evidence may be appropriate and just.

[38] Consequently, the Court must next hear Corporal Reid's arguments as to why this Court should exclude the witness from testifying against him in his court martial.

FOR THESE REASONS THE COURT:

[39] **FINDS** that QR&O article 111.11 does not bar the prosecution from the late calling of a witness, nor does it remove the jurisdiction of a court martial in considering the admission of the late disclosure of a witness or evidence relevant to the offences before the Court.

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The Director of Military Prosecutions as represented by Major G. Moorehead, Captain B. Richard and Captain S. Mulrain, Counsel for the Respondent