COURT MARTIAL

Citation: *R. v. Martin*, 2022 CM 5009

Date: 20220330
Docket: 202164

General Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

Prosecutor
and
Responding Party

- and -

Petty Officer 1st Class J. T. Martin

Accused
and
Moving Party

Before: Commander C.J. Deschênes, M.J.

DECISION RESPECTING A MOTION TO SUMMARILY DISMISS AN APPLICATION UNDER SUBSECTION 24(1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ALLEGED VIOLATION OF SECTION 7 AND PARAGRAPH 11(*d*) OF THE *CHARTER*.

(Orally)

Introduction

[1] The accused and moving party, Petty Officer 1st Class Martin, is charged with three offences pertaining to events that allegedly took place while aboard Her Majesty's Canadian Ship's (HMCS) *Harry Dewolf* (HDW). The first and second charges laid pursuant to section 129 of the *National Defence Act* (*NDA*) allege conduct to the prejudice of good order and discipline in relation to harassment on the basis of race

toward two crewmates of the rank of sailor second class. The third charge, ill-treated a person who, by reason of rank, was subordinate to him contrary to section 95 of the *NDA*, alleges that, between 1 and 31 March 2021, the accused struck the leg of one of the two crewmates with his knee.

[2] The accused seeks a declaration that a written order titled "HDW NO CONTACT ORDER" given to him by his chain of command violates his rights to make full answer and defence, right to cross-examination and right to be present throughout the course of a court martial. He seeks a stay of proceedings in accordance with subsection 24(1) of the *Canadian Charter of Rights and Freedoms*. In response, the prosecution served a motion asking for a summary dismissal of the *Charter* application.

[3] The issue is whether there is an evidentiary foundation supporting the claim that the order prohibiting the accused from contacting the two crewmates allegedly subjected to harassment and abuse of a subordinate infringes or denies the right of the accused to make full answer and defence. In a nutshell, does the accused's application have a reasonable prospect of success?

Facts

[4] The relevant facts in support of the accused's application can be summarized as follows. After being informed of the allegations forming the basis of the charges, the chain of command gave the accused "HDW NO CONTACT ORDER 001/21" signed by Commander Gleason on 20 April 2021. The order forbids the accused from contacting in any way Sailor 2nd Class Brady and Sailor 2nd Class Parsons. It also specifies that the accused is "ordered to not coerce, convince, or request by any means, a third party to contact either Sailor 2nd Class Parsons or Sailor 2nd Class Brady, nor to make any attempts at such behaviour." The prohibition includes not to attend their respective residence, "or any residence in which they may reside from time to time for their own comfort and safety as communicated to their chain of command", as well as their current place of employment, HMCS *Margaret Brooke* shore office. The order prescribes that the accused may attend HMCS *Margaret Brooke* shore office for duty-related reasons once permission is granted by the coxswain of the two crewmates. The order provides that failure to comply could result in administrative and/or disciplinary measures against the accused. It also specified that the order remains in effect until all proceedings are complete, until rescinded by the commanding officer (CO), "CCFL or until superseded by the order of a judge." On the same day, the accused signed the acknowledgement of the order.

[5] On 7 December 2021, a representative from the Director of Military Prosecutions preferred the three charges against the accused. On 11 February 2022, counsel for the accused informed counsel for the prosecution that the accused's rights were being breached by the order and asked to have the order rescinded immediately. Two weeks later, the CO of HMCS *Harry Dewolf* rescinded "HDW NO CONTACT ORDER 001/21" and simultaneously issued "HDW NO CONTACT ORDER 001/22". The document is largely the same as the original version, however it specifies that the

order does not apply to the accused's defence counsel. The two crewmates' current place of employment was also expanded to include a prohibition to attend: "HMCS MAX BERNAYS shore office" and "MILPERSCOM Transition Centre Halifax". On 2 March 2022, the accused acknowledged receipt of the new version by digitally signing the "Acknowledgment of Order" attached to it.

[6] On 25 March 2022, the CO of HMCS *Harry Dewolf* rescinded "HDW NO CONTACT ORDER 001/22" and simultaneously issued "HDW NO CONTACT ORDER 002/22". This last version specifies that the order is not intended to hamper the preparation and conduct of the accused's defence at court martial and does not apply to court martial proceedings or any events related thereto. The same day, the accused acknowledged receipt of the document by digitally signing the "Acknowledgment of Order" attached to it.

Is there is an evidentiary foundation supporting the claim that the order denies the right of the accused to make full answer and defence?

Position of the moving party (accused)

[7] The accused alleged that his right to make full answer and defence has been breached by the order, on the basis that it is invalid because it was created based on administrative powers found outside the Code of Service Discipline. He contended that the military hierarchy cannot use its general or residual administrative powers pursuant to *the Queen's Regulations and Orders for the Canadian Forces* (QR&O) to amend the Code of Service Discipline and self-empower with new rights or authority belonging exclusively to, and affecting, the Code of Service Discipline. He further contended that the order infringes upon his right to make full answer and defence in two ways: it limits his right to cross-examine the two alleged victims because he is prohibited from contacting them through his counsel to interview them in order to prepare his defence; and the order has the effect of preventing him from attending these courts martial proceedings once the two crewmates are called to give their testimony in court since the courtroom becomes their place of duty, which is a place that the accused is not permitted to go by virtue of the order.

[8] Defence counsel also explained during the hearing of the prosecution's motion to dismiss, that the only witness he intended to call in support of his *Charter* application is the accused, who would testify mainly for the purpose of introducing the three versions of the order along with the summons he was served with to attend these court martial proceedings.

Position of the responding party (prosecution)

[9] In support of his motion to dismiss, the prosecution submitted that the order was never intended to impair the accused's rights to make full answer and defence. The order has a narrow focus and is not intended to apply to defence counsel in the conduct of the accused's defence, or to the trial proceedings. Consequently, there is no factual foundation to support the accused's application and it should be dismissed.

Analysis

[10] In deciding whether the application has a reasonable prospect of success, I have considered the *Charter* principles the accused contended have been breached. Section 7 and paragraph 11(*d*) of the *Charter* provide as follows:

> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> . . .
>
> **11** Any person charged with an offence has the right:
>
> > . . .
> >
> > **(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[11] Sections 7 through 14 of the *Charter* are informed by the cardinal principles of the presumption of innocence and the right to a fair trial. The principles of fundamental justice and the requirements of paragraph 11(*d*) are "inextricably intertwined": see *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at page 603.

[12] The right to make full answer and defence is protected by both section 7 and paragraph 11(*d*) of the *Charter*. It is one of the principles of fundamental justice. In *R. v. Rose* [1998] 3 S.C.R. 262, the majority for the Supreme Court of Canada (SCC) wrote in this regard at paragraphs 98 and 99 that:

> The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, the right to know the case to be met before opening one's defence, the principles governing the re-opening of the Crown's case, as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.
>
> As suggested by Sopinka J. for the majority of this Court in *Dersch v. Canada (Attorney General),* [1990] 2 S.C.R. 1505, however, the right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case.
> [Citation omitted.]

[13] In order to determine whether the accused's right to make full answer and defence has been breached, the actions of the state taken in relation to the case, and their impact and consequences, are facts that would generally come under scrutiny in the context of the application. For example, evidence adduced in support of the application showing, on a balance of probabilities, that the prosecution withheld relevant evidence, would likely result in a determination of a violation of the applicant's constitutional right. In the military context, actions taken by the chain of command in relation to the

court martial proceedings, such as issuing orders to the accused, could have a detrimental effect and impair the right of the accused to defend himself. The determination of whether the accused's right has been breached requires a contextual analysis and must be supported by evidence. The burden of proof is on the accused person who is alleging a violation to their *Charter* rights.

[14] At the outset, I must state that an order can be lawful as defined in the applicable regulation and accompanying note, but infringe on the accused's *Charter* rights. I will, in any event, first address the chain of command's authority to issue the contentious order.

[15] The fundamental obligation to obey orders, which forms the basis of an efficient and disciplined force, is encapsulated in the liability to serve of Canadian Armed Forces (CAF) members of the regular force and is found at subsection 33(1) of the *NDA*, which provides that:

> The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.

[16] Article 19.015 of the QR&O found in Volume 1 – Chapter 19 Conduct And Discipline, complements subsection 33(1) of the *NDA* by providing that every officer and non-commissioned member shall obey lawful commands and orders of a superior officer. When this obligation is violated by a CAF member, the imposition of disciplinary measures against the member would most likely follow since disobedience of lawful commands is a service offence (see section 83 of the *NDA* and section 106 of the *NDA* which particularizes the offence when committed aboard a ship).

[17] In this context, Note (F) of Article 103.16 of the QR&O contains the following clarification with regard to what constitute a lawful order in relation to the offence of disobedience of lawful command:

> (F) A command, in order to be lawful must be one relating to military duty, i.e., the disobedience of which must tend to impede, delay or prevent a military proceeding. A superior officer has the right to give a command <u>for the purpose of maintaining good order or suppressing a disturbance</u> or for the execution of a military duty or regulation or <u>for a purpose connected with the welfare of troops</u> or for any generally accepted details of military life. He has no right to take advantage of his military rank to give a command which does not relate to military duty or usage which has for its sole object the attainment of some private end.
> [My emphasis.]

[18] The QR&O expands on other military concepts by codifying customs of the service such as command and control, and general responsibilities of officers found at article 4.02. Some of these responsibilities include the obligation to promote the welfare, efficiency and good discipline of all subordinates. Article 4.20 of the QR&O defines the responsibilities of commanding officers:

> (1) A commanding officer is responsible for the whole of the organization and safety of the commanding officer's base, unit or element, but the detailed distribution of work

> between the commanding officer and subordinates is left substantially to the commanding officer's discretion.
>
> (2) Unless otherwise provided in QR&O, a commanding officer may allocate to officers, who are immediately subordinate to the commanding officer, all matters of routine or of minor administration.
>
> (3) A commanding officer shall retain for himself:
>
> a. matters of general organization and policy;
> b. important matters requiring the commanding officer's personal attention and decision; and
> c. the general control and supervision of the various duties that the commanding officer has allocated to others.

[19] As part of its responsibility to enforce and maintain discipline and morale, the chain of command is a key player in the administration of military justice. It has the power to investigate, lay charges, and refer matters to court martial amongst other things.

[20] The Court Martial Appeal Court (CMAC) has recognized the responsibility of the chain of command to not only maintain discipline and morale, but also to promote the welfare of subordinates. In *R. v. Champion*, 2021 CMAC 4, an appeal decision pertaining to a custody review decision where the detained person was released from custody with conditions when no charges had yet been laid, the CMAC stated:

> [49] The respondent is correct in asserting that the chain of command has obligations to ensure the welfare of their subordinates and, often times, may have insight into a person's history that can inform the decision-making process. This does not constitute a weakness of the military justice system, rather, it is demonstrative of the military ethos of team and community support. The military justice system is clothed with purposes unknown to the civilian criminal justice system. These include the maintenance of discipline, efficiency and morale (*MacKay*, *supra*; *Généreux*, *supra*), the re-integration of military personnel into the service (one of the principles of sentencing set out in s. 203.1 of the NDA) and the responsibility of Officers toward those under their command as set out in article 4.02 of the QR&O. See, in this regard, *Edwards et al.*, *supra*; *R. v. Proulx*; *R. v. Cloutier*, 2021 CMAC 3.

[21] The CMAC also added that:

> [53] Charter values and Charter rights must be considered within the context of the environment in which they are being applied. In the military, it is reasonable that commanders, military police, CROs and military judges have the discretion to take action and issue orders including conditions on release even for those who have not been charged. This authority is consistent with the lawful restrictions the chain of command could impose on subordinates in the course of any other aspect associated with their duties.

[22] In applying these principles in the context of the accused's application, the Court finds that the order was intended to achieve two purposes: to maintain good order; and to ensure the welfare of the two crewmates.

[23] The order's first purpose was to ensure that the alleged harassment and abuse of subordinates, if any, would cease, by imposing on the accused the obligation to refrain from contacting the two junior sailors, greatly mitigating the risk of any further disturbances on-board ship and ensuring that good order was maintained. Ultimately, it had the effect of putting the accused on notice to refrain from repeating the alleged conduct. The second purpose, intertwined with the first, was connected to the welfare of troops, in particular the junior members who were allegedly the subject of the harassment and abuse. This conclusion can easily be reached when reviewing the three versions of the order, which, in addition to the prohibition imposed on the accused not to contact the two junior sailors, include the mention of not attending any residence in which they may reside from time to time "for their own comfort and safety". The order lists the name of the two sailors and the position of the deck officer in its distribution list to ensure that they were informed of the order so measures could be taken should the order be breached.

[24] While I agree that in the criminal justice system, a prohibition of this sort imposed on a civilian would generally be found in an undertaking upon release from custody, the chain of command does have additional tools in its tool kit to impose this type of obligation or prohibition on a subordinate. By its nature, functions and responsibilities as explained before, the chain of command has several lawful means to achieve good order and discipline. Thus, an order prohibiting contact with a court participant can lawfully be issued outside of an undertaking. Indeed, the issuance of an order is a fundamental mean to ensure discipline.

[25] I therefore find that when the accused's CO issued his order in the specific circumstances of this case, he was properly exercising his leadership role in managing military personal under his command, ensuring the welfare of two junior sailors whom he believed had been the subject of harassment and abuse. He was also exercising his lawful authority to issue the order in compliance with his leadership responsibility to maintain good order or to suppress a disturbance. This was an important issue that required the CO's personal attention and decision.

[26] For these reasons, the Court finds that the order was issued within the authority of the chain of command as codified in the *NDA* and in the QR&O. The Court also finds that the three versions of the order issued were, at their face, lawful. Having found that the order is lawful as described in the applicable regulations and accompanying note, I must decide if the order infringes the accused's *Charter* right to make full answer and defence.

Whether the order breached the applicant's rights to make full answer and defence

[27] In regard to the accused's contention that the order prevented defence counsel from contacting the two crewmates, I have reviewed the wording used in the order to describe the prohibition imposed on the accused. The use of the expression "coerce, convince, or request by any means" proves that the prohibition is limited to preventing further incidents of harassment in any form including through the assistance of a third party. The words "coerce" and "convince" in particular logically implied that any

legitimate communications between the accused's legal representative and the two crewmates were not covered by the order because the decision to contact the two crewmates would be made after consultation with the accused, not after coercion or other pressuring means. Nevertheless, the CO erred on the side of caution shortly after defence counsel raised his concerns with the prosecution by issuing subsequent versions of the order that unequivocally excluded defence counsel from its application. The decision of the chain of command to amend the original order confirms that the prohibition it contained was never intended to impede the applicant's rights to make full answer and defence.

[28] In addition, the obligation or prohibition the order imposes on the accused is narrow in scope; it is limited to prohibiting contact with the alleged victims and to refraining from attending places where they might be found, with the caveat that visits to the listed service-related locations are allowed if permission is granted. The prohibition it contained is therefore both reasonable and justified in the circumstances.

[29] The case at bar is very different from the 1957 case law provided by the accused, *Weiner vs the Queen*, no.1/57. In this latter case, senior military authority misused their powers against the accused within the context of the trial proceedings in several ways, one of which involved ordering the officers of the unit who were likely defence witnesses not to speak to defence counsel about the accused's case. In Petty Officer 1st Class Martin's case, there is no allegation that the chain of command took some measures to prevent defence counsel's access to the two alleged victims and to other potential witnesses.

[30] Further, although there is no guarantee that they would have agreed to speak to defence counsel outside of their testimony in court, it is part of his mandate as defence counsel, once he gave due consideration to this option, to attempt to contact the two crewmates regardless of the existence of the order. It seems that the defence did not even attempt to contact the two crewmates. In any event, generally speaking, defence counsel would not necessarily seek to communicate with prosecution's witnesses, particularly because there is a right to cross-examine them at trial.

[31] In examining the order and considering defence's submissions, it is apparent that the order was issued within the chain of command's lawful authority and that the purposes of the order were lawful. The order also did not impair the accused's right to make full answer and defence because it does not, and was never meant to, apply to counsel in preparation of his client's defence for these trial proceedings.

[32] Finally, the order's intent was clearly not to interfere with the ability of this Court to preside this matter impartially and independently. First, the document prohibits the accused from attending the place of employment of the alleged victims, it does not refer to their place of duty. Second, the courtroom is not one of the places listed in the order. Finally, the order expressly subordinates itself to the authority of a military judge. Common sense dictates that an order imposed on an accused person prohibiting him from contacting an alleged victim does not have the effect of expelling the accused from

the courtroom once the alleged victim enters the courtroom to testify. In sum, in regard to these trial proceedings, the accused and witnesses are under the jurisdiction and authority of this Court, a fact that is clearly articulated in the order.

Conclusion

[33] Considering the evidence that was admitted in support of the prosecution's motion and the submissions of both parties, the Court finds that the application of the accused has no reasonable prospect of success, since he failed to present a sufficient factual foundation and legal argument in support of his request. In applying my authority as stated in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659 at paragraph 38, I will not grant a hearing of the *Charter* application.

FOR THESE REASONS, THE COURT:

[34] **GRANTS** the motion of the prosecution.

[35] **SUMMARILY DISMISSES** the application of the accused.

Counsel:

The Director of Military Prosecutions as represented by Major G. J. Moorehead and Lieutenant-Commander H. E. Burchill, Counsel for the Responding Party

Major É. Carrier, Defence Counsel Services, Counsel for Petty Officer, 1st Class J.T. Martin, Accused and Moving Party