COURT MARTIAL

Citation: *R. v. MacLellan,* 2011 CM 3003

Date: 20110520
Docket: 201067

General Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Captain J. C. MacLellan, Accused

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

REASONS ON APPLICATION MADE BY THE ACCUSED FOR AN ALLEGED VIOLATION OF SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ABUSE OF PROCESS

(Orally)

INTRODUCTION

[1] Captain MacLellan is charged with three offences punishable under section 85 of the *National Defence Act* for having used insulting language to a superior officer. Essentially, it is alleged that he used insulting words at three different times while having a single heated verbal exchange with his Commanding Officer, Lieutenant-Colonel Lewis, on 24 July 2010 at the Regional Gliding School Atlantic (hereinafter RGS (A)) in Debert, Nova Scotia.

[2] This preliminary motion is brought by way of an application made under Queen's Regulations and Orders (hereinafter the QR&O) subparagraph 112.05(5) (*e*) as a question of law or mixed law and fact to be determined by the military judge presiding at this General Court Martial. More specifically, Captain MacLellan is requesting from the

presiding military judge at this General Court Martial to stay the proceedings pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedom* (hereinafter the *Charter*) as a remedy to an alleged breach of his right under section 7 of the *Charter*.

[3] Captain MacLellan is claiming that considering the abuse of authority shown by his CO, who is the complainant in this case, toward him at various moments for over a year, and also considering the way the disciplinary investigation was conducted, the manner the process leading authorities to the laying of charges against him, and the process leading to this court martial were managed, all these actions would constitute psychological harm that would have led to a violation of his right to security under section 7 of the *Charter*. Also, he is claiming that this same set of facts would shock the conscience of the community, including the military community, and is so detrimental to the proper administration of justice that it warrants judicial intervention by this court by a stay of proceedings, as those facts being an issue to be considered falling under the residual category of rights under section 7 of the *Charter*.

THE PROCEEDINGS

Timing of hearing

[4] On 1 February 2011, defence counsel announced at the first pretrial conference call I held for the proper conduct of this trial, that he intended to request a stay of proceedings by the court on the basis of an alleged abuse of process made by the prosecution pursuant to section 7 of the *Charter*. It was announced as a preliminary matter that I would have to deal with at the beginning of the trial.

[5] Later, on 9 March 2011, at the second pretrial conference call on this matter, the defence counsel reiterated his intention to present such application.

[6] However, by way of a letter received by the Office of the Court Martial Administror on 15 March 2011, defence counsel informed me that further to a discussion he had with the prosecutor, he intended to present such application at the end of the main trial, further to the hearing of the full evidence by the court. I then held a third pretrial conference call with counsel on the same day to discuss that matter. Defence counsel was then even more specific about the grounds he was raising at that time in order to support such application. He wanted to proceed that way in order to avoid having some or all the witnesses to testify twice on the same matter, first on his application and second in the main trial. Essentially, he wanted to examine or cross-examine at the same time witnesses on the evidence relevant to the charges before the court, and also on the evidence relevant to the abuse of process application.

[7] I acknowledged defence counsel's intent and warned both parties that by doing so, such approach may involve issues that may require my intervention to avoid a situation where irreparable harm be caused by inadmissible evidence put before the panel members, or improper or tainted information or comments be made by counsel before the

panel, which could affect panel members to the point that the entire trial is compromised and would lead me to pronounce a mistrial.

[8] On the first day of the trial and some time before it started, in chambers, in presence of the prosecution, defence counsel articulated in an extensive manner the grounds he was relying on for the abuse of process application, in order to respond to my concern for proceeding with his *Charter* application for abuse of process at the end of the trial. In court, on the same day, I summarized what was said in chambers, including what was said about the abuse of process application and my concerns to proceed in such manner. I also mentioned to both counsel in court that I was still thinking about what would be the best time to present such application during the trial.

[9] Then, on the first day set for the trial, which is on Monday, April 4th, 2011, we proceeded with a voir dire on the admissibility of an unofficial confession made by the accused. Once the hearing of this *voir dire* was completed, I announced to both parties on Wednesday, April 6th, 2011, that I intended to proceed immediately with a second *voir dire* for the hearing of the *Charter* application announced by defence counsel concerning an alleged abuse of process.

[10] As the trial judge, relying on my inherent authority to control the trial proceedings, I came to the conclusion that absent of any rules of practice on such matter, that it is to me to decide what procedure should be followed in order to dispose of the *Charter* application. I relied, as a matter of fact, on the Ontario Court of Appeal decision in *Kutynec*[1] to proceed in that way.

[11] During the first *voir dire*, I heard evidence put before the court by two witnesses that was enough to establish that there was some merit and some foundation in law concerning the *Charter* application. Essentially, it has been established by those two witnesses that a few people, including the complainant in the present matter and who his the superior of the accused, wore many hats in the conduct and the decision process related to the disciplinary and to the administrative measures taken against the accused about the very same incident at the heart of the charges put before this court.

[12] More specifically, I heard during that first *voir dire*, evidence from the accused's and the complainant's XO, Lieutenant Commander Carberry, who was also the investigator and the authority who laid the charge against the accused, and I heard evidence from the administration officer of the unit, Major Kavanagh, who described some administrative process that was going on in relation to the accused, and that was initiated by the complainant in relation to the same incident at the origin of the charges before this court. This evidence was sufficient, in my opinion, to justify scrutiny by this court of the process that brought the charges before this General Court Martial in the light of section 7 of the *Charter*, as required in the application put forward by Captain MacLellan.

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[1] R v Kutynec 70 C. C. C. (3d) 289

[13] Also, I must say that during this first *voir dire*, I clearly noticed the existence of a very tense relationship between both counsels. During those three days of hearing on the first *voir dire*, I had to intervene many times with both counsel to remind them about their comments and attitude. I invited them to talk to each other outside the court in order to solve some administrative matters in relation to the conduct of the case and to make the conduct of the trial more effective, but they clearly couldn't and they decided to put on the record, in court, any thing they did. At some point in time, I had to strongly suggest to them to do things in order to ensure the effectiveness and the fairness of the process. In addition, I had to remind defence counsel, more then once, that he was not allowed to argue with witnesses or affirm his own view on some matters while asking questions to them. I also had to rule many times on objections made by both counsel that would have required very often, if a panel would have been present, to ask panel members to retire numerous times because of the nature of the comments made by counsel, which would have potentially threatened the good conduct of the main trial and slowed down seriously the pace of it. I must say that both counsels never shown at any time any disrespect toward the court, but they had to be reminded by me at numerous times to stay within acceptable boundaries as a matter of procedure and decorum.

[14] Then, considering that the *Charter* application had some merit and foundation in law, and considering the great potential that tainted information or comments could be made by both counsels before panel members during the main trial and would oblige me to consider at various times if the trial is compromised, I came to the conclusion that in all fairness to the accused, the administration of justice would be best served if the abuse of process application be heard as a preliminary matter at the beginning of this trial and in the absence of the panel members

The need of a reasonable notice in writing

[15] Once I communicated my decision to both parties in court, it was then raised by the prosecutor that no reasonable notice in writing had been given by the accused to the military judge assigned to preside at the court martial and to the opposing party, in accordance with article 112.04 of the QR&O.

[16] Considering that I imposed on the accused the obligation to proceed with his *Charter* application at the beginning of the trial instead of doing it at the end, that defence counsel has provided sufficient detail of the nature of the application and of the relief sought, that he articulated over the last two months the evidence he relied on at the hearing, and that he mentioned the length of time required, I granted permission to the accused to proceed without providing such written notice, because he established a reasonable cause for failure to give it in accordance with paragraph 112.04(3) of the QR&O. Reality is that it was not a surprise to the prosecution that Captain MacLellan intended to present that application because his counsel clearly claimed in presence of the prosecutor, at various times over the last two months, that he will do so and always why and how.

[17] Defence counsel identified again in court, on my request, the main witnesses he intended to call for this purpose and provided to the prosecution, always in court, the list of case law he was relying on.

[18] The military prosecutor relied on article 4 of the Military Rules of Evidence (hereinafter the MRE) to argue that considering the absence of any procedural rule governing the presentation of a *Charter* application before the court martial, it shall rely on article 27 of the Ontario Court of Justice Criminal Proceedings Rules to allow him an adjournment of 30 days to prepare this hearing. I mention to him that article 4 of the MRE is about evidence issue and not procedural issue and that, considering the context of this case, I would not allow any 30 days adjournment for this hearing. Instead, I decided to adjourn the trial to the next afternoon in order to give some time to the prosecution and defence counsel to prepare the hearing, considering my decision to proceed immediately, instead of doing it at the end of the trial.

THE EVIDENCE

[19] This application's hearing took place from 7 to 9 April 2011 and from 11 to16 April 2011. Eleven witnesses were heard by the court during the hearing. The court heard, in the order of their appearance, Major Vichnvetskaia, Captain McPhee, Captain (Navy) Garnier, Chief Petty Officer First Class (CPO1) Cashin, Major Cooper, Captain Keirstead, Commander (Cdr) Reddy, Captain Dawe, Lieutenant-Commander Carberry, Major Kavanagh, and Lieutenant-Colonel (LCol) (retired) Berntson.

[20] Three exhibits were introduced during the hearing, which are:

a. Exhibit VD2-1, a binder containing a copy of all the documentation disclosed by the prosecution to Captain MacLellan for the purpose of this trial, and admitted for the limited purpose of only establishing what documents were received by the accused and not for the truth of the content of any document to be found in that binder;

b. Exhibit VD2-2, a copy of the investigation report concerning the matter before this court; and

c. Exhibit VD2-3, a photocopy of a booklet's page from Captain MacLellan's pilot licence for all gliders which is valid until June 2010 and a copy of his renewed medical certificate signed by the aviation medical examiner on 4 March 2010.

[21] Also, the court took judicial notice of the facts in issues under Rule 15 of the Military Rules of Evidence.

THE FACTS

Structure of the Regional Gliding School (Atlantic)

[22] For a number of years, those who had or would like to glide in the air cadet movement may have done or do so by going on the summer gliding program run by the Regional Gliding School (Atlantic) (hereinafter RGS(A)) in Debert, Nova Scotia.

[23] This program is under the responsibility of the Regional Cadet Support Unit (Atlantic) (hereinafter RCSU (A)). This unit is part of the Maritime Forces Atlantic (MARTLAN) and its headquarters are located at Canadian Forces Base (CFB) Shearwater, near Halifax. The RCSU (A) CO, the commanding officer, is usually a Regular Force officer as of the rank of commander and coming from the navy element, as the Executive Officer position of the rank of lieutenant-commander and the Coxswain position of the rank of chief petty officer first class.

[24] The Regional Cadet Air Operations Officer Atlantic (RC Air Ops O (A)) is the person responsible for running the program within the unit and he is assuming at the same time the RGS (A) CO position. The RC Air Ops O (A) is of the rank of lieutenant-colonel and may rely on a team of three other people: a Deputy Commanding Officer (DCO) of the rank of major since April 2010, an Air Standards Officer (ASO) of the rank of captain, and since April 2010, a Flight Safety Officer (FSO) also of the rank of captain.

[25] The RC Air Ops O (A) position is usually filled by a member of the Reserve Force, who, most of the time, is a former regular force pilot. The three other positions are usually occupied also by Reserve Force officers who are Cadet Instructor Cadre (CIC) officers.

[26] Those four positions in the RC Air Ops department are on class B terms of service, which mean that those people are committed on a full time basis for a minimum of three years, automatically renewable in accordance with the RCSU (A) policy for another three years. After that, the position is put to competition and those who were occupying a position must compete as any other reserve member interested. Once a person won the competition, then the same process regarding the duration and a renewal of the class B terms of service previously described will apply.

[27] As a matter of fact, those who are in these four positions usually have some experience as a pilot and are usually qualified on an aircraft as tow pilot or glider pilot.

The summer gliding program

[28] About 50 cadets participate each year to the summer gliding program run by the RGS (A). The team of four officers are helped during the summer by a team of augmentees employed on a temporary basis as supervisors or instructors on the program. There are CIC officers and Civilian Instructors usually qualified as tow or glider pilot and sometimes both. As a matter of fact, many of them are former cadets who went through the program.

[29] Usually, the program runs from the month of June to the month of August. Essentially, during the month of June, an instructor's program takes place as a mandatory annual requirement to familiarize, prepare and qualify instructors on the glider. The summer gliding program really takes off at the beginning of the month of July with the arrival of the cadets' candidates and it goes on for six weeks. The course is divided in two parts: the theory is taught in class for some period of time and once this part is done, candidates will fly in a glider with an instructor up to the time they will be able to fly a glider solo. Further to some solo practice, they will have to perform the flight test in order to get their qualification. At the end of the program, a formal graduation parade takes place in order to recognize cadets who got their wings as a glider pilot.

The people and their working relationship

[30] Captain MacLellan, the accused on this trial, has been part of the summer gliding school program in the Atlantic Region for a great number of years. As a matter of facts, for many years, only the RC Air Ops O (A) and he were on the line to organize this program on a full time basis. He was the RGS (A) DCO for many summers over the years, wearing the rank of Major (Acting) while at the school during that period of time. While the RGS (A) CO took care of many aspects of the operation, such as the budget' school, the flying, the allocation or resources and the contacts with the various maintenance organizations involved, Captain MacLellan was responsible for the execution part of all those aspects, which included to maintain a good and large networking relationship with people from various sites and Cadet Leagues. Because he devoted himself in many ways for many years in order to make things happen, he has become familiar with the nuts and bolts of all aspects of this program and he has become well known in that capacity by many people over the years in the Atlantic region and over. He is considered as some sort of institutional memory for the RGS (A).

[31] In 2007 or 2008, Lieutenant-Colonel Lewis was posted in the RC Air Ops O (A) position and became at the same time, the RGS (A) CO. It looks like that at that time, under is authority was the ASO, Captain Cooper as he then was, and the DCO, Captain MacLellan. In 2009, an augmentee was added to that team on a class B terms of service, which is Captain Aucoin.

[32] It appears that the working relationship between the CO and his three section members went correctly up to the time a specific incident where a confrontation occurred between the RGS (A) CO and DCO.

[33] It appears that late in 2009, while as the selection process for the allocation of the running of the Power Pilot Scholarship Program (PPSP) was undergoing, Lieutenant-Colonel Lewis recommended, further to an assessment he did, two flight training facilities instead of three, as it has usually be done in the past, excluding for the first time since 15 years the flight training facilities in Gander. It appears that it became a significant incident because of the impact on employment it had in that region. It generated a lot of activities, including political one, which ended by having political

authorities change the initial decision made on the RC Air Ops O (A) assessment, and having Gander training facilities reinstated as flight training facilities for the PPSP.

[34] However, it was clear that during this episode, RGS (A) CO and DCO had a huge disagreement that can be considered as the probable starting point for the deterioration of the working relationship between Lieutenant-Colonel Lewis and Captain MacLellan.

[35] In December 2009, the RCSU (A) CO, Commander Reddy, decided to review the status of Captain MacLellan's employment. Fact was that the position occupied by Captain MacLellan had to be re-competed by April 2010 because he would have been in it for six years.

[36] Commander Reddy consulted Captain MacLellan's supervisor, Lieutenant-Colonel Lewis on that issue. Commander Reddy's intent was to offer a lateral transfer to another position to Captain MacLellan. However, he learned from Lieutenant-Colonel Lewis that Captain MacLellan had not maintained his flying qualifications. He agreed with Lieutenant-Colonel Lewis that in both positions, DCO or ASO, the person employ in that position must have a valid pilot licence, either as a tow pilot or a glider pilot. Then, Commander Reddy instructed his personnel to compete the RGS (A) DCO position and let go about the lateral transfer because the position that Commander Reddy was contemplating at that time did not exist and couldn't be funded.

[37] However, what he did not know is that Lieutenant-Colonel Lewis reviewed and changed the terms of reference (TOR) for that position without his knowledge and approval, which was not necessary at that time. Lieutenant-Colonel Lewis included in the DCO's TOR the requirement of having a valid pilot licence as a tow pilot and a glider pilot.

[38] Reality is that Captain MacLellan had a valid licence pilot until June 2010 as a glider pilot and that he had to only just renew his medical for maintaining his ability to pilot, which he did on 10 March 2010. When Captain MacLellan saw the new TOR for his position, he clearly realized that he couldn't compete for it, considering the new specific requirement for a valid pilot licence on two aircrafts. Also, it appeared as it was made to target specific people for the position. In this small world, it appears that the only person having the necessary position in order to meet the new TOR requirements was Captain Cooper, as he then was.

[39] Further to that, Captain MacLellan explored the possibility to retire from the Canadian Forces and started to find out about his pension. However, he consulted also a lawyer on that issue. It is further to a letter coming from Captain MacLellan's counsel, Mr. MacDonald, that Commander Reddy realized that TOR were changed. He then initiated a process in which he sought approval for extending Captain MacLellan's class B current terms of service and funding for a new Flight Safety Officer position in the RCSU (A) Air Ops department that could be offered to Captain MacLellan as a class B terms of service position for the next three years.

[40] Commander Reddy got approval. Captain MacLellan's class B current terms of service were extended and he was offered the new Flight Safety Officer position in the RCSU (A) Air Ops department. He accepted the offer, which has as a result for him to be again under the supervision of Lieutenant-Colonel Lewis. Commander Reddy also issued a directive to his administrative personnel to the effect that any change to any TOR class B position would, from then on, require his review and approval.

[41] Captain Cooper competed for the DCO position and was employed in that capacity as of 1 April 2010 and he was also promoted to the rank of major.

[42] As a matter of fact, this episode did not improve the working relationship and trust between, on one hand, the RGS (A) CO, Lieutenant-Colonel Lewis, and on the other hand, the DCO, Major Cooper, the new ASO, Captain Aucoin, and the new FSO, Captain MacLellan. Also, as a matter of fact, the necessary relationship that must exist in order to ensure the success of RGS (A) mission deteriorated further in the following months, especially between Lieutenant-Colonel Lewis and Captain MacLellan, as the evidence put before this court demonstrated it.

[43] Further to that event, Lieutenant-Colonel Lewis started to inform by email, for the record, Commander Reddy about any discussion or action involving Captain MacLellan.

[44] During spring 2010, while preparing the summer gliding school program, RGS (A) CO made some decisions about changing the location of some facilities, for which Captain MacLellan expressed his disagreement with.

[45] At the beginning of the month of June 2010, Captain MacLellan was expected by Lieutenant-Colonel Lewis to attend the Standard Instructor Refresher Course,. However, the DCO, Major Cooper told Captain MacLellan that he had not to attend the course, which he did by staying at home. During that course, Lieutenant-Colonel Lewis came for a visit and found out that Captain MacLellan was not on the course as he instructed him. He called him at home right away and yelled at him while letting him know about his dissatisfaction concerning the situation. He also documented the incident in an email, reflecting the lack of communication and trust between both individuals.

[46] Later on the month of June 2010, relying on a presumed conversation that would have taken place with his DCO, Major Cooper, Lieutenant-Colonel Lewis informed his CO, Commander Reddy, that it seems that Captain MacLellan has not a valid medical in order to allow him to pilot an aircraft. Later, Lieutenant-Colonel Lewis inquired to Captain MacLellan about this issue and it was found out that the latter has a valid medical since March 2010. As the DCO, Major Cooper told the court that he could not recall having provided such information to his CO and was never informed of the emails exchanged on that issue. Also, it does not appear that the correct information was at any time relayed to Commander Reddy.

[47] During the month of July 2010, the DCO, Major Cooper, took medical leave for mental health issues. Then, the CO took the decision to take over the DCO's job and did

not spread out among his personnel that his DCO was absent and the reason why. Considering his extensive experience as the former DCO, Captain MacLellan took on himself to make some things happen and did various things in addition to the one he had to do as the FSO.

[48] At that time, cohesion among the RGS (A) staff was low but good enough to allow operations to take place. The multiple tasks to perform and the difficulty experience by the CO and Captain MacLellan to communicate in an efficient and cohesive manner, because of the animosity existing between both individuals, was a reason, but not the only one, that could explain the existence of such situation. I infer from that situation that there was a real lack of communication between the main school staff officers and the CO and that it affected in some ways the working environment. And between the accused and the CO, it got worse.

The incident

[49] On the morning of 24 July 2010, Lieutenant-Colonel Lewis was trying to get a hold of Captain MacLellan, He wanted the latter to sign some candidates' pilot permits in order to allow them to fly solo that morning. Among many things he had done to contact him, the CO sent an email asking the accused where he was. However, for some reason, he put carbon copy (cc) the RCSU (A) CO and XO on that email.

[50] Around noon, the RGS (A) CO finally found Captain MacLellan near the trailers on the airfield. He went out of his car, and both individuals started quickly to have a very heated argument concerning the CO's email and Captain MacLellan alleged absence from the airfield. Both individuals talked to each other in a loudly manner in front of officers, parents, and some cadets. Then, Lieutenant-Colonel Lewis left the place and got in his car.

The process leading to the laying of a charge

[51] Further to that event, the RGS (A) CO informed on the same day, by email, Lieutenant-Commander Carberry about the exchange that had just occurred with Captain MacLellan and commented about how he felt. In response, he was told by the RCSU (A) XO to take some time to think about what he wanted to do before doing anything else.

[52] The day after, on 25 July 2010, Lieutenant-Colonel Lewis put in an email an account of what happen from his perspective and requested Lieutenant-Commander Carberry to look at the incident in order to see if some action should be taken, considering it could be considered as some sort of insubordination behaviour from Captain MacLellan. He also informed the RCSU (A) XO that he had started to secure written statements of people who witnessed the incident.

[53] Lieutenant-Commander Carberry replied by email that he will look into the incident, that RGS (A) CO must stay out of the investigative process, meaning by this

that he could make sure that written statements are secured but that he has no involvement in the taking of them.

[54] On 26 July 2010, Captain MacLellan went to Lieutenant-Commander Carberry's office, on his own initiative, to inform and discuss what was going on at RGS (A) between the CO and his staff and also to provide his view about the heated verbal exchange he was involved in with Lieutenant-Colonel Lewis on the 24 July.

[55] The RCSU (A) XO listened to Captain MacLellan but clearly stated to him that he did not want to hear from him about what happened on 24 July with Lieutenant-Colonel Lewis because he was investigating the matter. So, a discussion took place between them but nothing was said about the incident of 24 July.

[56] On 27 July 2010, the Coxwain, CPO1 Cashin was sent by Lieutenant-Commander Carberry to Debert in order to get the written statements regarding the incident. CPO1 Cashin went at that location. He received from Lieutenant (Navy) Trickett three statements that she took from a filing cabinet where she had secured them. She put statements of Captain MacRae, Captain Hubley, and Mr. Samson in an unsealed envelope and handed over it to the Coxwain.

[57] Later that day, the Coxwain find out that Major Cooper, the RGS (A) DCO was absent and he informed Commander Reddy about that fact.

[58] Commander Reddy sought out for Major Cooper and he found him. He explained to him that he had to report, that he should meet with a doctor if he was considered that he had to be absent for a long time and get medical leave from that doctor to justify his absence. Major Cooper met a physician and got medical leave for some period of time.

[59] On his return, CPO1 Cashin handed over the envelope, with the statements in it, to Lieutenant-Commander Carberry. The latter had a look at the situation. He made an informal assessment of the facts and concluded, at that time, that the situation had to be addressed from an administrative perspective only because he did not see at that time any evidence supporting the laying of any charge.

[60] In his written testimony Captain MacRae clearly said that Captain Dawe was with him at the time of the incident on 24 July between Lieutenant-Colonel Lewis and Captain MacLellan. However, no statement seemed to have been written by Captain Dawe. Reality is that the latter wrote his statement, gave it to Lt (N) Trickett but it was never handed over to anybody else. Despite the fact that Lieutenant-Commander Carberry noticed the absence of a statement made by Captain Dawe, he concluded that the latter couldn't report more than what Captain MacRae stated in his own written statement, which was confirmed by Captain Dawe himself in his testimony before the court, and he decided to not look for a statement from Captain Dawe.

[61] At the end of the month of July or the beginning of the month of August 2010, the situation was discussed by Lieutenant-Commander Carberry with RCSU (A) CO and, in

the light of all circumstances, including the well known dynamic that has developed between Lieutenant-Colonel Lewis and Captain MacLellan since the TOR's incident, Commander Reedy concurred that an administrative resolution of that incident would be the most appropriate course of action to be taken, and as a general approach to all this issue, it would be the best approach to adopt in order to try to resolve the whole situation. Then, Lieutenant-Commander Carberry left for his three weeks leave.

[62] In early August 2010, Commander Reddy, went to Debert to meet with LCol Lewis in order to do two things: first, assess if the security of the operations of the summer gliding program was at risk to the extent that the program must be shot down because of the lack of cohesion and morale among the school staff, and second, to let know RGS (A) CO about the course of action he has been decided in regard of the 24 July incident that occurred with Captain MacLellan.

[63] While in Debert, further to his visit, Commander Reddy came to the conclusion that operations of the summer gliding school program had not to be shut down because the safety and security of operations were not at risk. However, he informed Lieutenant-Colonel Lewis that, concerning the 24 July incident involving Captain MacLellan, he wanted to deal with it administratively once the summer gliding school program would be over. No immediate action would be taken against anybody. From Commander Reddy's perspective, facilitation was needed among Lieutenant-Colonel Lewis crew in order to improve the working relationship at an acceptable level.

[64] This informal resolution approach seemed to not please Lieutenant-Colonel Lewis, and on 17 August 2010, in accordance with Defence Administrative Orders and Directives (DAOD) chapter 5012-0, Harassment Prevention and Resolution, he transmitted his formal complaint by email to Commander Reddy. In this complaint Lieutenant-Colonel Lewis reiterated what he said in his initial email he sent to Lieutenant-Commander Carberry about the 24 July incident, relying on the exact same evidence.

[65] A situational assessment was conducted by the administrative officer, Major Kavanagh, as the official advisor to the RCSU (A) CO on this matter. Major Kavanagh discussed the matter with some people at the superior chain of command level, reviewed the facts and came to the conclusion, in accordance with the harassment policy, that a disciplinary investigation must be conducted prior proceeding with any administrative investigation.

[66] At the same time Commander Reddy informed his superior, the Assistant Chief of Staff, Personnel and Training, for the Maritime Forces Atlantic, Captain (Navy) Garnier about the harassment complaint. An informal discussion occurred between both of them on this issue, and Capt (N) Garnier was of the opinion that the formal harassment complaint was more of the nature of a disciplinary matter to deal with than an administrative matter.

[67] At the end of the month of August 2010, while he just came back from three weeks leave, Lieutenant-Commander Carberry was ordered by Commander Reddy to proceed with a formal disciplinary investigation concerning the incident that occurred on 24 July 2010 between Lieutenant-Colonel Lewis and Captain MacLellan.

[68] Lieutenant-Commander Carberry considered that his investigation was then at the last step for gathering evidence on that matter and he decided to meet Captain MacLellan as a suspect. On 2 September 2010, he asked Major Kavanagh to get Captain MacLellan and bring him in his office. In presence of Major Kavanagh, Lieutenant-Commander Carberry conducted a formal interview with Captain MacLellan in his office. He legally cautioned Captain MacLellan and had him fill and sign a caution statement form to that effect.

[69] The interview lasted about 20 minutes during which Captain MacLellan provided his side of the story about the 24 July incident. Further to that, he was asked if he wanted to provide a written statement. He showed interest in doing so, but some time later, asked to provide one later.

[70] On his return from the long weekend Lieutenant-Commander Carberry, on 7 September 2010, inquired to Captain MacLellan about his intent to provide a written statement. He said that he had to talk to his lawyer and that it still was his intent to provide one. On 8 September 2010, Lieutenant-Commander Carberry received by email from Captain MacLellan's lawyer his written unsigned statement. On 10 September 2010, Lieutenant-Commander Carberry had Captain MacLellan sign his statement before Major Kavanagh and him.

[71] Further to that, Lieutenant-Commander Carberry passed his investigation report (VD2-2) to the AJAG Halifax office and requested legal advice about a potential charge to be laid. Once he received legal advice, he made his decision concerning this matter.

[72] As he was authorized to do so by his CO, Commander Reddy, at his arrival in his current position on summer of 2009, Lieutenant-Commander Carberry laid a charge of insubordination against Captain MacLellan for having used, on 24 July 2010, insulting language toward his superior, Lieutenant-Colonel Lewis, contrary to article 85 of the *National Defence Act*.

The process leading to a hearing before a General Court Martial

[73] On or about the same day as the charge was laid, the RCSU (A) Public Affair Officer (PAFO), Captain Keirstead, in accordance with the regulation, was appointed by RCSU (A) CO as the accused's assisting officer.

[74] Captain Keirstead was in some way familiar with the incident. Some time after 24 July 2010, in his capacity as the PAFO, Captain Keirstead heard about the incident between Lieutenant-Colonel Lewis and Captain MacLellan further to an informal conversation he had with the latter. He then went to Major Kavanagh and also to

Lieutenant-Commander Carberry to discuss the incident that allegedly occurred in public to find out if he would have to advise on this matter if questioned by any media on that issue. He found out that the matter was handled at the time and that he didn't need to get involve from a PAFO perspective. However, as a glider pilot himself who at one time went through the summer gliding school program where he first met Captain MacLellan, he still had concerns about what was going on.

[75] Considering the rank of the accused, only a superior officer could deal with the charge. Once he received the Record of Disciplinary Proceedings regarding Captain MacLellan, Captain (Navy) Garnier, in his capacity as a superior officer, decided to request legal advice on the opportunity for him to give the accused his right to elect to be tried before a court martial instead of proceeding by summary trial.

[76] Once he received that legal advice from AJAG Halifax office, Captain (N) Garnier considered that his powers of punishment were not sufficient in the circumstances of the case and that Captain MacLellan would probably want to be represented by counsel for the conduct of the disciplinary proceedings, and he made the decision to give the accused his right to elect to be tried before a court martial. Then, on 4 October 2010, at RCSU (A) Headquarters at CFB Shearwater, in presence of Lieutenant-Commander Carberry, and in the absence of Captain MacLellan's assisting officer, in accordance with paragraph 108.17(2) of the QR&O, Captain (N) Garnier informed the accused about his right to be tried by court martial and that he had to make his decision known to him by 11 October 2010.

[77] The 11 October 2010 being a statutory holiday on that year, it is on 12 October 2010 before Lieutenant-Commander Carberry who was acting on behalf of Capt(N) Garnier, in presence of his assisting officer, and after he consulted a lawyer prior to that date, that Captain MacLellan elected to be tried before a court martial.

[78] On 18 October 2010, Captain MacLellan and his assisting officer, Captain Keirstead went to Captain (N) Garnier's office in order to meet with him as the latter requested it. As requested by QR&O article 109.04, he wanted to inquire of the accused about his intent to retain legal counsel. The appropriate form was filled and signed by Captain MacLellan. In addition, Capt (N) Garnier mentioned to the accused that if he would have been in his position, he would have chosen to be tried by summary trial.

[79] On 28 October 2010, Captain (N) Garnier sent an application to the referral authority for disposal of the charge and transmitted with it the documents listed at QR&O paragraph 109.03(6).

[80] On 29 October 2010, pursuant to QR&O article 109.05, the referral authority, Rear-Admiral Gardam, Commander of the Maritime Forces Atlantic, forwarded the application to the Director of Military Prosecutions for disposal.

[81] On receipt of the file, a military prosecutor was assigned to it in order to perform a post-charged screening for deciding if a charge should be preferred or not. Meanwhile,

the conduct of this process by the unit led the unit clerk at RCSU (A) responsible for preparing and amending conduct sheet for all personnel to find out about the existence of a message in Captain MacLellan's personal file that would require his conduct sheet to be amended. Captain MacLellan's conduct sheet was amended accordingly.

[82] Also, Mr MacDonald, who is legal counsel for Captain MacLellan in these proceedings, and paid at the accused own expense, made some representations in order to get a military lawyer from the Directorate of Defence Counsel Service. It would have provided the ability for Captain MacLellan to get a legal counsel very familiar with the military law and the proceedings before a court martial without cost. However, this request was denied by the Director of Defence Counsel Services (DDCS) as he claimed that in accordance with the policy, Captain MacLellan could be represented either by a private practice lawyer of his own choice and at his own expense or either by a military lawyer from the office of DDCS at no cost, but not by both.

[83] As set out in the charge sheet dated 29 November 2010, three charges were preferred by the Director of Military Prosecutions on 1 December 2010. At some point in time after that, Captain MacLellan decided of the type of court martial and he chose to be tried by a General Court Martial.

[84] The General Court Martial regarding those charges started on 4 April 2011. All along of those two hearings for the applications before this court, the prosecutor disclosed all relevant material requested by defence counsel.

POSITION OF THE APPLICANT

[85] The applicant alleges that because of a difficult working relationship with his CO, Lieutenant-Colonel Lewis, he has been the victim over the last year of a series of events which constitute retaliation made on bad faith by the latter. He also affirms that his CO submitted false information to people in order to have him put under disciplinary and administrative actions.

[86] Considering that he was deliberately targeted, Captain MacLellan is claiming that the overall disciplinary process, including the investigation, were made in such way by the state's representatives that it constituted a serious psychological harm to him, which led to a violation of his right to security under section 7 of the *Charter*. He says that this violation was not made in accordance with a fundamental principle of justice, which is the right to a fair trial, which would include the issue of disclosure and the guarantee to procedural justice, which he referred as due process.

[87] Also, he suggested that the court should proceed to its analysis of an alleged violation of the right of the accused under section 7 by keeping on its mind some of the more specific principles of fundamental justice enunciated as more specific rights under section 8 to 14 of the *Charter*. He referred the court more specifically to the right of not arbitrarily be detained under section 9 of the *Charter*, the right to not be deprived of

counsel of his choice under paragraph 10(b) of the *Charter*, and the right not to be subjected to any cruel and unusual treatment under section 12 of the *Charter*.

[88] On the basis of the same set of facts, Captain MacLellan is alleging that it calls also for an analysis by the court under this residual category of conduct identified by the Supreme Court of Canada and caught by section 7 of the *Charter*, which would be an abuse of process.

[89] Finally, he also claims that his right to equality under the law was violated contrary to section 15 of the *Charter*.

[90] Facing the clearest of cases flowing from these violations to the *Charter*, it is strongly suggested by the applicant that the court has no other choice than to stay the proceedings as an appropriate remedy pursuant to subsection 24(1) of the *Charter*. He also requests this court to order that witnesses he called have their fees paid at prosecution expense. Finally, he is asking this court to order the payment of *Charter* damages. He is saying that an amount of $5,000 should be allowed for each breach the court would conclude to.

POSITION OF THE RESPONDANT

[91] The respondent alleges that Captain MacLellan's right to security under section 7 of the *Charter* was not infringed. He submitted the fact that what it has come from the difficult relationship with RGS (A) CO. Lieutenant-Colonel Lewis, might have caused him some psychological effects but certainly not serious psychological harm as required by case law on that matter. In addition, he strongly suggests to the court that if harm was caused to the accused, then it was coming from actions done by an individual on his own and not by somebody acting as an agent of the state.

[92] The prosecutor submits that the accused was never detained as the concept is defined under section 9 of the *Charter*, that Captain MacLellan asks this court to apply the concept of the right to counsel of his choice in a more larger way than it has been interpreted by the Supreme Court of Canada under paragraph 10(b) of the *Charter* and that there was no evidence adduce by the accused in order to establish that he was subjected to any cruel and unusual treatment or punishment under section 12 of the *Charter*. The respondent also indicated to the court that what was identified by the applicant as his right to equality under the law does not fit under article 15 of the *Charter*.

[93] Essentially, the prosecutor takes the position that the disciplinary process in regard of the matter before this court was followed in accordance with the applicable provisions in the regulation and in the *National Defence Act*. He says that the issue raised concerning the disclosure were addressed and settled by the prosecution in accordance with the principle of fundamental justice concerning the right of the accused to a fair trial and nothing could support the allegations of the accused on that issue or any other issue concerning this disciplinary process.

[94] For those reasons, the prosecutor concludes that no remedy could be allowed by this court. However, he raised that if the court would come to the conclusion that a violation of the accused's *Charter* rights occurred, than the court is not facing the clearest of cases allowing the court to stay the proceedings. At best, consideration should be given to reduce the sentence to be imposed by the court if the trial reaches that stage. Concerning damages, the applicant raises that this court is very limited in its capacity to do such thing.

ISSUES

[95] Concerning the violation of the rights of the applicant under the *Charter*, the court has to answer the three following questions:

a. Was the applicant's right to security under section 7 of the *Charter* violated?

b. Was the applicant's right to security under section 15 of the *Charter* violated?

c. Does the way the disciplinary proceedings were conducted by the prosecution, which includes the investigation process, the laying of charges, and the process that caused the accused to be tried by a General Court Martial, constitute an abuse of process and a violation of the rights of the applicant under section 7 of the *Charter*, in light of Lieutenant-Colonel Lewis' behaviour towards the applicant and the difficult working relationship they had?

[96] Concerning the remedy, if the court comes to the conclusion that there is a violation of the applicant's rights under the *Charter*, what would be the appropriate one in accordance with the application of subsection 24(1) of the *Charter*?

ANALYSIS

[97] The court will proceed to its analysis under those three different grounds:

a. First, the court will proceed to an analysis of an alleged violation of Captain MacLellan's right to security under section 7 of the *Charter*;

b. Second, the court will address the alleged violation of the right of the applicant under section 15 of the *Charter*;

c. Third, the court will proceed to an analysis of an alleged abuse of process in the light of section 7 of the *Charter*;

[98] Then, if the court concludes that a violation occurred, then the court will proceed with a determination for an appropriate remedy under paragraph 24(1) of the *Charter*.

The right to security

[99] Section 7 of the *Charter* reads 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.

[100] It has been established by the Supreme Court of Canada in *Morgentaler*[2] that the right to security under this article protects both physical and psychological integrity of an individual. However, in *Blencoe*[3], the Supreme Court of Canada expanded more on the criteria in order to proceed with an analysis on that specific legal issue.

[101] Dignity and reputation are not free-standing rights but still are underlying values of the right to security under the *Charter*. However, they do not constitute the criteria on which a court must assess a violation of this right.

[102] In order to prove, on a balance of probabilities, a violation to his right to security as an harm to his psychological integrity, Captain MacLellan must proved at the first stage, two things, as set out in *Blencoe*[4]:

a. First, that it results from the actions of the state;

b. Second, that the psychological prejudice is serious

[103] Essentially, Captain MacLellan is claiming that the stress, stigma, and anxiety he has suffered are the results from the state's actions constitute a serious harm to his psychological integrity.

[104] It is true that Lieutenant-Colonel Lewis and Captain MacLellan are not the best friends in the world. However, there is no requirement that such situation exist. It has been established by the applicant that since the beginning of the year 2010, a clear lack of communication between both individuals as conducted their working relationship to a point that it may affect their working environment and their attitude toward each other.

[105] The court recognizes that Captain MacLellan has been clearly part of the Regional Gliding School Atlantic for years and without his personal attachment and commitment to it, things would not have been the same for many cadets and glider pilots over the last 25 years or so.

[106] However, the TOR incident must be mainly seen as a fact that contributed only to deteriorate the relationship between both individual. It has been addressed by the chain of command at the time, and from an employment perspective, it looks like Captain MacLellan is satisfied with the situation. Despite any claim made by his lawyer about the

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[2] [1988] 1 S.C.R. at p.173
[3] Blencoe v British Columbia (Human Rights Commission) [2000] 2 S.C.R. 307
[4] Id. at para 57

final result, no evidence has been put before this court indicating that Captain MacLellan made a redress of grievance or sued anybody on that issue. Reality is that positions filled at the RCSU (A) as class B terms or service are subject to competition every six years, in spite of the performance and reputation of the person who performed the job. As clearly stated by Major Cooper during his testimony, despite the fact he knew that TOR's were changed and the great respect he had for Captain MacLellan, he competed for the RGS (A) DCO's position because it is a job.

[107] Some stress and anxiety resulted from that situation for Captain MacLellan because he learned about it very shortly before his job was coming to an end and also because of the uncertainty while facing the possibility of not having a job at that place anymore. He probably got worse when he learned the personal involvement his own CO, Lieutenant-Colonel Lewis, had in that matter.

[108] After that incident, the lack of communication went to such low level between both individuals that they became suspicious toward each other. Then, instead of simply providing simple information to each other regarding issues such as career or preparation of the gliding summer program, they decided to go through different people or the email system to talk or provide comments. It is not surprising that in a context like this, everything that was said by one was taken as something wrong directed to the other personally. Also, for the first time, Captain MacLellan was not occupying a position that would allow him to play the same role as he had done for years so far for the preparation and the execution of the summer school gliding program.

[109] So, when during the summer, Major Cooper went on medical leave, his absence had to be compensated in order to have his job done. Without clearly talking to each other, it looks like that Captain MacLellan saw an opportunity to help in order to make things happen. Having performed the RGS (A) DCO's job for years, he had his own view about how to do things. It looks like that his CO had different expectation on that issue and it is without any surprise to anybody that a heated exchange occurred at some point in time. At that point, it is clear that the stress, stigma, and anxiety that Captain MacLellan has allegedly suffered was the result of his personal working relationship he had at the time with his CO, Lieutenant-Colonel Lewis.

[110] It is also clear from the evidence adduced before this court, that further to the 24 July 2010 incident that led to the laying of a charge, the chain of command involvement was required by both individuals. The approach taken by the chain of command regarding the working relationship between the CO and his staff, including Captain MacLellan, was to tell Lieutenant-Colonel Lewis to sit and talk with his people under his command, which he does not seem wanting to do. Then, the chain of command was contemplating to oblige him to do so at some point in order to have things improved within this department. As a matter of responsibility, the chain of command made sure that safety and security of people were not at stake and that the mission at the RGS (A) could be accomplished.

[111] It is true that further being told by his chain of command that the 24 July 2010 incident was seen only as an administrative matter to be solved after the completion of the summer gliding program, than Lieutenant-Colonel Lewis took a formal way to have the chain of command address the situation as a matter of harassment by Captain MacLellan toward himself. This formal complaint may have added to the stress, stigma, and anxiety suffered by Captain MacLellan.

[112] However, all along the disciplinary process, Lieutenant-Colonel Lewis had nothing to do in it. Other than being the complainant in that matter, he never made anything during that process that would have led the chain of command to take action that would have resulted beyond the usual stress, stigma, and anxiety that any other person subject to the Code of Service Discipline would have suffered in result of the investigation, the laying of a charge, and the hearing of the matter before a General Court Martial.

[113] It is clear for the court that the psychological prejudice Captain MacLellan is relying on comes from the working relationship he has had, so far, with his CO, and not from the disciplinary process initiated by his chain of command and for which Lieutenant-Colonel Lewis was part of as the complainant only. Then, it is my conclusion that Captain MacLellan has not proved, on a balance of probabilities, that the harm to his psychological integrity, in regards to the disciplinary proceedings, is the results of the actions of the state.

[114] However, I must say that if the court is wrong about its appreciation of that criterion, it would have concluded that the Captain MacLellan would not have established, on a balance of probabilities, that he was subject to serious psychological harm. The burden is on him to prove that the prejudice he suffered was of a more important nature than the one usually caused to people formally charged under the Code of Service Discipline.

[115] In that way, some stigmatisation may have come from the fact that further to a verbal altercation with his, CO, a charge was laid. As a result of this, attention was formally put on Captain MacLellan on a specific incident with his CO.

[116] Also, as a matter of fact, the process must be conducted independently by some key players in the chain of command; such things happened. However, the decision to allow the accused to elect to be tried before a court martial had to be made. Once the decision is made to allow the accused to do so, it is up to the accused to decide, in his own interest, which forum he considers to be the most appropriate one to deal with the matter, knowing that it is not considered as a minor incident anymore by the superior officer presiding at the summary trial.

[117] It may look like that the incident went out of proportion, as indicated by some witnesses during the hearing, but with a closer look to it, people must understand that a court martial is not there just for dealing with only serious disciplinary and criminal matters, but also to provide all the constitutional guarantees that any citizen, including

Canadian Forces members, is allowed to have, no matter what is the seriousness of the incident. By electing to be tried before a court martial, Captain MacLellan made a choice to be treated before a court where he could have those guarantees. Then, for that reason, the fact that the verbal altercation between Lieutenant-Colonel Lewis and the accused resulted in charges to be dealt with before this court cannot be considered as a factor to assess the stress, stigma, or anxiety suffered by Captain MacLellan.

[118] The court does not deny at all that Captain MacLellan has suffered any psychological prejudice in result of the disciplinary actions taken by the chain of command. However, the court is saying that he has not demonstrated, on a balance of probabilities, that he had suffered serious psychological prejudice that goes beyond the nature of the one caused to people charged. As a more general context, if the court considers the psychological prejudice coming from the working relationship the accused had with his CO, it does not change its conclusion.

[119] Then, it is not necessary for the court to proceed with the second stage analysis, which would be that Captain MacLellan was deprived to his right to security in accordance, or not, with the principles of fundamental justice.

[120] Having failed to meet the requirements on the first stage, it is the conclusion of this court that the applicant's right to security under section 7 of the *Charter* was not violated.

Equality before the law

[121] Paragraph 15(1) of the *Charter* reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[122] Captain MacLellan is claiming that he has been treated more harshly than another person subject to the Code of Service Discipline under the law and that he suffered discrimination.

[123] The difficult relationship that Captain MacLellan has experienced with his CO since the beginning of the year 2010 and the fact that he has been investigated and charged for insubordination in accordance with the Code of Service Discipline further to a heated conversation he had with Lieutenant-Colonel Lewis on 24 July 2010 does not establish, in any way, that he was treated more harshly than another Canadian Forces member. He still has his job, he has not been put under any administrative measure and basically, other than the specific incident, there is no concern what so ever with his ability to perform his job.

[124] For sure, the working environment is still a concern and further to these proceedings, maybe people involved will turn the page or find a way to improve the

existing working relationship. However, nothing was established by the applicant to allow this court to conclude that he was treated more harshly. In fact, no evidence has been put before this court to allow it to compare his situation with the one that would be considered as the standard one. Conclusion of this court is that he failed to demonstrate, on a balance of probabilities, that he was treated more harshly.

The abuse of process

[125] The conduct of the Prosecution when prosecuting an individual may be subject to a careful analysis, as held by the Supreme Court of Canada in *O'Connor*[5]:

> As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter* .... In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[126] As regards the matter for the applicant of establishing that the conduct of the prosecution constitutes an abuse of process, it is important to recall the words of Justice McLaughlan in *R. v. Scott*, [1990] 3 S.C.R. 979, where she stated at page 1007:

> In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. While Wilson J. in *R. v. Keyowski*, 1988 CanLII 74 (S.C.C.), [1988] 1 S.C.R. 657, at pp. 658-59, used the conjunction "or" in relation to the two conditions, both concepts seem to me to be integral to the jurisprudence surrounding the remedy of a stay of proceedings and the considerations discussed in *R. v. Jewitt*, 1985 CanLII 47 (S.C.C.), [1985] 2 S.C.R. 128, and *R. v. Conway*, *supra*. It is not every example of unfairness or vexatiousness in a trial which gives rise to concerns of abuse of process. Abuse of process connotes unfairness and vexatiousness of such a degree that it contravenes our fundamental notions of justice and thus undermines the integrity of the judicial process. To borrow the language of *Conway*, the affront to fair play and decency must be disproportionate to the societal interest in prosecution of criminal cases.

[127] Then, the burden is on the applicant to prove, on a balance of probabilities, that there is an abuse of process within the meaning described above, in accordance with section 7 of the *Charter*.

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[5] *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paragraph 73

[128] As a matter of introduction, I must say that the purpose of the concept of discipline in an armed force is to ensure cohesion between a large number of individuals in order to carry out a mission. In this sense, discipline is learned with the ultimate aim of training people who will discipline themselves. It is at this moment that the notion of leadership may arise, since it is up to the individual to set an example through self-discipline

[129] There are several ways to achieve this. On the subject, the study prepared by Martin L. Friedland for the Commission of Inquiry on the deployment of the Canadian Forces in Somalia, entitled "Controlling Misconduct in the Military," illustrates nicely that the military justice system is only one mechanism for enforcing discipline so as to educate and train military members on this concept. As I often state in my decisions on sentencing, the military justice system is the last resort to ensure the respect of discipline, which is a crucial an essential aspect of military activity in the Canadian Forces.

[130] Officers of Cadets Instructors Cadre (CIC) are an integral part of the Canadian Forces. They are officers of the Reserve Force whose primary duty is the supervision, administration, and training of cadets as stated in chapter 2-8 of the Canadian Forces Administrative Orders (CFAO). As being part of a sub-component of the Reserve Force, these officers are subject to the same Code of Service Discipline as the officers of the Regular Force or the Special Force, which represent the two other components of the Canadian Forces.

[131] Then, it is clear for the court that CIC Officers may be treated through the disciplinary process as any other officer in the Canadian Forces. However, the way a CIC officer is treated still subject to a review of this court in the context of an alleged abuse of process.

[132] I will then review the different steps of the disciplinary process that Captain MacLellan went through regarding the present charges before this court in order to determine if the disciplinary proceedings:

a. are oppressive or vexatious; and

b. violate the fundamental principles of justice underlying the community's sense of fair play and decency.

Context of the disciplinary proceedings

[133] It is important to say that in order to proceed to my analysis, I have to consider in which context it was done. For that purpose, comments and conclusion I made in relation to the kind of working relationship existing prior and during the disciplinary process is still relevant to this matter. However, I do not intent to repeat what I concluded previously on those facts, other than to say that it is fully part of my analysis under this legal issue.

The investigation process

[134] The RCSU (A) XO, Lieutenant-Commander Carberry, was, at the time of the incident, an officer authorized by his commanding officer to lay a charge under the Code of Service Discipline. In that capacity, he could conduct an investigation to determine whether or not there are sufficient grounds to justify the laying of a charge. It would also mean that he will collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation.

[135] First, when he received Lieutenant-Colonel Lewis' complaint, he proceeded to some informal investigation, knowing the nature of the working relationship that existed between the complainant and Captain MacLellan.

[136] It is not an unusual practice for a CO to secure written statements regarding an incident that occurred in his unit. Reality is that in an environment such as the RGS (A), it is a common practice to do so. What is less usual is having the CO being the complainant and doing such thing. However, Lieutenant-Commander Carberry was well informed that Lieutenant-Colonel Lewis did such thing further to the incident, and he assumed that the latter would not be the one taking personally the statement from the witnesses. The evidence has revealed that it was the case and that the unit members who witnessed the 24 July 2010 incident provided their version of the event through a written statement that was secured by Lt (N) Trickett. There is no evidence whatsoever that would support in any way the fact that Lieutenant-Colonel Lewis did something in order to influence the story that the witnesses provided in writing.

[137] Three written statements were received by Lieutenant-Commander Carberry further to the incident. He was fully aware that a fourth witness attended the scene of the incident while beside one of the three known witness but he assumed that that witness could not tell more than the others, which the court found out to be true once it heard the said witness. He knew about parents and a cadet who would have witnessed the incident, but their identity was unknown at the time and considering the nature of the incident, he thought that it would be difficult to identify them and he just let it go. The court finds nothing wrong with that.

[138] Two days after the incident, Captain MacLellan, on his own initiative, went to the XO's office in order to discuss the situation at the RGS (A) with Lieutenant-Colonel Lewis, including the incident. Knowing that it was not appropriate to discuss specifically about the incident. Lieutenant-Commander Carberry warned Captain MacLellan that he did not want to hear from him about it. He heard from the applicant about the lack of communication between the RGS (A) CO and his staff, but nothing about the incident itself.

[139] Some days after he came to the conclusion that there was no sufficient grounds to justify the laying of any charge from the perspective where a subordinate failed to respect his superior by the language he used. From his perspective, the heated exchange between Lieutenant-Colonel Lewis and Captain MacLellan was another illustration of the lack of communication and the poor working relationship that existed at that time between both

individuals. In his view, this matter had to be addressed from an administrative perspective by finding a way to have those people sit together and talk. He never said so, but the court may infer from his testimony that both individuals were considered as being at fault.

[140] RCSU (A) CO shared Lieutenant-Commander Carberry's perspective and, as established before this court, Commander Reddy went to RGS (A) location and met with Lieutenant-Colonel Lewis. Once he was satisfied that the operations of the summer gliding program were not at risk, he spoke with RGS (A) CO and informed him that the 24 July 2010 incident will be dealt with administratively once the summer gliding school program would be over.

[141] The fact that Lieutenant-Colonel Lewis requested, in a formal manner, the chain of command to pay attention from an administrative perspective, to the 24 July 2010 incident as a harassment incident toward him, is somewhat unusual, but certainly not abusive. There is no evidence adduced by the applicant to support such conclusion.

[142] However, regarding the harassment complaint, the chain of command had to provide a formal response. Through a consultation process and further to an analysis, it was decided that the disciplinary process must be fully completed before proceeding with the investigation of the harassment complaint. By doing so, it would avoid a situation where the administrative process would lead to the discovery of any evidence relevant to the disciplinary process.

[143] Lieutenant-Colonel Lewis has never been part of the consultation process or the analysis, which conducted Lieutenant-Commander Carberry to fully complete his investigation. The decision to complete the disciplinary process was not abusive in any way and is the result of a normal process in those circumstances. Despite how it may appears to the applicant, no evidence was adduced by him in order to support the fact that Lieutenant-Colonel Lewis made his harassment complaint for the sole purpose of reactivating the disciplinary process about the 24 July 2010 incident. It resulted in that way but Lieutenant-Colonel Lewis did not have a word to say about it.

[144] On his return from leave at the end of the month of August 2010, Lieutenant-Commander Carberry was ordered to complete his investigation about the 24 July 2010 incident. He assessed the situation and came to the conclusion that the last thing he had to do was to meet with Captain MacLellan. On 2 September 2010, in presence of Major Kavanagh, he met with Captain MacLellan in his office, legally cautioned him, and obtained his verbal version of the events. In the context described earlier in my decision, a written statement concerning the incident was provided and signed by Captain MacLellan to Lieutenant-Commander Carberry.

The laying of the charge

[145] On 13 September 2010, Lieutenant-Commander Carberry sent his investigation report (exhibit VD2-2) to the AJAG office in order to obtain legal advice as required by

regulation. He got legal advice on that matter and on 22 September 2010 he laid a charge against Captain MacLellan for having used insulting language toward his superior, Lieutenant-Colonel Lewis, on 24 July 2010. On any time during that stage, Lieutenant-Colonel Lewis had any involvement.

The election to be tried by a court martial

[146] I conclude that the way that was handled the process in order for Captain MacLellan to elect to be tried by a court martial does not disclose anything relevant to this matter. The process was followed in application of the relevant regulation and legal advice was sought at the necessary steps. Also, the applicant had full opportunity to consult a lawyer, what he did, and was fully assisted by his assisting officer on this specific matter. It is clear that Lieutenant-Colonel Lewis had no involvement in this process either.

The preferral of the charges

[147] No evidence has been adduced by Captain MacLellan in order to support that the prosecution has preferred the charges before this court in an abusive manner. Reality is that, except for calling from the prosecution a decision to withdraw the charges because of the alleged context, there is no evidence to support that ground.

The procedure before the court

[148] Since the beginning of this trial, the prosecution conduct regarding disclosure has been a diligent one. Each time that something new was learned about something, the prosecution inquired and provided as soon as possible the document or an answer that would satisfy Captain MacLellan and the court.

[149] At the beginning of this trial, Captain MacLellan's counsel submitted that a written statement was missing. The prosecution made all necessary steps to find out what really happened and the court was informed that this written statement was done but it was also lost. However, defence counsel had access to the witness and in fact he had him testified during this application.

The counsel of his choice

[150] No evidence has been adduced by Captain MacLellan supporting the fact that the DDCS' decision to not provide him with a military lawyer was made for any other purpose than respecting the policy in force, nor any evidence was introduced before the court to provide it an opportunity to appreciate the impact of such decision on the applicant.

The conduct sheet

[151] A review of Captain MacLellan's personal file initiated a review and resulted in annotation of his conduct sheet. I just want to state on that matter that this review and correction of the conduct sheet was made in accordance with CO's duties, as set out in chapter 7006-1 of the *DAOD*.

Conclusion

[152] This review of the different steps of the disciplinary proceedings concerning Captain MacLellan lead me to conclude that they were conducted in an appropriate manner, that they were not oppressive or vexatious and that they did not violate the fundamental principles of justice underlying the community's sense of fair play and decency. Concerning the overall disciplinary process, I come to the same conclusion.

[153] Nothing during all over the disciplinary proceedings steps occurred in order to make them abusive. Lieutenant-Colonel Lewis has had no other involvement in those proceedings then being the complainant. He was never in a position to influence or to direct people on how to do things. Moreover, those who had to make decisions did it in accordance with the applicable act and regulation and as expected by the public, which is in a just and fair manner.

[154] It is true that in the context of the difficult working relationship experienced for months by Lieutenant-Colonel Lewis and Captain MacLellan, the fact that the latter was investigated and charged for an incident involving both individuals further to a heated verbal exchange, has exacerbated the over all picture from Captain MacLellan's point of view. When things are put in perspective, the evidence introduced before the court does not disclose any challenge to the integrity of the military justice system. To the contrary, according to the evidence, things were done in a just and fair manner to Captain MacLellan in regard of the disciplinary proceedings.

[155] Considering that the court came to the conclusion that there is no violation of the rights of the applicant under the *Charter*, consequently it is not necessary to proceed with the analysis of the appropriate remedy under subsection 24(1) of the *Charter*.

DISPOSITION

[156] The application made by the accused for a stay of proceedings of this court martial under subsection 24(1) the *Charter* for a violation of his rights under sections 7 and 15 of the *Charter* is accordingly dismissed.

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