

Citation: R. v. Corporal M.A. Wilcox, 2009 CM 2023

Docket: 200849

**GENERAL COURT MARTIAL
CANADA
NOVA SCOTIA
VICTORIA PARK, SYDNEY**

Date: 9 July 2009

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

**CORPORAL M.A. WILCOX
(Applicant)**

**REGARDING THE NUMBER OF EXPERT WITNESSES PERMITTED TO
TESTIFY
(Rendered orally)**

[1] The prosecution may call the evidence of the proposed expert witnesses Barr and Pollanen.

[2] The defence objects to the calling of these witnesses, relying on Military Rule of Evidence 62(2), under the rubric "Expert Witness:

"(1) When permitted to give an opinion under this Division or Division VII, an expert witness may give the court that opinion whether or not he has observed the facts needing further interpretation.

(2) Unless leave is granted by the judge advocate before any experts have been called by a party, not more than three experts may be examined by that party."

[3] The defence argues that the court has already heard from three witnesses who were qualified by the court to give and did give opinion evidence as experts: Dr Filips has already testified before the panel of this General Court Martial as an expert in general surgery and trauma surgery; as well, Lieutenant-Commander Campbell and

Captain Harvey testified in *voir dire* proceedings as to the mental and emotional state of the accused as these two expert nurses understood it.

[4] The witness Barr, I am told, is a ballistics expert and the witness Dr Pollanen is a pathologist. The defence agrees that the issues to be addressed by the two witnesses are not the same factual matters that have been addressed by any of Dr Filips, Lieutenant-Commander Campbell or Captain Harvey.

[5] The interpretation of Military Rule of Evidence 62(2) came before the Chief Military Trial Judge in the 1995 General Court Martial of *Lieutenant-Commander Marsaw*. In that case, the learned judge advocate applied the reasoning of the Supreme Court of Canada in *Fagnan v. Ure*, to hold that the numerical limit created by the MRE applied in respect of a factual issue in the trial and not to the whole of the proceedings no matter the number of factual issues. In my view, the CMTJ was correct in his interpretation of the numerical limit created by MRE 62(2).

[6] Counsel drew my attention to the ruling of Hughes J. in *Eli Lilly and Co. v. Apotex Inc*, dated 10 October 2007. With respect for those whose views may differ from mine, I cannot—check that. Counsel drew my attention to the ruling of Hughes J. in *Eli Lilly and Co. v. Apotex*, dated 10 October 2007, which in turn relied upon the decision of the Manitoba Court of Appeal in *B.C. Pea Growers v. City of Portage la Prairie*. With respect for those whose views may differ from mine, I cannot read the different statutory formulation in the *Manitoba Evidence Act* as undermining the authority of *Fagnan v. Ure* on this issue of interpretation. In this respect, I note that there appears to be a difference of opinion on this issue within the Federal Court in its interpretation of section 7 of the *Canada Evidence Act*.

[7] The evidence of the two witnesses will be heard.

Commander P.J. Lamont, M.J.

Counsel:

Major J.J. Samson, Regional Military Prosecutions Atlantic, and Lieutenant-Commander R. Fetterly, Canadian Military Prosecution Service
Counsel for Her Majesty, The Queen (Respondent)

Major S. Turner and Lieutenant-Colonel D.T. Sweet, Directorate of Defence Counsel Services
Counsel for Corporal M.A. Wilcox (Applicant)