



COURT MARTIAL

Citation: *R. v. Cruz*, 2010 CM 2021

Date: 20101207

Docket: 201045

Standing Court Martial

Asticou Centre
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Private D.J. Cruz, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR THE APPLICATION TO EXCLUDE EVIDENCE BASED UPON A BREACH OF THE CHARTER RIGHT

(Orally)

[1] The application marked M3-1 seeking a stay of proceedings or in the alternative the exclusion of evidence is dismissed.

[2] At the opening of his trial by Standing Court Martial on five charges, and prior to plea, the accused, Private Cruz, whom I will also refer to as the applicant, applied by written Notice of Application, Exhibit M3-1, for an order "declaring that the applicant's personal information was used and disclosed contrary to the *Privacy Act*, resulting in an illegal and warrantless search and seizure, violating the applicant's expectation of privacy protected under section 8 of the *Canadian Charter of Rights and Freedoms*" and seeking as a remedy a stay of proceedings or in the alternative "the exclusion of all primary and derivative (tainted) evidence obtained in the violation" of the section 8 right. At the conclusion of argument I dismissed the application and undertook to provide reason in due course.

[3] The evidence on the application disclosed that the applicant came to the attention of Sergeant Pereira, a senior clerk in the orderly room of the Canadian Forces Support Unit (Ottawa) in July of 2008. At that time, Private Cruz was concerned about his entitlement to Post-Living Differential, a financial benefit paid to CF members depending on their place of duty within Canada. Over a period of a few weeks, Sergeant Pereira was involved in verifying Private Cruz's entitlement to PLD. In late August she pulled Private Cruz's file and noticed inconsistent information on the file with respect to his marital status and address. She discussed her findings with another sergeant who apparently agreed that some of the information on the file was conflicting. On the suggestion of the other sergeant, Sergeant Pereira contacted the military police in order to have the matter looked into. In September of 2008, Sergeant Pereira provided a statement to the military police, Corporal Catania, detailing the information she gleaned from the personnel file of Private Cruz, and in July of 2009, Sergeant Pereira provided another MP, Master Corporal Keeble, with documents from the personnel file of Private Cruz.

[4] At no point was a search warrant sought or granted for the obtaining of the information by the military police, nor was a request made pursuant to section 8(2)(e) of the *Privacy Act* for the disclosure of personal information to a federal investigative body. Sergeant Pereira did not seek or obtain authority from anyone else to examine the personnel file of Private Cruz or to disclose its contents to the military police.

[5] Sergeant Pereira described her position in 2008 as the orderly room supervisor. She is the custodian of personnel files for all members of the Star Top Road detachment of the Canadian Forces Support Unit except the reservists. She and her staff maintain these files and they concern pay and records, course reports, and some financial benefits. When necessary, they conduct reviews of files. She testified that she has the authority to open personnel files and that it is her job to investigate if there is a question as to a file.

[6] Section 8 of the *Charter* reads, "Everyone has the right to be secure against unreasonable search or seizure." The precise nature of the infringement of section 8 alleged by the applicant is not set out with particularity in the Notice of Application, but in response to a question from the court, counsel for the applicant clarified that his position is that there is an unreasonable search or seizure by Sergeant Pereira when she examined, without authority, the personnel file of the accused, and again, when she disclosed the contents of the file to the military police and finally, again, by the military police when they accepted the information and documents from Sergeant Pereira.

[7] In order to establish an infringement of the right guaranteed in section 8, the applicant must first establish that he had a reasonable expectation of privacy. Whether there is a reasonable expectation of privacy depends on the totality of the circumstances, including the subject matter of the information sought, whether the individual had a direct interest in the subject matter, whether the individual had a subjective expectation of privacy in the subject matter, and whether such an expectation of privacy in the subject matter was also objectively reasonable.

[8] In this case, the application claims an infringement of his interest in informational privacy. In *R. v. Plant*, the Supreme Court of Canada held that the section 8 right extended to the protection of the:

.... biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. (*R. v. Plant*, [1993] 3 S.C.R. 281 at page 293)

[9] On an application such as this, the court is called upon to balance different social interests after taking all the circumstances into consideration. As the Supreme Court noted in *Plant*, page 293:

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allows for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.

Even evidence of criminal activity may be very personal biographical information.

[10] The information in this case is again not specified with particularity, but its nature can be gleaned from some of the evidence. Sergeant Pereira's statement to Corporal Catania is Exhibit M1-7. In it, she describes the kinds of information she was interested in as a result of her review of the personnel file as follows: name and street address of Private Cruz at the time of enrolment, his driver's license, marital status on enrolment, next of kin, date of legal marriage, his application for recognition of common law status, and correspondence to military authorities detailing personal living arrangements. The review of the file disclosed that the applicant had applied for financial benefits, that his entitlement to benefits depended in part on his personal circumstances, and that some of the information on the file concerning his personal circumstances was conflicting. In my view, the information examined by Sergeant Pereira gave rise to a reasonable suspicion on her part that the applicant was engaged in criminal behaviour; that is, the making fraudulent claims for benefits to which he was not entitled.

[11] Much of the argument on behalf of the applicant proceeded on the basis that since the information contained in the documents on the file was "personal information" as that term is defined in the *Privacy Act*, R.S.C. 1985, c. P-21, s. 3, that it was, therefore, objectively reasonable to expect that that information would not be shared. In my view, although there is often an overlap between personal information as defined in the statute, and information for which there is a reasonable expectation of privacy, the two concepts are not co-extensive, see *R. v. Chehil*, 2009 248 CCC (3d) 370 Nova Scotia Court of Appeal. The determination of the existence of a reasonable

expectation of privacy depends upon an examination of all the circumstances of the case.

[12] The legislative context that applies to certain kinds of information is one of the circumstances to be examined and taken into consideration, but the existence of legislation that governs the collection and dissemination of information is not determinative one way or the other as to the objective reasonableness of an expectation of privacy in that information, see *R. v. Gomboc*, 2010 SCC 55 per Deschamps J, at paragraphs 31-34 and per the Chief Justice and Fish J, paragraphs 138-141.

[13] I agree with the submission of counsel on behalf on the applicant that much of the information contained in the personnel file of Private Cruz is "personal information" as that term is defined in section 3 of the *Privacy Act*. But some of the items of information in the personnel file of Private Cruz are much more personal than other items of information. For example, "personal information" as a defined term in section 3 includes "(d) the address, fingerprints or blood type of the individual," but one's address is often listed in publicly available directories and is hardly part of the biographical core of information that many people would wish to withhold from the authorities. On the other hand, domestic living arrangements can be of a highly personal nature. I note, however, that Private Cruz appears to have been the source of all the information Sergeant Pereira relied upon, and that information appears to have been voluntarily provided by him to military authorities for Private Cruz's purposes.

[14] The applicant argues that the examination by Sergeant Pereira of his personnel file violated his reasonable expectation of privacy. It is argued that Sergeant Pereira was engaged in a criminal investigation for disciplinary purposes at the time of her review.

[15] In my view, on the evidence I have heard, at the time of her review Sergeant Pereira was simply engaged in an administrative review of the applicant's file. She did this as part of her normal duties as the custodian of the file and was not engaged in the kind of disciplinary investigation contemplated by Chapter 106 of Queen's Regulations and Orders. Her purpose at the time was not to collect evidence with a view to a determination of penal liability. Her purpose was to ensure the accuracy of information and take proper administrative steps to process benefit entitlements based upon accurate information. It would be unreasonable for a member of the Canadian Forces to suppose that the private information they disclosed to the Canadian Forces for their own purposes will not be reviewed for proper administrative purposes, which include, of course, the verification of the accuracy of the information provided. The expectation of privacy claimed by the applicant in this case on this point is objectively unreasonable.

[16] The applicant also submits that Sergeant Pereira infringed the applicant's reasonable expectation of privacy by disclosing the contents of the personnel file to the military police. There is no merit to this submission. I was referred to no case authority for the proposition that the disclosure of personal information to the police infringes a reasonable expectation of privacy, at least in circumstances, such as this

case, where the information gives rise to a reasonable suspicion of criminal activity. Case authority is rather to the contrary. Thus in *Quebec (Attorney General) v. Laroche*, 2002 SCC 72 audit information developed by a provincial vehicle insurance agency that raised suspicions of criminal activity was passed to the police. No issue was raised as to the propriety or *Charter* compliance of this disclosure. See also *R. v. Jarvis*, 2002 SCC 73 and *R. v. Ling*, 2002 SCC 74, where information obtained by Revenue Canada tax auditors was passed to criminal investigators within the same agency.

[17] Queen's Regulations and Orders, Chapter 5, entitled "Duties and Responsibilities of Non-Commissioned Members," provides in article 5.01:

A non-commissioned member shall:

- (a) become acquainted with, observe and enforce
 - ...
 - iv. all other regulations, rules, orders and instructions that pertain to the performance of the member's duties;
 - ...
- (e) report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline.

[18] As I have already stated, the information that came to the attention of Sergeant Pereira in the course of her duties gave rise to a reasonable suspicion that Private Cruz was engaged in fraudulent behaviour. Sergeant Pereira, therefore, was not only authorized but was required by the terms of Queen's Regulations and Orders to bring this information to the attention of "the proper authority." In my view, the military police were the proper authority to receive the information from Sergeant Pereira since they have the responsibility to investigate service offences, including criminal offences such as fraud. Thus the disclosure of the information in the personnel file to the military police was in accordance with the *Privacy Act*. Section 8(2)(b) of that *Act* provides:

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

- ...
- (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure.

[19] Finally, it is submitted that the receipt by the military police of information from Sergeant Pereira infringes a reasonable expectation of privacy and that the investigators should have made a request for disclosure under section 8(2)(e) of the *Privacy Act* or obtained a search warrant. The applicant points to the decision of the Court Martial

Appeal Court in *R. v. M.S.*, 2010 CMAC 1 in which medical records were obtained by police investigators pursuant to their request under section 8(2)(e) of the *Privacy Act*. Letourneau J gave the judgment of the Court and stated at paragraph 13:

In the case at bar, we have a government employee suspected of having defrauded his employer. This is precisely the type of situation contemplated by paragraph 8(2)(e) of the PA in a context of suppressing crime.

[20] I do not read the judgment of the Court Martial Appeal Court in *M.S.* to hold that a section 8(2)(e) request is the only method by which federal criminal investigators can come into lawful possession of documents containing "personal information" as defined. The issue is whether by receiving the information and documents that Sergeant Pereira provided the military police engaged in an unreasonable seizure. In my view, and quite apart from the privacy analysis, it would do violence to the ordinary meaning of the word "seizure" if it were applied to the passive receipt by the military police of the information from Sergeant Pereira. As Doherty J stated in delivering the judgement of the Ontario Court of Appeal in *R. v. Wills*, (1992) 70 C.C.C. (3d) 529 at page 540:

If an individual chooses to give something to a police officer, it is a misuse of the language to say that the police officer seized the thing given. Rather, the officer simply received it. As there is no seizure, the reasonableness of the police conduct need not be addressed.

[21] Even if I am wrong on this point, I cannot conclude that it is reasonable to expect that the documentation in his personnel file that raised a reasonable suspicion of criminal activity would not be accepted by the police when it was lawfully offered to them by Sergeant Pereira.

[22] In conclusion, I am not persuaded by the evidence and argument on this application that the actions of Sergeant Pereira in perusing the information contained in Private Cruz's personnel file or in disclosing that information to the military police, or the actions of the military police in receiving the information from Sergeant Pereira, infringe upon an objectively reasonable expectation of privacy that is protected by section 8 of the *Charter*. There is no infringement of the *Charter* guaranteed right.

[23] In view of the conclusion I have reached I consider it is unnecessary to deal with the issue of remedy under section 24 of the *Charter*.

Counsel:

Captain E. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major J.A.E. Charland, Directorate Defence Counsel Services
Counsel for Private D.J. Cruz