Citation: *R. v. Corporal T.M. Khadr,* 2007 CM 2026

Docket: 200707

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA

Date: 21 September 2007

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

HER MAJESTY THE QUEEN
v.
CORPORAL T.M. KHADR
(Accused)

Decision re: Section 7 and 11(d) *Charter* application -
(Reasonable Apprehension of Bias)
(Rendered orally)

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[1] At his trial by Standing Court Martial on two charges under the *National Defence Act*, Corporal Khadr applied, through counsel at the opening of the trial and prior to plea, by way of a plea in bar of trial, for a stay of proceedings because of what is said to be the infringement of the rights guaranteed by sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms.*

[2] At the conclusion of argument from both counsel, I made a ruling denying the plea in bar of trial for reasons to be given later. These are those reasons.

[3] The charges arise out of the alleged conduct of the applicant at or around the time of his summary trial before his Company Commander, Major Scott, for unrelated offences that are not before me. The Company Sergeant Major, Master Warrant Officer Brander, was present for the summary trial before Major Scott. In the first charge before me, Corporal Khadr is charged with behaving with contempt toward a superior officer; in that, on 1 August 2006, at Canadian Forces Base Petawawa, he pointed at Master Warrant Officer Brander and said, "Don't you fuck with me," or words to that effect. In the second charge, Corporal Khadr was charged with the offence of causing a disturbance in the proceedings of a person presiding at a summary trial; in

that, on and at the same date and place, when before a summary trial presided over by Major Scott, he continued to speak after being told by Major Scott to stop speaking.

[4] The applicant points to the roles and actions of both Master Warrant Officer Brander and Major Scott in dealing with the charges at the unit level before they came before me at court martial, and submits that there is a reasonable apprehension that either or both of Master Warrant Officer Brander and Major Scott were biased toward the applicant in deciding to proceed with charges, and that their dealings with the charges were not carried out in an independent and impartial manner required by the principles of fundamental justice.

[5] These shortcomings are argued to amount to infringements of the rights of the applicant under sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms.* The evidence before me on the application consisted of a number of admissions of fact to which counsel agreed. Most of the admissions were reduced to writing and exhibited before me. The rest of the evidence was also in documentary form. The evidence discloses that Master Warrant Officer Brander was involved in the investigation of the offences now before the court by the taking of statements from witnesses. He then forwarded the statements to the Deputy Judge Advocate in order to obtain legal advice in accordance with QR&O article 107.03.

[6] Master Warrant Officer Brander also signed the Record of Disciplinary Proceedings that instituted these charges on 15 August 2006, and in so doing he was following the legal advice of the DJA. Master Warrant Officer Brander was also a witness to the events referred to in the charge No. 2 before me, and as well he was the complainant named in the first charge before me. At one point, in respect of the allegations of 1 August 2006, he wished to have the applicant arrested by the military police in order to ensure the safety of the applicant.

[7] Major Scott was the applicant's Company Commander and the delegated officer presiding over the summary trial on 1 August 2006. In this capacity, he became a witness to the events charged against the applicant in the second charge. By the time the charges were instituted on 15 August, Major Scott had become the acting commanding officer of the applicant's unit. In this capacity, he reviewed the charges instituted by Master Warrant Officer Brander and referred the charges out of the unit to be dealt with by another commanding officer. Once the applicant elected trial by court martial, the charges were referred back to him and he applied for disposal of the charges to the referral authority, recommending a trial of the applicant by court martial.

[8] In his capacity as the commanding officer of the unit, Major Scott also dealt administratively with the applicant by putting him on counselling and probation for a period of six months from 9 August 2006. It is important to note, I think, that the applicant is not alleging actual bias on the part of either or both of Master Warrant

Officer Brander and Major Scott toward the applicant. Rather, it is argued that either or both might reasonably be seen by an objective observer to be biased against the applicant.

[9] The test for a reasonable apprehension of bias is well settled in our law, and was restated by Cory J. of the Supreme Court of Canada in the case of *R. v. S.(R.D.)* 118 C.C.C. (3d) 353, at paragraph 111, and I quote:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 at p. 394 ...
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> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."

Continuing with the quote from Cory J:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case [authority cited]. Further, the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold" [authorities cited]. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

[10] The applicant argues that Major Scott and Master Warrant Officer Brander should not have been involved in the institution or processing of these charges because of a reasonable apprehension of bias on their part toward the applicant. I understand the submission of the applicant to be that this reasonable apprehension arises, in the case of Master Warrant Officer Brander, from his position as a witness in respect of both of the charges, as well as being the complainant in respect of the first charge when he instituted the charges that are before the court.

[11] Applying the test as set out by Justice Cory, I cannot conclude that a reasonable observer would consider that Master Warrant Officer Brander was biased against the applicant. A knowledgeable observer would be aware, that as the Company Sergeant Major, Master Warrant Officer Brander had disciplinary responsibilities of a demanding character in respect of all the non-commissioned members of the company. There is no suggestion that Master Warrant Officer Brander had any interest in proceeding with charges against the applicant, other than to deal appropriately with an incident of alleged insubordination by a junior member.

[12] There is no basis in the evidence to conclude that Master Warrant Officer Brander was motivated in proceeding with charges by anything other than the interests of unit discipline, for which he bore a heavy responsibility. I reject the submission that Master Warrant Officer Brander could reasonably be perceived as biased in any of the actions he took in this case. There is simply no evidence to support the submission of counsel that Master Warrant Officer Brander instituted the charges to retaliate or settle a score with the applicant. It would be unreasonable for anyone to draw such a conclusion on the evidence I have heard in the course of the application.

[13] Similarly, I reject the submission that Major Scott could reasonably be perceived as biased against the applicant. It is true that the observations he made of the conduct and behaviour of the applicant, both in the document by which he put the applicant on counselling and probation and the letter he signed referring the charges up for court martial, were not complimentary in respect of the applicant. Indeed, these documents detailed a history of misconduct on the part of the applicant that, to my mind, fully justified both of the actions that Major Scott took. There is no suggestion in the evidence or argument that any of those observations was incorrect in any material particular, or even exaggerated to the detriment of the applicant.

[14] The documents Major Scott generated and signed were required to be signed by someone in his position if charges were to proceed to court martial or the member was to be placed on C and P. The content of those documents was dictated by the terms of Queen's Regulations and Orders under which Major Scott was proceeding. I find no basis in the evidence to draw the conclusion that Major Scott was biased against the applicant.

[15] These findings of fact are sufficient to address the application and require that the application be dismissed. It is, therefore, unnecessary to decide if, as a matter of law, a charging authority is required to act in an unbiased manner when proceeding with charges that will subsequently come before a court. On the basis of the passage from the judgement of Chief Justice Maloney of the Court Martial Appeal Court in the case of *R. v. Lunn* (1993), 5 C.M.A.R. 157, at paragraph 12, to which I was referred by counsel in argument, I have doubts that this proposition is correct in law. But, in view of my conclusion that there is no reasonable apprehension of bias, I find it is unnecessary to decide the issue.

[16] I also do not reach the issue of whether, assuming a reasonable apprehension of bias is established, that therefore an infringement of either section 7 or 11(d) of the *Charter* was established. That issue will have to await a case in which a reasonable apprehension of bias is established. The application by way of plea in bar was, therefore, dismissed.

P.J. LAMONT, COMMANDER, M.J.

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