Citation: *R. v. Master Corporal J.E.M. Lelièvre,* 2007 CM 1011

Docket: 2006104

STANDING COURT MARTIAL
CANADIAN ELEMENT OF THE NATO AIRBORNE EARLY WARNING FORCE
GEILENKIRCHEN
GERMANY

Date : May 22, 2007

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL J.E.M. LELIÈVRE
(Accused-applicant)

DECISION RELATING TO AN APPLICATION UNDER PARAGRAPH 112.03(2) OF THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES IN RELATION TO A VIOLATION OF SECTIONS 7 AND 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Delivered from the bench)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] This is an application by the defence under paragraph 112.03(2) of the Queen's Regulations and Orders for the Canadian Forces on the ground that the procedure set out in paragraphs 6, 15 and 18 of the document issued on the authority of the Chief Military Judge on July 19, 2001, entitled "Court Martial Procedures – Guide for Participants and Members of the Public, A-LG-007/AG-001", violates the rights guaranteed by the *Canadian Charter of Rights and Freedoms* [the Charter], and more specifically sections 7 and 11(*d*), in that they violate the accused's dignity, right to freedom and right to a just and fair trial and the presumption of innocence.

[2] The applicant is seeking the following relief under section 24(1) of the Charter:

> [TRANSLATION]
> that the procedure used to bring the accused before the Court under article 112.05 of the Queen's Regulations and Orders for the Canadian Forces [QR&O] be declared to be of no force or effect; and
>
> that the accused before the Court Martial, Master Corporal Lelièvre, appear seated beside his counsel dressed in the same manner as the other members and officers of the Court.

EVIDENCE

[3] The evidence on the motion consisted of the following:

> first, matters within judicial notice, under section 15 of the Military Rules of Evidence; and
>
> second, exhibits produced before the judge presiding at the motion on the consent of counsel and solely for the purposes stated in the consent of counsel: Exhibits PP1-1 (Notice of Motion and Application for Declaration of Unconstitutionality), PP1-2 and PP1-3 (Convening Order and Charge Sheet), PP1-4, (CFAO 111-1 — Courts Martial Administration and Procedures) and PP1-5 (Court Martial Procedures — Guide for Participants and Members of the Public), to which I referred earlier.

POSITIONS OF THE PARTIES

Applicant

Re: Violation of sections 7 and 11(d) of the Charter

[4] The applicant submits that the procedure set out in paragraphs 6, 15 and 18 of the document issued on the authority of the Chief Military Judge dated July 19, 2002, entitled "Court Martial Procedures — Guide for Participants and Members of the Public", is archaic, abusive, without basis and *ultra vires* the regulation-making powers granted in this respect, and otherwise unconstitutional under the Charter. He submits

that any procedure that puts a military accused in a different position from a civilian accused before a court martial operates only to isolate the accused and differentiate him or her in a way that affects the presumption of innocence, the right to dignity and the right to liberty guaranteed by sections 7 and 11(*d*) of the Charter. 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.

Section 11(*d*) provides:

> 11. Any person charged with an offence has the right:
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In support of his application, the applicant essentially relies on the Canadian and American case law dealing with developments in the procedure used in criminal trials in relation to whether or not the accused is to appear in the prisoner's box. He also discussed, incidentally, the development and role of military law, in particular before courts martial, citing the decision of the Supreme Court of Canada in *R. v. Généreux* and the recent decision of the Court Martial Appeal Court in *R. v. Nystrom.*

Respondent

The respondent submits that the issue raised in the application does not engage the Charter. She added that in Canadian law, the question of whether the accused appears in the prisoner's box is not governed by section 7 or section 11(*d*) of the Charter. The respondent submits that the procedure set out in paragraphs 6, 15 and 18 of the document issued on the authority of the Chief Military Judge dated July 19, 2002, entitled "Court Martial Procedures — Guide for Participants and Members of the Public", is within the exclusive authority of the Court Martial under section 179 of the *National Defence Act* or the power of the Court or a judge to determine the Court's procedure in matters that are not provided for in legislation or regulations. In addition, he submits that there is no legal basis for the impugned provisions and that they derive from custom and tradition. The prosecution elected not to lead evidence to explain the context and purpose of those provisions. The prosecution concluded by stating that it had no objection to this practice being altered to accommodate the request made by the defence, at least in this case.

DECISION

[5] It is entirely clear that the matters addressed in the document entitled "Court Martial Procedures — Guide for Participants and Members of the Public" are *intra vires* the Chief Military Judge. The purpose of the Guide is to ensure the proper decorum at courts martial presided at by military judges. Decorum is a matter within the authority of the Court, and the Court Martial has an inherent power to control its procedure in respect of residual matters that are not dealt with in the Act or regulations. I would add that a military judge even has discretion to deviate from the provisions set out in the Guide issued on the authority if the Chief Military Judge if he or she believes that doing so serves the interests of justice, for example by applying the doctrine of abuse of process. However, it must be acknowledged that deviating from the directives issued by the Chief Judge is not something that should be done lightly. The Guide replaced CFAO 111-1, which, because it was an order, was issued on the authority of the Chief of Defence Staff and published by the Director of Personnel Legal Services – in other words, by the executive. If we consider how the law as it relates to judicial independence has evolved, it seems plain that if that situation were to exist today, the question of the lawfulness of the CFAO made by the executive would be obvious.

[6] For section 7 of the Charter to apply, the applicant has the initial burden of proving that the right in question comes within that provision. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, the Supreme Court of Canada specified the nature of the liberty interest set out in section 7 of the Charter. Bastarache J., writing for the majority, commented, at paragraph 49:

> The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices.

[7] Just as the Canadian courts have not qualified the accused's appearance in the prisoner's box as a violation of his right to liberty, I cannot find that the decorum provided for in paragraphs 6, 15 and 18 of the Guide violates the liberty interest of a military accused before a Court Martial. Also, it does not violate his right to the presumption of innocence under section 11(*d*). On this point, it should be noted that military judges are experienced jurists who have been appointed to exercise exclusively judicial powers, by the Governor in Council, and that they enjoy guarantees of judicial independence. In addition, it is always open to a military judge – apart from the directives given by the judge to a disciplinary or general court martial panel on matters relating to the presumption of innocence and the burden of proof on the prosecution, to prove the offence beyond a reasonable doubt – it is always open to a military judge to give the members of the court martial panel instructions that the court martial panel may

not or could not draw any conclusion or inference that is negative or unfavourable to the accused from the fact that the decorum provided for in paragraphs 6, 15 and 18 was followed. There is no doubt that the present procedure makes the status of the person brought before the Court Martial as the accused plain; with respect for the contrary opinion, however, that has no effect on the presumption of innocence. It must be acknowledged, however, that a tradition or custom associated with decorum at Courts Martial that might call for a military judge to caution the disciplinary or general court martial panel members does raise serious questions in my mind about the soundness of that decorum today.

[8] I would reiterate that there is no evidence before this court as to the history that would explain this tradition, or why the tradition has been continued before the Court Martial. That evidence is not required only for the purposes of determining the validity of a provision or situation under section 1 of the Charter; it is just as important when considering whether to maintain or abandon this sort of tradition or custom. That question is not a matter within judicial notice, either under section 15 of the Military Rules of Evidence or under section 16 of the Military Rules of Evidence.

[9] I note that counsel for the prosecution does not object to the request made by the applicant, in the circumstances, and that there should be the broadest possible consultation this question, in terms of the validity of paragraphs 6, 15 and 18 of the document issued on the authority of the Chief Military Judge dated July 19, 2002, entitled “Court Martial Procedures — Guide for Participants and Members of the Public”.

Decision

[10] For these reasons, the Court:

allows the application by the defence, in part;

gives the applicant leave to sit beside his counsel at the commencement of the proceedings provided for in article 112.05 of the QR&O, but without headdress;

gives the applicant leave to have his headdress with him if he testifies, should that be the case;

dispenses with the need for an escort for the purposes of the Court Martial procedure in this case, that is, there will be no escort; and

directs the applicant to adhere to the decorum that applies to civilians and former members of the military who are subject to the Code of

Service Discipline who appear before the Court Martial in respect of any other matter governed by the Guide for Participants and Members of the Public.

[11] As the proceedings progress, counsel, and in particular defence counsel, may have questions relating to some particular rule that must be followed, and at that point, we will address those questions as they arise and be able to deal with them in that manner.

COLONEL M. DUTIL, C.M.J.

Counsel:

Major B. McMahon, Director of Military Prosecutions
Counsel for the prosecutor-respondent
Lieutenant-Colonel J.-M. Dugas and Major C.E. Thomas, Directorate of Defence Counsel Services
Counsel for Master Corporal Lelièvre