Citation: R. v. Corporal M.A. Wilcox, 2009 CM 2006

Docket: 200849

GENERAL COURT MARTIAL
CANADA
NOVA SCOTIA
VICTORIA PARK, SYDNEY

Date: 25 March 2009

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

HER MAJESTY THE QUEEN
v.
CORPORAL M.A. WILCOX
(Accused)

***CHARTER* CHALLENGE UNDER SECTION 7 AND 11(*d*), JUDICIAL INDEPENDENCE AND IMPARTIALITY OF GENERAL COURTS MARTIAL**
(Rendered in writing)

[1] At his trial by General Court Martial on charges of manslaughter, criminal negligence causing death, and negligent performance of a military duty, and prior to plea, the accused, whom I will refer to as the Applicant, seeks a stay of proceedings, or other relief, on the ground that General Courts Martial constituted and empowered under sections 166 to 168 of the *National Defence Act* (*NDA*) are not independent and impartial tribunals guaranteed by sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*). The notice of application, which was filed as Exhibit M3-1, also asks that as the appointed trial judge I disqualify myself on the basis of a reasonable apprehension of bias because of a ruling I made in the case of *R. v. Corporal Parsons*, 2005 CM 16, and was subsequently reappointed as a military judge by P.C. 2008-1034. At the opening of the argument of the application counsel withdrew the request that I disqualify myself.

[2] On 12 and 13 January 2009 I heard evidence and argument on the application, and on 17 March 2009 I dismissed the application and undertook to provide these reasons for so doing in due course.

[3] Both parties provided written submissions on the issues raised by the application. The written submissions of the Applicant, entitled "Defence Written

Submissions," were marked as Exhibit M3-2. In this document, at paragraph 3, counsel for the Applicant narrowed the scope of the debate to two fundamental issues, *viz*.:

> 1. Do military judges have sufficient security of tenure to meet the constitutional standards of judicial independence and impartiality pursuant to s.11(*d*) of the *Charter* where … judicial appointment must be renewed every five years? and,
>
> 2. if military judges lack the necessary security of tenure to be sufficiently independent, impartial, and unbiased, what is the appropriate remedy?

The Applicant seeks a declaration that the court is not an independent and impartial tribunal, and seeks either an order terminating the proceedings until such time as Parliament may remedy the problem by amending the *National Defence Act* or a stay of proceedings.

[4] The question of the independence of military judges was raised before me in the cases of the Standing Courts Martial of *R. v. Corporal Parsons* and *R. v. Master Corporal Dunphy*.[1] In the reasons I delivered in the case of *Corporal Parsons* on 31 January 2006, I concluded that neither the appointment of military judges for a fixed term of five years, nor the possibility of the renewal of such appointments infringed the independence of the judiciary guaranteed by section 11(*d*) of the *Charter*. I went on to find, however, that the scheme for the renewal of the appointment of military judges set out in Queen's Regulations and Orders (QR&O) articles 101.15 to 101.17 failed to respect the principle of judicial independence, and for that reason the regulations governing the reappointment process for military judges were struck down as unconstitutional. While I granted, in part, the declaration as to the state of the law that Parsons sought, I denied Parsons's claim for the personal remedy of a stay of proceedings.

[5] I made the same ruling in the case of *Master Corporal Dunphy*. On the appeal of both *Dunphy* and *Parsons* to the Court Martial Appeal Court, 2007 CMAC 1, the Court held with reference to the impugned articles of QR&O, (para 1):

> …[W]e are in substantial agreement with the military judge's conclusion that the articles in question violate the *Charter* and his conclusion that no individual remedy should be afforded.

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[1] 2006 CM 16 and 2005 CM 53

[6] In my view, the reasons I gave in *Parsons* dispose of the first issue raised by counsel on this application. Counsel argues, however, that the conclusions I reached in *Parsons* should be re-visited for 2 reasons.

1. Decisions of Dutil CMJ

[7] Counsel for the applicant drew the court's attention to a series of decisions rendered by the Chief Military Judge in late 2005 and early 2006 in the cases of *Ex-Leading Seaman Lasalle,* 2005 CM 46*, Corporal Nguyen,* 2005 CM 57*, Ex-Able Seaman Hodinott,* 2006 CM 24, and *Corporal Joseph,* 2005 CM 41. In those decisions the CMJ held that in order to safeguard the independence of the military judiciary the judges must have security of tenure until the age of retirement. In order to remedy the constitutional invalidity that he had found, the CMJ struck down that part of subsection 165.21(2) of the *National Defence Act* that provided for a five-year term appointment for military judges.

[8] The CMJ recently restated his conclusions on these issues in the case of *R. v. Master Seaman Middlemiss*, 2008 CM 1025.

[9] The Applicant submits that the reasoning and the conclusions of the CMJ in these cases are compelling and cogent, and invites me to follow the conclusions of the CMJ and declare the five-year term appointment of military judges unconstitutional.

[10] With great respect for those whose views on the issues differ from mine, I have not been persuaded on this application that the conclusions I reached in *Parsons* upholding the constitutional validity of term appointments for military judges were wrong.

2. Court Martial Appeal Court decision in *Dunphy*.

[11] Secondly, counsel argues that in the decision of the CMAC on the appeal of *Dunphy*, the Court seems to have accepted the approach of the CMJ in the cases I already referred to, and that the Court recommended in *obiter dictum* that military judges be awarded security of tenure until retirement, subject to removal for cause.[2]

[12] In my reasons in the cases of *Parsons* and *Dunphy* I followed the holding of the CMAC in 1998 in the case of *R. v. Lauzon*, CMAC - 415, that the appointment of military judges for a fixed term was a sufficient guarantee of security of tenure. I stated at para 50:

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[2] See exhibit M3-2, Defence Written Submissions, paras 10 and 12.

> "… I … consider the question before me as to the constitutional validity of term appointments for military judges presiding at a Standing Court Martial to be settled by the authority of *Lauzon*. A term appointment of five years for military judges is not *per se* unconstitutional.

The CMAC had also reached the same conclusion in respect of a judge advocate sitting with a Disciplinary Court Martial in the 1995 case of *R. v. Edwards,* CMAC - 371.

[13] But the issue of term appointments for military judges, which the CMAC addressed in *Edwards* and *Lauzon,* was not raised before the Court in *Dunphy*. Counsel for the appellant appears to have restricted the scope of his appeal by assuming the correctness of the ruling at trial that the QR&O articles concerning reappointment were unconstitutional, and taking issue only with the failure of the trial judge to grant a personal remedy as a consequence of the invalidity. Thus the Court stated:

> The only issue in Dunphy's appeal is whether the military judge erred by not granting Dunphy a *Charter* remedy pursuant to subsection 24(1)....

[14] The only question about term appointments for military judges arises on the cross-appeal of the Crown in both *Parsons* and *Dunphy*, but the scope of the cross-appeal was limited to the trial ruling concerning the constitutional validity of the regulations governing reappointment. The cross-appeal did not raise the larger issue of the validity of term appointments as the Crown, the cross-appellant, had succeeded on that issue at trial.

[15] Thus, neither party to the appeal in *Dunphy* raised the central issue that was before the trial courts in *Lasalle*, *Nguyen*, *Joseph*, *Hodinott*, *Parsons* and *Dunphy*.

[16] Still, the Applicant appears to argue that the decision of the CMAC in *Lauzon* has been overruled by the Court in *Dunphy*. Some support for this position might be taken from passages in the decision of the Court beginning at para 18 where, in reference to *Lauzon*, the Court states, "The time has come to reconsider this decision."

[17] Thus the CMAC has unambiguously signalled its willingness to reconsider its earlier decision in *Lauzon* dealing with the term tenure of military judges, but to this point the Court has not yet done so. That issue was not before the CMAC in *Dunphy*. The Court dealt only with the issue that was before it; that is, the constitutional validity of the regulations governing the renewal process as they stood at the time.

[18] While the CMAC may choose to reconsider its earlier decisions, it is plainly no part of this court's duty to reconsider the previous decisions of the higher court. Until such time as the CMAC may reconsider and overrule its earlier decisions, this court is bound to follow the clear holdings in *Lauzon* and *Edwards*.

[19] With great respect for those whose views on this differ from mine, I cannot read what the Court stated in *Dunphy* as overruling its earlier decisions in both *Lauzon* and *Edwards*. Neither of the parties to the appeal raised the issue that was decided in the earlier cases, and neither party asked the Court to overrule its previous decisions.

[20] Finally on this point, the Applicant points to what is characterized as an *obiter dictum* statement from the CMAC in para 23 of *Dunphy* where the Court adds its voice to that of the former Chief Justice of Canada in a report to parliament in which The Right Honourable Antonio Lamer recommended that military judges be appointed until retirement. Whether the authority of mere *obiter dicta* from courts of appeal is enhanced as a result of the decision of the Supreme Court of Canada in *R. v. Henry,* [2005] 3 SCR 609, that authority does not extend to give the force of law to a mere recommendation from an appeal court for an improvement in the law that might be effected by parliament.

[21] I conclude that the statements of the CMAC in the decision in *Dunphy* do not affect the conclusions I reached in *Parsons* as to the validity of renewable term appointments for military judges.

[22] The Applicant goes on to attack the current scheme for the renewal of military judicial appointments. Following the decision of the CMAC in *Dunphy* new regulations were made with effect from 11 March 2008 governing the reappointment process for military judges. QR&O articles 101.15 to 101.17 now read:

> 101.15 - ESTABLISHMENT OF RENEWAL COMMITTEE
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> For the purpose of subsection 165.21(3) of the *National Defence Act* there is hereby established a committee to be known as the Renewal Committee consisting of one person, being the Chief Justice of the Court Martial Appeal Court.
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> 101.16 – NOTIFICATION BY MILITARY JUDGE
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> A military judge seeking reappointment shall notify the Renewal Committee and the Minister not earlier than six months, and not later than two months, prior to the expiration of the military judge's appointment.

101.17 – RECOMMENDATION BY RENEWAL COMMITTEE

> (1) The Renewal Committee shall, upon receipt of notification under article 101.16 (*Notification by Military Judge*) and before the expiration of the appointment of the military judge concerned, make a recommendation to the Governor in Council concerning the renewal of the appointment of the military judge.
>
> (2) In making its recommendation the Renewal Committee shall not consider the record of judicial decisions of the military judge concerned.

[23] It is apparent that the scheme that is now in place to govern the reappointment process for military judges is very different from the scheme that was before the court in the cases of *Parsons* and *Dunphy*. The Renewal Committee now consists only of a member of the judiciary who, by virtue of his position, is knowledgeable about the military justice system, and who may be considered to be concerned solely with the best interests of the administration of military justice when making a recommendation as to the reappointment of a military judge. The Renewal Committee is no longer required to consider the irrelevant matters set out in the regulations that were struck down in *Parsons* and *Dunphy*.

[24] As I stated in my reasons in *Parsons*, (para 58):

> … [A]ny scheme for the renewal of the term appointment of a military judge must be carefully drawn in order to banish any reasonable perception that the decisions of the military judge might be influenced by the prospect of reappointment.

[25] In my view, the scheme established in the regulations governing judicial reappointment, effective 11 March 2008, meets that standard.

[26] The Applicant argues that the new regulations fail to meet the constitutional standard because the scheme is not part of the statute, but is only contained in regulations that may be changed by the executive branch of government without the scrutiny of parliament. Secondly, the Renewal Committee only makes a recommendation, and the recommendation could be ignored by the Governor in Council who is the reappointing authority, and, in any case, the process for reappointment is not transparent.

[27] In my view there is no merit to these arguments. With respect to the first point, I was faced with and rejected a similar argument in *Parsons* and *Dunphy.* With respect to the fact that the Renewal Committee only makes a recommendation, while it

is theoretically possible, it is not reasonable to suppose that the Governor in Council would ignore the recommendation of the Renewal Committee, as it is presently constituted, on a matter involving the tenure of a particular sitting judge.

[28] As I observed in the course of my reasons in *Parsons*, term appointments of judges is not common in Canada. But where they do exist in our law, the merely formal power of reappointment may rest with the executive branch of government as long as it is the judiciary who has the power to recommend reappointment.[3]

[29] But, more importantly, it is simply not reasonable to suppose that the decisions of a sitting military judge might be influenced by the prospect that the Governor in Council might decline to accept the recommendation of the Renewal Committee to reappoint the judge.

[30] The argument of the Applicant seems to proceed on the basis that the reappointment of a military judge can only be made for a period of a further five years.[4] But neither the *National Defence Act*, nor QR&O specifies the period of a renewed appointment of a military judge If the Renewal Committee considered that the constitutional guarantee of independence of military judges required it, the Committee could recommend that a military judge be reappointed until the judge reached the age of retirement.

[31] Thus, this court finds the scheme for the renewal of appointments of military judges contained in QR&O articles 101.15 to 101.17 to be constitutionally valid, and, there being no infringement of a constitutional right, the issue of remedy does not arise.

[32] For these reasons the application was dismissed.

Commander P.J. Lamont, M.J.

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[3]See the text accompanying footnotes 59 and 60 in *Parsons* and the authorities there referred to.

[4] See exhibit M3-2, Defence Written Submissions, at para 3 "…judicial appointment must be renewed every five (5) years…" and at para 14 "The term of office, however, is only for five years, but with the opportunity for reappointment, subject to the recommendation of a Renewal Committee, for subsequent five-year terms."

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