Citation: *R. v. Private S.J.L.S. Bergeron,* 2008 CM 3011

Docket: 200802

STANDING COURT MARTIAL
CANADA
QUEBEC
VALCARTIER GARRISON

Date: 7 May 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
(Prosecutor)
v.
PRIVATE S.J.L.S. BERGERON
(Applicant)

DECISION RESPECTING AN ALLEGED VIOLATION OF SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR ABUSE OF PROCESS BY THE PROSECUTION
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

[1] Private Bergeron is accused of neglect of instructions because he did an act in relation to a thing that may be dangerous to life or property, which act was likely to cause loss of life or bodily injury, contrary to section 127 of the *National Defence Act*; in the alternative, he is accused of neglect to the prejudice of good order and discipline for having failed to apply the firing instructions that he had been issued as part of practical training for the firing of a C-13 grenade, contrary to section 129 of the *National Defence Act*.

[2] At the beginning of this trial by Disciplinary Court Martial, specifically on 5 May 2008, before pleading guilty or not guilty to each charge, defence counsel representing Private Bergeron filed a motion for which a written notice had been received by the Office of the Court Martial Administrator on 22 April 2008. This motion was aimed at obtaining an order from the Court Martial in accordance with section 24(1) of the *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter*) for a stay of proceedings.

[3] This preliminary motion is filed under article 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (hereinafter the QR&O) as a question of law or mixed law and fact to be decided by the military judge presiding over the Disciplinary Court Martial, as provided in article 112.07 of the QR&O.

[4] The evidence in support of this motion is comprised of:

a. Testimonies heard in the order of their appearance: the testimony of the applicant, Private Bergeron, and the testimonies of Major Giroux, Master Warrant Officer Chiasson, Warrant Officer Hêtu and Sergeant Deschênes;

b. Exhibit VD1-1, the notice of motion;

c. Exhibit VD1-2, chapter VI of the standing operating procedures of the Land Force Quebec Area Training Centre (hereinafter the LFQA TC), entitled "minor punishments";

d. Exhibit VD1-3, chapter 4, instructions - dispatch rider on duty, for the LFQA TC; and

e. The judicial notice taken by the Court of the facts and questions contained in Rule 15 of the *Military Rules of Evidence*.

[5] The events underlying this motion took place between 6 October and 8 October at the Valcartier Garrison, Courcelette, province of Quebec. On the morning of 6 October 2006, the platoon of the 0612 soldier qualification (hereinafter SQ) course was on a grenade range for practical training. When Private Bergeron, a member of this platoon, reported to the firing bay to do a live fire grenade practice, he is alleged to have neglected to follow the instructions received, thus causing a safety breach.

[6] Still on this Friday 6 October in the morning, at the end of the grenade practice, this safety breach was reported to the assistant range safety officer, Warrant Officer Hêtu, who was also the platoon second-in-command. He decided to investigate immediately by meeting with the instructor involved who had reported the incident to him, namely Sergeant Deschênes, and then by meeting with the alleged wrongdoer, Private Bergeron. The candidates were returned to the garrison by vehicle, during which time the warrant officer ensured that written statements were filled out by the staff involved in the incident.

[7] All this was reported to the company commander, Major Giroux, who met with the instructors and then with Private Bergeron. This is the fact-confirmation step, as described by Major Giroux in his testimony. He then reviewed Private Bergeron's file and decided that further training on weapons handling, and grenade handling in

particular, was required for this private. Major Giroux based this decision on the serious and specific nature of the incident, which, furthermore, involved the handling of a weapon, an essential task for a soldier receiving infantry training. He did so knowing that a progress review board would have to rule at a later date on the decision to keep Private Bergeron in this soldier course, have him retake the course in its entirety or remove him from the course with a recommendation for release from the Canadian Forces.

[8] It is also important to recognize that the decision to have Private Bergeron appear before a progress review board quickly was made in a context where there were only about two weeks left in this training course. Consequently, and as explained by Major Giroux, it was important on the one hand to correct the observed failing, and on the other hand to give the concerned solder the opportunity to show that he was able to self-correct.

[9] Major Giroux therefore ordered that additional grenade training be given to Private Bergeron. However, he never specified the conditions of this training, thus leaving the responsibility of implementing his order to the appropriate instructors. As a result, Master Warrant Officer Chiasson, as the company sergeant major, saw to the execution of the major's order. He made sure that qualified instructors would be available to provide Private Bergeron with additional training.

[10] Warrant Officer Hêtu, who had also been informed of the decision, made sure that everything would be done as quickly and correctly as possible. According to him, Private Bergeron had been informed directly by Major Giroux regarding the additional training. The warrant officer decided to have this training period coincide with the fact that a few days beforehand, Private Bergeron had previously been identified as the person on duty to serve as dispatch rider at the same time as the instructors identified by Master Warrant Officer Chiasson were also on duty. In fact, detailing candidates on duty was a task for the SQ course, and it was normal for SQ 0612 to have identified candidates for this task in keeping with the process described by Master Warrant Officer Chiasson.

[11] However, Private Bergeron contends that it was the warrant officer who informed him of the company commander's decision. According to the private, the warrant officer had also indicated to him that he would be on duty as dispatch rider from Friday night until Sunday end of day, a task of which he had no prior knowledge. From what the warrant officer said, he also came to the conclusion that he would be confined to his barracks when he was not on duty. He also concluded that it was because of the incident that morning that he found himself in this situation, which appeared to him to be a punishment, in the sense of a sentence imposed. He states that everything that happened to him in connection with this incident seems sufficient to him, and that these proceedings are abusive since their only aim is to punish him once again for the same thing.

[12] On that same Friday, Private Bergeron did the 13-km forced march with the other members of his platoon in the afternoon, then went to his room, took a shower and reported at the arranged time to the duty non-commissioned officer as ordered. On Friday night, he received additional training. According to him, he copied the grenade manual word for word. According to Sergeant Deschênes, who was the non-commissioned officer on duty, Private Bergeron received practical training that was held outside the buildings. He does not deny the possibility that Private Bergeron may have received additional training with another instructor that night.

[13] Private Bergeron returned to his room on Friday night, to which, according to him, he was confined. On Saturday morning he reported to the non-commissioned officer, who was probably Master Corporal Breton, and received additional grenade training, on both theory and practice, for a period of approximately two hours. Throughout the rest of the day, Private Bergeron performed his duty as dispatch rider until about 2100 hours. He then returned to his barracks, considering that he was confined there. Finally, on Sunday, he performed his duty as dispatch rider between 0900 and 2100 hours and returned to his barracks, still considering that he was confined to them. The next morning, he once again began the normal training activities with his platoon.

[14] 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.

[15] The conduct of the Crown when prosecuting an individual may be subject to a careful analysis, particularly when the fairness of the trial is at stake. As held by the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paragraph 73:

> 73 As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(*b*) of the Charter, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin*, *supra*). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(*d*) of the Charter. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights

> enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[16] As regards the matter for the applicant of establishing that the conduct of the prosecution constitutes an abuse of process, it is important to recall the words of Justice McLaughlan in *R. v. Scott*, [1990] 3 S.C.R. 979, where she stated at page 1007:

> In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. While Wilson J. in *R. v. Keyowski*, 1988 CanLII 74 (S.C.C.), [1988] 1 S.C.R. 657, at pp. 658-59, used the conjunction "or" in relation to the two conditions, both concepts seem to me to be integral to the jurisprudence surrounding the remedy of a stay of proceedings and the considerations discussed in *R. v. Jewitt*, 1985 CanLII 47 (S.C.C.), [1985] 2 S.C.R. 128, and *R. v. Conway*, *supra*. It is not every example of unfairness or vexatiousness in a trial which gives rise to concerns of abuse of process. Abuse of process connotes unfairness and vexatiousness of such a degree that it contravenes our fundamental notions of justice and thus undermines the integrity of the judicial process. To borrow the language of *Conway*, the affront to fair play and decency must be disproportionate to the societal interest in prosecution of criminal cases.

[17] It is thus up to the applicant to prove, on a balance of probabilities, that there is abuse of process within the meaning described above, in accordance with section 7 of the *Charter*.

[18] To this end, I must first determine the exact nature of the actions taken by the Crown representatives, namely the chain of command, in respect of Private Bergeron following the alleged incident in which he was involved that occurred on the morning of 6 October 2006 on the grenade range, and which is the subject of charges before this Court today. I will then be able to determine whether the proceedings before this Disciplinary Court Martial are an affront to fair play and decency that is disproportionate to the societal interest in ensuring the effective prosecution of service offences.

[19] The applicant's allegation is to the effect that the fact that he was placed on duty from Friday night to Sunday night—that is, for the whole weekend beginning on 6 October 2006—in addition to having been confined to his barracks, is simply the equivalent of a minor punishment of confinement to barracks being applied by the authorities of the training school, the LFQA TC, which normally could have been imposed by a military court following a conviction for a service offence. The applicant,

by counsel, has conceded that the other administrative measures taken in accordance with the school's policies—the signing of a caution form and the appearance before the progress review board—need not be considered by the Court in its determination of the nature of the actions taken following the incident, since they were applied in the normal course of the management of such a thing.

[20] Meanwhile, the respondent in this case submits that following the incident in question, the military authorities took the necessary and appropriate measures to adequately correct and train Private Bergeron. As a result, the taking of disciplinary action is another matter entirely which bears no relation to the corrective measures that were applied during the weekend of 6 October to 8 October 2006. What is more, the respondent alleges that the fact that Private Bergeron was detailed as dispatch-rider on duty is unrelated to the incident in question.

[21] The nature of the evidence in this case demands that I analyse the credibility and reliability of the testimonies delivered before this Court. This will allow me to correctly assess the applicant's testimony in light of all the evidence filed as part of this motion.

[22] Private Bergeron testified directly and honestly. He had a good memory of the events and presented them coherently. However, he tended to magnify or exaggerate his perception of the events. This disproportion in his retelling of the events was not dishonest, but clearly reflected his view of the inequality present between a soldier in training and the chain of command. As an example, after having stated during his examination in chief that he had been put on counselling and probation, which is a formal and final administrative measure aimed at giving a military member a last chance to reform before recommending his or her release from the Canadian Forces, Private Bergeron acknowledged during the cross-examination by the prosecution that the administrative measure he had been subjected to was only a recorded warning issued in the context of his SQ course. Moreover, he stated that he had concluded on his own that he had been confined to barracks owing to the circumstances and the measures applied, and not because anyone had clearly told him so.

[23] Major Giroux testified clearly and coherently. He explained well how he had been informed of the incident, the way he had confirmed the facts and reviewed the file, and the reasons that had led him to order additional training for Private Bergeron. He explained clearly to the Court the context of his decision and the other administrative measures that Private Bergeron was subjected to during his soldier qualification course. His testimony is reliable and credible.

[24] Master Warrant Officer Chiasson testified honestly and coherently. He provided a good description of his duties and his role as sergeant major of the company to which Private Bergeron belonged. He confined himself to explaining his actions in the management of the 6 October 2006 incident and did not attempt to speculate on the

actions that were taken since he was not Private Bergeron's immediate supervisor. His testimony is credible and reliable.

[25] Warrant Officer Hêtu testified calmly, providing numerous details. As Private Bergeron's immediate supervisor, he provided several details regarding the sequence of events. I found that he gave solid testimony and had an excellent memory of all the events and the measures that were taken regarding Private Bergeron in connection with the 6 October 2006 incident. His testimony is reliable and credible.

[26] As for Sergeant Deschênes, he clearly indicated that he had only a vague recollection of the events of the weekend of 6 October to 8 October 2006, with the exception of the incident itself which he had witnessed personally and the additional training he had given to Private Bergeron in the evening of 6 October 2006. It is clear that for the events he remembers, his testimony is reliable and credible.

[27] After having analysed the content of the applicant's testimony in light of all the evidence comprised in the testimonies described above and the documents filed as exhibits, I have come to the conclusion that his testimony is not reliable or credible as regards the exact nature of the measures that were administered to him following the 6 October 2006 incident.

[28] The learning of discipline as part of a soldiering training course is normal and essential. The word "discipline" has a very specific connotation in the military. This, moreover, is the conclusion reached by the author of the report of the Somalia Commission of Inquiry when he writes in chapter 18 (Volume 2) on discipline:

> The word 'discipline' would seem to have a distinct meaning when associated with the military as opposed to its application to society at large, as manifested in judicial, legal, and police usage. In the larger societal context, discipline has come to mean the enforcement of laws, standards, and mores in a corrective and, at times, punitive way. The same connotation certainly pertains to the military as well, and, in fact, is the focus of much of this chapter.[1]
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> However, it should be understood that the more important usage in the military entails the application of control in order to harness energy and motivation to a collective end. The basic nature of discipline in its military application is more positive than negative, seeking actively to channel individual efforts into a collective effort thereby enabling force to be applied in a controlled and focused manner.

[29] The purpose of the concept of discipline in an armed force is to ensure cohesion between a large number of individuals in order to carry out a mission. In this sense, discipline is learned with the ultimate aim of training people who will discipline themselves. It is at this moment that the notion of leadership may arise, since it is up to the individual to set an example through self-discipline.

[30] There are several ways to achieve this. On the subject, the study prepared by Martin L. Friedland for the Commission of Inquiry on the deployment of the Canadian Forces in Somalia, entitled "Controlling Misconduct in the Military,"

illustrates nicely that the military justice system is only one mechanism for enforcing discipline so as to educate and train military members on this concept. As I often state in my decisions on sentencing, the military justice system is the last resort to ensure the respect of discipline, which is an essential aspect of military activity in the Canadian Forces.

[31] On the matter of Private Bergeron being detailed as dispatch rider on duty for the whole weekend, including Friday night, this appears to me to be a measure taken for the purpose of disciplining him in relation to a specific event. Whether he was so detailed before or after the incident, it is nonetheless astonishing that he would have to perform this task for the entire weekend. Clearly, not all of the candidates in the course would perform such a duty, and the detailed persons could be selected on the basis of certain criteria unknown to the Court. It is general knowledge that the purpose of detailing persons on duty as part of military training is precisely to familiarize candidates with the concept of "duty" and, on certain occasions, to communicate a specific message to certain individuals.

[32] In the case before us, because of the length of the duty assigned to Private Bergeron, the Court may conclude that the chain of command wished to make him understand certain things. However, the duty of dispatch rider on duty has nothing to do with the punishment of confinement to barracks. As established in Exhibit VD1-2, the punishment of confinement to barracks comprises a specific schedule that includes a series of inspections of the room and the person as well as additional work. The movements of a person given such a punishment are controlled and restricted as much as possible. In fact, such a person is no longer in charge of his or her movements and must receive an authorization to move about.

[33] As Exhibit VD1-3 proves, the dispatch rider on duty is a military member who must make himself available in a place of work during a specific period in order to assist the duty non-commissioned officer in the execution of his tasks. The dispatch rider remains responsible for his movements in the context of his work and is not subject to inspections or any other restriction unrelated to his work.

[34] As regards the fact that Private Bergeron returned to his barracks without being able to leave them once his duty as dispatch rider was finished, it appears on a balance of probabilities that no one had required him to do such a thing, and that this was instead something that he had deduced himself from the circumstances. In the event that I were to find that such a thing had been imposed upon him, the fact remains that this one measure, or the effect thereof combined with the assigned duty, was far from having the characteristics of a punishment of confinement to barracks.

[35] I therefore conclude that the fact that Private Bergeron had been placed on duty from 6 October to 8 October 2006 and that, on his own initiative owing to his understanding of the circumstances, he had limited his movements between his periods

of duty does not amount to the imposition of a punishment of confinement to barracks. I would come to the same conclusion if he had been ordered to remain in his barracks. Indeed, the sentence of confinement to barracks entails conditions that bear no relation to what Private Bergeron experienced. In fact, I have reached the same finding as Judge Barnes in his decision dated 2 October 1996 in the court martial of Captain *McCallum*. That is, the fact that a duty may be for a longer period than is normal does not, in itself, make it a punishment that would be imposed by a military court due to the commission of a service offence.

[36] What is more, it is clear to me that the imposition of the duty on Private Bergeron was not the result of an order given by an officer having the power to judge and sentence the accused in connection with this incident. To the contrary, such an order could only have been given by a non-commissioned officer who does not have such a power.

[37] I would like to add that if I had concluded that there was abuse of process, I would not have granted the requested remedy, that is, the stay of proceedings. In fact, in the words of Justice l'Heureux-Dubé in her Supreme Court of Canada decision *R*. v. *O'Connor*, *supra*, at paragraphs 68 and 69:

> 68 …. It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the "clearest of cases".
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> 69 Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

[38] As a result, the remedy requested by the applicant finds no application except in the clearest of cases. As stated by the Supreme Court of Canada in *R*. v. *Regan*, [2002] 1 S.C.R. 297, at paragraph 54:

> 54. Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice. [O'Connor, at para. 75]

[39] I would have concluded that the two criteria stated above had not been met. In this matter, it is not one of the clearest of cases where going ahead with the proceedings before this Court would have manifested, perpetuated or aggravated the prejudice caused to the applicant. Furthermore, there is another remedy that could remove the prejudice. Were this Court to have found the applicant guilty of one of the two offences found in the charge sheet, clearly the presiding military judge could easily have taken the impact of such actions underlying the abuse of process into account as a mitigating factor and rendered an appropriate sentence in the circumstances.

[40] The motion by the accused requesting the Court to stay proceedings under section 24(1) of the *Charter* because of an abuse of process under section 7 of the *Charter* is therefore dismissed.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

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