Citation: *R. v. Leading Seaman S.W. Donnelly*, 2009 CM 3020

Docket: 200935

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX

Date: 27 November 2009

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

HER MAJESTY THE QUEEN
v.
LEADING SEAMAN S.W. DONNELLY
(Offender)

DECISION RE SECTIONS 7, 11(d), 11(h), AND 24(1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* - ABUSE OF PROCESS
(Rendered orally)

INTRODUCTION

[1] By the way of an application to this Standing Court Martial, the accused, Leading Seaman Donnelly, raises from a constitutional perspective, the ability for the military justice system to deal with a military offence related to a disciplinary incident he allegedly committed while superiors had already taken some measures against him immediately further to the alleged commission of the same incident and prior to the laying of the correspondent charges.

[2] LS Donnelly is charged with one offence punishable under section 83 of the *National Defence Act* for disobeying a lawful command of a superior officer, because he allegedly did not report for duty when ordered to do so, and in the alternative he is charged with one offence for being absented himself without leave from HMCS IROQUOIS for a period of a bit less than 24 hours contrary to section 90 of the *NDA*.

[3] At the opening of this trial by Standing Court Martial on 19 November 2009, prior to plea and after the oaths were taken, LS Donnelly made an application for which a written notice was received by the prosecutor and the office of the Court Martial Administrator on 10 November 2009. The applicant is seeking an order from this court for a stay of proceedings on all charges pursuant to subsection 24(1) of the *Canadian*

Charter of Rights and Freedoms (thereafter the *Charter*) for an alleged violation of his rights under section 7, subsections 11(d) and 11(h) of the *Charter*.

[4] The preliminary motion is brought by way of an application made under *Queen's Regulations and Orders* (*QR&O*) article 112.05(5)(e) as a question of law or mixed law and fact to be determined by the military judge presiding at this Standing Court Martial.

THE EVIDENCE

[5] The evidence on the application, heard in a voir dire that I opened, consisted of:

a. The testimonies heard in the order of their appearance before the court, the testimony of the applicant, Leading Seaman Donnelly, Petty Officer 1st Class Sheehan, Chief Petty Officer 2nd Class Bridgeo, Petty Officer 2nd Class Dain, Master Seaman Strowbdridge, and Chief Petty Officer 2nd Class Steeves;

b. Exhibit VD1-1, the written notice of application made by the accused;

c. Exhibit VD1-2, a Medical Disposition Report form for LS Donnelly dated 26 January 2009;

d. Exhibit VD1-3, an excerpt of the brow log for the period of 25 to 31st January 2009;

e. Exhibit VD1-4, a Record of Disciplinary Proceedings (RDP) concerning Leading Seaman Donnelly signed by Chief Petty Officer 1st Class Jeffrey on 20 March 2009;

f. Exhibit VD1-5, a Memorandum dated 26 November 2008 from LS Donnelly requesting his voluntary release;

g. Exhibit VD1-6, a Memorandum dated 25 June 2009 from LS Donnelly requesting to withdraw his voluntary release;

h. Exhibit VD1-7, an excerpt of the Division Notes taken by MS, Master Seaman, Strowbridge about LS Donnelly for the period of 20 March 2008 to 23 April 2009;

i. The judicial notice taken by the Court of the facts in issue under Rule 15 of the Military Rules of Evidence.

THE FACTS

[6] Leading Seaman Donnelly is a Naval Combat Information Operator (NCIOP) who is on Her Majesty's Canadian Ship (HMCS) Iroquois since the end of the year 2007 or the beginning of the year 2008. The ship was alongside for about two months at the time of the alleged incident in January 2009, and the crew was applying at that time the daily routine for such situation.

[7] Usually on the ship, the crew is organized in departments and sections. LS Donnelly was a member of the NCIOP section included in the Combat Department. Sailors on the ship will clean stations, will be involved in the watch of the ship as Quarter Master, or on duty watch as Boatswain's Mate, will take time on shore for training, or will help other sections or departments on the ship for different tasks when required.

[8] In port, the security of the ship, including the access and the activities related to fire and floods, is managed through a duty watch, which runs on a 24-hour basis. The responsible for the duty watch is the Quarter Master. In order to support and help the Quarter Master, each department is responsible for providing sailors for the watch at the brow, which constitutes the main entrance on the ship. Brow duties usually take place from 0730 hrs to 1530 hrs and are assigned to a department monthly and among departmental sections weekly.

[9] The person performing the brow duty is the Boatswain's Mate, and this person is assigned to this duty for a four-hour shift. The Boatswain's Mate stays at the brow and he is responsible for the pipes, for checking the identity of people getting onboard and to maintain a log book about the security activities on ship and about those getting on and off ship.

[10] As a matter of context, it is important to know that LS Donnelly removed himself from a QL5A course, which is a career course, and expressed, during the month of August 2008, an intention to request his voluntary release from the CF. His intentions were materialized in a memorandum he filed on 26 November 2009 and addressed to the Executive Officer of the HMCS IROQUOIS. His request was supported by the chain of command. He requested that his release not take place before the month of August 2009 in order for him to reorganize his life properly, considering that he would like to return to school in September 2009. It is also important to know that he filed another memorandum on 25 June 2009 requesting to withdraw his submission for voluntary release from the CF. His request was approved by his chain of command.

[11] On Saturday, 24 January 2009, the applicant was scheduled for brow duty.

However, he injured himself on one hand sometime before. He showed up for duty on ship, but requested permission from his superior, Master Seaman Strowbridge, to go to the hospital in order to be checked by a physician. He received permission and went to the hospital. After being viewed at the hospital, he called the Officer of the Day on ship and told him that he was going home. Then, he was told to report to the ship, which he refused to do, and that he allegedly didn't.

[12] On Sunday night, Petty Officer 2nd Class Dain talked to LS Donnelly and told him that he will see him on Monday morning.

[13] On Monday morning, 26 January 2009, LS Donnelly reported as usual to HMCS IROQUOIS. He met the Coxswain on that morning to explain what happened on the weekend. He then went to the sickbay and further to his examination by the physician assistant, he was put on light duty for 5 days with a temporary limitation for the use of his left hand.

[14] He reported to the Ops Room and he learned that he will be on the brow. After lunch, he reported to the brow and he switched his scheduled duty for that day with Bergeron, agreeing to take the Thursday duty in exchange. It is when he met PO2 Dain the same afternoon that he learned that he was scheduled as Boatswain's Mate for the week. He also learned that he was on duty lockup for the week also.

[15] The duty lockup consist of checking, at the end of the day, which is around 1530 hours, if everything that's supposed to be locked up in the Ops Room have been so. Once checked, the person performing this duty will confirm to the QM that things have been checked in the Ops Room by putting an annotation in the log book to that effect.

[16] Normally, the Boatswain's Mate and the lockup duty are performed once or twice a week on ship by sailors, depending of the availability of the members' section. Putting somebody on those duties for a week is unusual.

[17] On 27 and 28 January 2009, LS Donnelly was Boatswain's Mate as scheduled. On 29 January 2009, he was Boatswain's Mate because of the switch he made for that duty with Bergeron the previous Monday. On 30 January 2009, LS Donnelly was on the standby list for duty watch, and the reality is that he relieved, from 1530 to 1600 hours, the Quarter Master on that day. On 31 January 2009, he was Boatswain's Mate for LS Barnes because the latter took his duty on the previous Saturday when he did not allegedly report to the ship as allegedly requested.

[18] It is further to a question he asked to PO2 Dain on Thursday, 29 January 2009,

that LS Donnelly learned that he was put by him on duty watch for the week in relation with what occurred on 24 January 2009. Reality is that the Boatswain's Mate schedule was changed by PO2 Dain in order to assign LS Donnelly for the week.

[19] The week after, LS Donnelly was sent to the Supply Department for two weeks, starting on 2 February 2009, which is the week following the one he was tasked as Boatswain's Mate for the week.

[20] LS Donnelly did his work at the supply department for the full two weeks without any problem. He was never told that he was tasked there as a punishment for what he allegedly did on 24 January 2009, but he assumed that it was the case. Essentially, LS Donnelly was tasked to the Supply Department further to a request from that department for having an individual for 2 weeks. LS Donnelly was chosen among his peers by his supervisor because of several factors such as the ambiguous interest towards his trade at that time and his lack of proper attitude as a sailor.

[21] LS Donnelly clearly stated that he was punished by being put on the Boatswain's Mate scheduled for the week of 26 January 2009, and by being tasked for 2 weeks after that to the Supply Department.

[22] The Combat Section Chief, PO2 Steeves, who was responsible for training and discipline in the Combat Department, was never told that extra duties were imposed to LS Donnelly, and if such thing would have happened, he would have been aware, considering his position.

[23] About a month after the incident, LS Donnelly was met and told by his chain of command that he will be charged for the incident of 24 January 2009. On 23 March 2009, charges for disobeying a lawful command of a superior officer and for absence without leave were laid against LS Donnelly by the HMCS IROQUOIS Coxswain, CPO1 Morrison.

THE POSITION OF THE APPLICANT

[24] The applicant alleges that the fact that LS Donnelly was scheduled for the full week of 26 January 2009 as Boatswain's Mate, and for lockup duty, and that he was tasked out of his section for the further 2 weeks to Supply Department, resulted in extra work that would be the equivalent of a punishment as listed at section 139 of the NDA, in relation to the alleged incident of 24 January 2009, for not showing for duty as ordered.

[25] Consequently, he submits that this court martial would try and punish, for a second time, LS Donnelly, and by doing so, this situation would constitute a violation of his right listed at subsection 11(h) of the *Charter*. Also, he suggested to the court that

because of the treatment imposed to LS Donnelly by his superior, the applicant would not benefit anymore of the presumption of innocence for the actual proceedings because he was previously the subject of disciplinary measures that ended with a punishment, and such situation would constitute a violation of his constitutional right enunciated at subsection 11(d) of the *Charter*. Finally, considering the context as described above, the decision to prefer the charges made by the prosecution and to bring the matter to this court martial would constitute a violation of section 7 of the *Charter* as an abuse of process.

[26] Facing the clearest of cases flowing from those violations to the Charter, it is suggested by the applicant that the court has no other choice than to stay the proceedings as an appropriate remedy pursuant to subsection 24(1) of the Charter. Alternatively, the applicant submits that if the court comes to the conclusion that the staying of the proceedings is not considered by the court to be the proper remedy, than the mitigation of sentence would have to be considered if the court reaches that step during the trial.

THE POSITION OF THE RESPONDENT

[27] On the other hand, the respondent is of the opinion that LS Donnelly did not perform any extra work during the week of 26 January 2009 as a punishment. According to the prosecution, he got one or two extra duties in addition to his normal duties on ship. Also, the respondent suggests to the court that extra work is a normal part of military life and cannot be viewed as a punishment for a service offence.

[28] The respondent submits that subsections 11(h) and 11(d) of the *Charter* are not triggered by the evidence adduced in this *voir dire* concerning the extra work performed by LS Donnelly because it does not disclose the existence of any previous criminal proceedings or any charge laid prior to the one which are the subject of the current trial by court martial, and that resulted in true penal consequences.

[29] The respondent submits also that the applicant did not establish on a balance of probabilities that the decision to initiate the current proceedings would constitute an abuse of process from the prosecution in the circumstances and as defined under section 7 of the *Charter.* According to the prosecutor, the manner that the chain of command decided to handle the situation with LS Donnelly right away after the alleged incident of 24 January 2009 did not disclose any egregious conduct from the supervisors that would have precluded the prosecution to prefer and proceed with the charges before this court martial.

[30] Finally, the respondent suggests that if the court concludes that there is a violation of the rights of the applicant under the *Charter*, then circumstances of this case have not established the clearest of cases that would call for a stay of the proceedings.

At a maximum, it would have demonstrated that the mitigation of the sentence is the most appropriate remedy in the circumstances.

THE ISSUES

[31] Concerning the violation of the rights of the applicant under the *Charter*, the court has to answer the three following questions:

a. Is the right of the applicant not to be tried and punished a second time for the same offence under subsection 11(h) of the *Charter* violated?

b. Is the right of the applicant to be presumed innocent until proven guilty according to the law for these proceedings pursuant to subsection 11(d) of the *Charter* violated?

c. Does the decision of the prosecution to prefer charges against the applicant and proceed with them before a court martial constitute an abuse of process and a violation of the rights of the applicant under section 7 of the *Charter*, in the light of the measures taken by the chain of command toward LS Donnelly immediately further to the alleged incident of 24 January 2009?

[32] Concerning the remedy, if the court comes to the conclusion that there is a violation of the applicant's rights under the *Charter*, what would be the appropriate one in accordance with application of subsection 24(1) of the *Charter*?

THE ANALYSIS

[33] Subsection 11(h) of the *Charter* reads as follows:

> **"**Any person charged with an offence has the right
>
> *(h)* if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

[34] As a matter of introduction, it would be good to remind ourselves what was the conclusion of the Supreme Court of Canada on the application of section 11 of the *Charter*. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, Judge Wilson said, at paragraph 16, on behalf of the majority:

> The rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted.

[35] Then, in *Wigglesworth*, a test was set by the court for the application of subsection 11(h) of the *Charter*, as confirmed later in *R. v. Shubley*, [1990] 1 S.C.R. 3, at paragraph 25:

> The Court held that the criminal proceedings were not barred. Wilson J., writing for the majority, formulated two tests for determining whether prosecution is barred by s. 11: an offence falls under s. 11(*h*) if the proceedings are, by their very nature, criminal proceedings, or if the punishment invoked involves the imposition of true penal consequences.

[36] As mentioned by the court in *Shubley* at paragraph 34, it is not the nature of the act which gave rise to the proceedings that must be the subject of the analysis of this court, but the nature of the proceedings themselves.

[37] Was the decision process that led PO2 Dain to schedule LS Donnelly more often as Boatswain's Mate and for the lockup duty for the week of 26 January 2009 during normal working hours a criminal proceeding?

[38] The evidence discloses that the nature of PO2 Dain's decision essentially aimed the professional conduct of LS Donnelly as a sailor, considering the fact that attitude was a main concern. The specific decision process used by PO2 Dain or the chain of command was not established by the applicant, nor by the respondent. However, it is clear from the evidence adduced that the applicant did not go through a process of "a public nature, intended to promote public order and welfare within a public sphere of activity," as stated in *Wigglesworth* at paragraph 23. It is also clear that there was no judicial process that resulted in such decision. Considering the facts and circumstances, it appears to the court that the decision made by PO2 Dain was more of an administrative nature and could be the subject of the grievance process under Chapter 7 of the QR&Os.

[39] As stated by Military Judge Barnes in his finding for the Court Martial of *R*. v. *McCallum*, 1996 SCM 25, there is nothing precluding a supervisor in the Canadian Forces, especially when he has no legal authority to make findings and impose punishments pursuant to the Code of Service Discipline, to require from a subordinate to perform a normal task more often than usual during a normal day of work if the professional conduct of such individual is at stake. As I concluded above, such process is of an administrative nature and must be dealt with accordingly. I would add also that PO2 Dain was not a delegated officer or commanding officer empowered to impose minor punishments under Chapter 108 of the QR&O because of his rank, but he was a supervisor of LS Donnelly.

[40] Then, I conclude that the process that led PO2 Dain to schedule LS Donnelly more often as Boatswain's Mate and for the lockup duty for the week of 26 January 2009 during normal working hours was not a criminal proceeding

[41] Did the decision of PO2 Dain to schedule LS Donnelly more often as Boatswain's Mate and for the lockup duty for the week of 26 January 2009 during normal working hours involve the imposition of true penal consequences?

[42] In *Wigglesworth*, at paragraph 24, Judge Wilson has provided the meaning of the expression "true penal consequence":

> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

[43] The applicant suggested to the court that because LS Donnelly was scheduled more often as Boatswain's Mate and for the lockup duty for the week of 26 January 2009 during normal working hours by PO2 Dain, then it amounts to a minor punishment that could be imposed by a service tribunal as listed at section 139 of the *NDA*.

[44] Let me say first that PO2 Dain, as I expressed it earlier, has no authority to make finding and impose a punishment in accordance with the Code of Service Discipline. Moreover, the applicant was subject to an administrative measure taken in light of his professional conduct as a sailor. Also, it was never established on a balance of probabilities that this measure was in relation with the fact that he refused to show up as order to do so by his superior, or because he was absent from his brow duty shift. Disobedience to an order from a superior officer is objectively more serious than an AWOL. Establishing that would have been of interest for the court in its determination about the existence of true penal consequences.

[45] At any time during the week of 26 January 2009, the applicant was not deprived of his liberty because of the tasking he received or he was not in a situation where he had to pay some sort of punitive fine in relation with the alleged incident of 24 January 2009. The measures taken by PO2 Dain appear to the court to be commensurate with the goal of reminding subordinates about the importance for sailors to act in accordance with all Canadian Forces members' principles and obligations, such as serve Canada before self and responsibility.

[46] Then, I conclude that the decision of PO2 Dain to schedule LS Donnelly more often as Boatswain's Mate and for the lockup duty for the week of 26 January 2009 during normal working hours did not involve the imposition of true penal consequences.

[47] I would like to add that this matter was dealt with at a very low level in the chain of command of the ship, keeping the issue raised by the alleged incident of 24 January 2009 at the NCIOP section level. Never were the authorities responsible for discipline within the Combat Department, which includes the NCIOP section, made aware of the

immediate measures taken on LS Donnelly by his superior. The approach taken made it more a private matter than something of a public nature as defined in *Wigglesworth*.

[48] Now, concerning the two weeks made by LS Donnelly at the Supply Department, I could not see how the process that brought PO1 Sheehan to make such decision could be the equivalent of criminal proceedings. The latter made his decision through the normal administrative procedure that a superior will follow in order to choose the sailor that will be sent in response to the specific request made by the Supply Department. Also, the fact that LS Donnelly was sent specifically as a response to a request made by the Supply Department falls short from being a true penal consequence in relation with the alleged incident of 24 January 2009. The explanations provided by PO1 Sheehan support clearly that several factors, including the attitude of the applicant, were considered to make such decision. Moreover, the evidence demonstrated that it was not unusual for LS Donnelly to be employed in some other departments on the ship previously and after the alleged incident of 24 January 2009. Reality is, that for people in the Ccombat Department on a war ship, there is less to do on shore than at sea. It is the reason why helping other departments is part of the sailor's routine in port.

[49] It is my conclusion that the applicant has not established on a balance of probabilities that his right to not be tried and punished a second time for the same offence under subsection 11(h) of the *Charter* was violated.

[50] Subsection 11(d) of the Charter reads as follows:

> **"**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

[51] As established in the Supreme Court decision in *R. v. Pearson*, [1992] 3 S.C.R. 665, section 11(*d*) of the *Charter* creates a procedural and evidentiary rule which operates only at the trial, requiring the prosecution to prove the guilt of the accused beyond a reasonable doubt. Reality is that this section of the *Charter* would find application only once a person has been charged.

[52] No evidence has been adduced by the applicant in order to support that he would not benefit, during the current trial, of a reasonable doubt because of the measures taken by his superior immediately following the alleged incident of 24 January 2009. Also, the applicant is not raising the issue of impartiality and independence of the tribunal or the fact that he will not have a fair and public hearing.

[53] Essentially, the applicant is requesting this court to make a decision on the application of subsection 11(d) of the *Charter* on a matter for which he considers having been punished without being tried in relation to the measures taken against him by his

superiors immediately following the alleged incident of 24 January 2009. This court cannot make such decision, considering that subsection 11(d) of the *Charter* only applies to the charges on the charge sheet for which this court was convened.

[54] Moreover, the applicant failed to demonstrate on a balance of probabilities that the measures taken by PO2 Dain, further to the alleged incident involving LS Donnelly on 24 January 2009, would impact on the application of the presumption of innocence on the actual trial, the fairness of it, or the impartiality and independence of the current court martial.

[55] Finally, it is clear that there was no charge laid against LS Donnelly prior to the ones the court is dealing with and in relation with the same alleged incident of 24 January 2009.

[56] Then, it is the conclusion of the court that the right of the applicant to be presumed innocent until proven guilty according to the law for these proceedings pursuant to subsection 11(d) of the *Charter* was not violated.

[57] 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.

[58] The conduct of the prosecution when prosecuting an individual may be subject to a careful analysis. As held by the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paragraph 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*. (…) 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.

[59] 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 McLachlin 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.

[60] The burden is on 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*. To this end, I must first determine the exact nature of the actions taken by the prosecution, namely the chain of command, in respect of LS Donnelly following the alleged incident of 24 January 2004. I will then be able to determine whether the proceedings before this 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.

[61] In my analysis of a violation under subsection 11(h) of the *Charter*, I have previously made the determination that the actions of the chain of command were more of an administrative nature, because it is within the prerogative of a superior in the Canadian Forces to compel a subordinate to perform some tasking in a repetitive manner to reinforce the necessity of discipline.

[62] The learning and the application of discipline as part of a sailor's life aboard a ship 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 more 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. 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.

[63] 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

[64] 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 a crucial and essential aspect of military activity in the Canadian Forces.

[65] Having said that, it is my conclusion that the applicant has not demonstrated on a balance of probabilities that the proceedings of this court martial are oppressive or vexatious, because some actions were immediately taken by his superior further to the alleged incident of 24 January 2009. The applicant failed to demonstrate that the actual proceedings contravene our fundamental notions of justice and thus undermines the integrity of the judicial military process. I don't deny the fact that LS Donnelly felt punished for what he allegedly did on 24 January 2009 by being put more often on duty watch and for being tasked on lockup duty for the week of 26 January 2009, but this context does not result in making the actual proceedings oppressive or vexatious to the extent that they would constitute an abuse of process. For the 2 weeks he spent at the supply department, there is nothing in the evidence that supports the fact that he was specifically tasked there as a specific punishment in relation with his alleged misconduct.

[66] Then, I conclude that the decision of the prosecution to prefer charges against the applicant and proceed with them before a court martial does not constitute an abuse of process and a violation of the rights of the applicant under section 7 of the *Charter*, in the light of the measures taken by the chain of command toward LS Donnelly immediately further to the alleged incident of 24 January 2009.

[67] Considering that the court came to the conclusion that there is no violation of the rights of the applicant under the Charter, then it is not necessary to proceed with the analysis of the appropriate remedy under subsection 24(1) of the *Charter*.

CONCLUSION

[68] The application made by the accused for a stay of proceedings of this court martial under subsection 24(1) the *Charter* for a violation of his rights under subsections 11(h), 11(d) and section 7 of the *Charter* is accordingly dismissed.

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

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