



COURT MARTIAL

Citation: *R v Hunter*, 2012 CM 4001

Date: 20120124

Docket: 201130

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.D. Hunter, Applicant

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR PLEA IN BAR OF TRIAL

(Orally)

[1] The accused, Corporal Hunter, is charged with having used a computer belonging to the Department of National Defence for a use contrary to Defence Administrative Orders and Directives or in the alternative used a Land Force Information Systems asset to perform unauthorized task, contrary to annex B of the Land Force Information Security Orders. He is charged under section 129 of the *National Defence Act*; that is to say, conduct to the prejudice of good order and discipline.

[2] The accused has made an application under subparagraph 112.05(5)(b) of the *Queen's Regulations and Orders for the Canadian Forces* objecting to the court proceed with the trial with respect to the charges on the basis that he has already been tried and convicted of these charges. The accused requests the proceedings on the charges be stayed.

[3] The evidence consisted of the testimony of Master Warrant Officer (retired) Murphy, Corporal Hunter and Warrant Officer (retired) Cochrane and of two exhibits, Exhibit M1-2, the notes of the telephone interview of Major Ethier by Major Rawal and Exhibit M1-3, an email sent by Master Corporal LeBlanc. The court took judicial notice of the facts and matters contained in Military Rule of Evidence 15. The court also took judicial notice under Military Rule of Evidence 16(2)(a) that there does exist unit discipline or sergeant major discipline, in that senior NCOs at different rank levels will at time exercise a form of discipline which means that they might impose some form of punishment onto their subordinates to ensure discipline reigns within the unit or to attempt to correct conduct that is not the conduct one wishes to have in the unit.

[4] Corporal Hunter testified he gathered information on a vehicle using the New Brunswick Motor Vehicle Databank. Corporal Hunter did this to assist a commercial enterprise. Warrant Officer (retired) Cochrane testified Corporal Hunter told her he had gathered the information for his father-in-law. Corporal Hunter did not try to access SAMPIS or CPIC.

[5] Corporal Hunter reported himself to Warrant Officer Cochrane after a conversation with his peers. Warrant Officer Cochrane informed Master Warrant Officer Murphy who asked her to verify the relevant documents to determine if SOPs or rules had been breached. Master Warrant Officer Murphy was the Canadian Forces Base Gagetown MP detachment Sergeant Major and he was the acting OC on that specific day. Master Warrant Officer Murphy concluded that Corporal Hunter had not breached any SOP or other rule but that his actions were still unacceptable since it involved using the motor vehicle database for personal reasons and not for military police duty reasons.

[6] Corporal Hunter was marched into Master Warrant Officer Murphy's office by Warrant Officer Cochrane. Master Warrant Officer Murphy explained to Corporal Hunter that he had committed an error and that he would be punished by being awarded two days of extra duty. Corporal Hunter had to move furniture and filing cabinets and clean the guardhouse on one day and he had to complete a 12-hour patrol shift on the second day of his extra duties. He performed these extra duties when he was not scheduled to work. Sometime later, the National Investigation Service investigated this matter and charges were laid.

[7] Section 66(1)(b) of the *National Defence Act*¹ provides that

- (1) A person may not be tried or tried again in respect of an offence or any other substantially similar offence arising out of the facts that gave rise to the offence if, while subject to the Code of Service Discipline in respect of that offence, or if, while liable to be charged, dealt with and tried under the Code in respect of that offence, the person

¹ R.C.S., 1985, c. N-5

- (b) has been found guilty by a service tribunal, civil court or court of a foreign state on a charge of having committed that offence and has been punished in accordance with the sentence.

[8] Section 2 of the *National Defence Act* defines civil court as "a court of ordinary criminal jurisdiction in Canada and includes a court of summary jurisdiction" and service tribunal as "a court martial or a person presiding at a summary trial". A "charge" is a formal accusation that a person subject to the Code of Service Discipline has committed a service offence. A charge is laid when it is reduced in writing in Part 1 of the Record of Disciplinary Proceedings and signed by a person authorized to lay charges (see art.107.015 of the QR&O).

[9] It is clear from the evidence that Master Warrant Officer Murphy did not charge Corporal Hunter. There is no evidence before this court that Corporal Hunter was tried by a service tribunal, civil court or court of a foreign state in respect of an offence or any other substantially similar offence arising out of the facts that gave rise to the offences before this court.

[10] Corporal Hunter was given two days of extra duties but he was not punished in accordance with a sentence. He received a form of informal punishment that was deemed to be appropriate by Master Warrant Officer Murphy at that time based on the information Master Warrant Officer Murphy had gathered and received. Counsel for Corporal Hunter indicated that the punishment was not a formal punishment as in the case of a court martial or a summary trial. The informal punishment awarded by the detachment sergeant major is not the type of punishment envisioned by section 66 of the *National Defence Act*. Section 66 pertains to sentences imposed by service tribunals, a civil criminal court or the criminal court of a foreign state.

[11] Section 11(h) of the *Charter of Rights and Freedoms* provides that

- 11. [Every] 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.

Section 66 of the *National Defence Act* basically provides the same rights as found in section 11(h) of the *Charter*.

[12] Counsel for Corporal Hunter argues that the test in the *Wigglesworth* decision (*R v Wigglesworth*, [1987] 2 SCR 541) does not apply in the present case since the offences before this court are not criminal in nature as was the case in *Wigglesworth* and in *R v Shublely*, [1990] 1 SCR 3. While it is true the facts in the *Wigglesworth* and in the *Shublely* decisions are not identical to the facts in the present case, I find the test set out in the *Wigglesworth* decision can still be applied to our case. This test is associated with the right now found at section 11(h) of the *Charter of Rights and Freedoms*.

[13] The first question of the *Wigglesworth* test is whether the proceedings in question are by their nature criminal proceedings. In a military context, one would have to ask if the proceedings in question are by their nature military justice proceedings. Corporal Hunter was not charged by Master Warrant Officer Murphy and he was not tried summarily by Master Warrant Officer Murphy. Corporal Hunter was not the subject of any formal disciplinary process as found in the Code of Service Discipline. He was the subject of an informal process of unit discipline. The discovery of the error, the investigation by Master Warrant Officer Murphy and Warrant Officer Cochrane, the marching in of Corporal Hunter in Master Warrant Officer Murphy's office and the awarding of two days of extra duties to Corporal Hunter by Master Warrant Officer Murphy all occurred within the same day and happened in relative isolation. While an email was subsequently sent to each member of the detachment advising them to only use the SAMPIS, CPIC and DMV for police activities, this email did not publicize the meeting between Master Warrant Officer Murphy and Corporal Hunter. I find the actions taken by Master Warrant Officer Murphy were not proceedings that can be described as being criminal or military justice proceedings.

[14] The second question of the test is whether the punishment imposed on Corporal Hunter involved the imposition of true penal consequences. True penal consequences was described as "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" (see para 24 of *Wigglesworth*). In our case, Corporal Hunter was awarded two days of extra duty. He had to work during two days when he would have otherwise been off duty. He did lose two days of his free time. This was his punishment. This type of punishment does not amount to imprisonment or a fine.

[15] I find the provisions of section 11(h) of the *Charter* do not apply in this case.

FOR THESE REASONS:

[16] This plea in bar of trial is not allowed.

Counsel:

Major P. Rawal and Lieutenant(N) C.J. Colwell, Director of Military Prosecutions
Counsel for Her Majesty the Queen

Mr D. Bright, Directorate of Defence Counsel Services
Counsel for Corporal D.D. Hunter