



COURT MARTIAL

Citation: *R v Hunter*, 2012 CM 4002

Date: 20120131

Docket: 201130

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.D. Hunter, Accused

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

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] The accused, Corporal Hunter, is accused of having used a computer belonging to the Department of National Defence for a use contrary to Defence Administrative Orders and Directives 6001-1 or in the alternative used a Land Force Information Systems asset to perform an 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.

THE APPLICABLE LAW

[2] Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[3] It is fair to say that the presumption of innocence is most likely the most fundamental principle in our Canadian law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt under the Code of Service Discipline, as with cases dealt under Canadian criminal law, every person charged with an offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[4] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[5] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice.

[6] In *R v Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[7] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, the Supreme Court of Canada held that:

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Corporal Hunter, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents,

photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[9] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[10] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe, a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably, more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[11] The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant, or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts?

[12] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well taint a witness's entire testimony.

[13] The court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[14] The court has focused its attention on the test found in the Supreme Court of Canada decision of *R v W.(D.)*, [1991] 1 SCR 742. This test goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[15] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court. The evidence before this court martial is composed essentially of the following: judicial notice, the testimony of witnesses, admissions and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. Ten exhibits were produced by the prosecution and defence counsel presented two exhibits. Admissions are found at Exhibits 3 and 4. The prosecution presented eight witnesses during the trial. Mr Kemp and Mr Cooper were commissionaires employed by 3 MP Platoon at the time of the alleged offences. Master Corporal Sheppard was a computer technician posted to CFB Gagetown at the time of the alleged offences. Corporal Stewart, Master Corporal Calleja, Master Seaman Smith and Corporal McDougall were members of 3 MP Platoon at the time of the alleged offences. Sergeant Shannon was a member of the Canadian Forces National Investigation Service Atlantic Region detachment at the time of the alleged offences. Master Warrant Officer (retired) Murphy, the 3 MP Platoon Sergeant Major at the time of the alleged offences, Corporal Hunter, Warrant Officer (retired) Cochrane, a member of 3 MP Platoon at the time of the alleged offences and Mrs Hunter were called to testify by defence counsel. Master Warrant Officer (retired) Murphy, Warrant Officer (retired) Cochrane, Corporal Hunter testified during a plea in bar motion and that evidence is considered during the main trial as requested by defence counsel and concurred by prosecution. Every military witness except Master Corporal Sheppard is or was a military police member.

[16] The particulars of the first charge read as follows:

"In that he, between January 2010 and March 2010, at or near Canadian Forces Base Gagetown, New Brunswick, used a computer belonging to the Department of National Defence for a use contrary to Defence Administrative Orders and Directives 6001-1."

Charge No. 1 is alternative to the second charge and charge No. 2 is alternative to the first charge. The prosecution had to prove the following essential elements for this offence, the first charge, beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Corporal Hunter used a computer;
- (c) that the computer belonged to the Department of National Defence;
- (d) the standard of conduct required, specifically DAOD 6001-1;
- (e) that Corporal Hunter knew or ought to have known the standard of conduct required;

- (f) that Corporal Hunter's use of the computer constitutes a breach of the standard of conduct required;
- (g) that the conduct was intentional; and
- (h) the prejudice to good order and discipline resulting from the conduct.

[17] The particulars of the second charge read as follows:

"In that he, between January 2010 and March 2010, at or near Canadian Forces Base Gagetown, New Brunswick, used a Land Force Information Systems asset to perform an unauthorized task, contrary to Annex B of the Land Force Information Security Orders, dated 13 December 2002."

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Corporal Hunter used a Land Force Information Systems asset;
- (c) the standard of conduct required, specifically Annex B of the Land Force Information Security Orders, dated 13 December 2002;
- (d) that Corporal Hunter knew or ought to have known the standard of conduct required;
- (e) that Corporal Hunter's use of the Land Force Information Systems asset to perform an unauthorized task constitutes a breach of the standard of conduct required;
- (f) that the conduct was intentional; and
- (g) the prejudice to good order and discipline resulting from the conduct.

[18] The identity of the offender and the time and place of both offences are not contested by defence counsel. It is not contested that Corporal Hunter did intentionally use a computer belonging to the Department of National Defence to search the New Brunswick Department of Motor Vehicles (DMV) database to obtain certain information on license plates. This computer is also a Land Force Information Systems asset. The evidence before this court proves these elements of the offences beyond a reasonable doubt.

[19] It is also not disputed by defence counsel that Corporal Hunter obtained this information for his future father-in-law and that this activity was not performed for official military police duties. The evidence also clearly proves these facts.

[20] What is the standard of conduct required of Corporal Hunter? The prosecutor submits that Corporal Hunter's search for personal information on the DMV database contravened DAOD 6001-1 because this use was an unauthorized use since it would reflect discredit upon the Department of National Defence or the Canadian Forces. He further argued this use was a prohibited use under this DAOD since it is contrary to a provincial law; specifically subsection 6(2) of the New Brunswick *Protection of Personal Information Act*. The prosecutor also submits the use of the computer is in contravention of Annex B to the Land Force Information System Security Orders because paragraph 3 of that annex stipulates that Land Force Information System and assets shall only be accessed and used to perform authorized tasks.

[21] Did Corporal Hunter know or ought to have known the standard of conduct required? Corporal Hunter was aware of the contents of DAOD 6001-1. He completed and signed Annex B to 2100-1 (B Ops O) 29 June 2006, CFB Borden Information Systems\Electronic Network User Access Agreement (see Exhibit 5) on 7 April 2008. In it, he acknowledged that he was aware and understood the definitions of authorized use, official use, unauthorized use and prohibited use in DAOD 6001-1. This form also stipulates that DND Information Systems\Electronic Networks shall only be used for "official and/or authorized use". Corporal Hunter also initialled these sections of that form.

[22] Exhibit 6 is a copy of Annex B to the LF IS Security Orders. Corporal Hunter signed this form on 20 October 2008. He acknowledged that he had read and understood the principles and regulations of the LF IS Orders listed in that annex and that he was aware of his responsibilities as a LF IS User.

[23] Did Corporal Hunter's conduct constitute a breach of the standard of conduct required? Before I move on to that point, the evidence proves beyond a reasonable doubt that Corporal Hunter knew or ought to have known the standard of conduct required for charge No. 1 and for charge No. 2.

[24] Did Corporal Hunter's conduct constitute a breach of the standard of conduct required? Mr Peters, Corporal Hunter's future father-in-law, was in the business of repossessing vehicles. Mr Peters provided Corporal Hunter with four New Brunswick license plate numbers and Corporal Hunter verified the addresses associated with these license plates. Corporal Hunter conducted searches on the DMV database to assist Mr Peters locate these vehicles (see Exhibit 3).

[25] The use of SAMPIS and CPIC appears to be well understood by every military police witness that appeared before this court, including Corporal Hunter. They all referred to documentation that provided direction on the use of SAMPIS and CPIC. The DMV database is also a tool used by military police members in the execution of

their duties. Each military police witness described how they used this database to gather information on a vehicle or on a person during a traffic stop or during an investigation.

[26] Exhibit 11 is the Acknowledgement of Restrictions Respecting the Handling of the New Brunswick Motor Vehicle Licensing Terminal, Material, Records and Information. This document was created after the incident involving Corporal Hunter. This document seeks to clarify the authorized use of that system. It does state that DMV information will not be disclosed to unauthorized persons but it does not indicate who is authorized to receive such information. Interestingly enough, it does not clearly state that the DMV computer may only be used for official military police purposes. As is often the case, procedures or guidelines are put in place to prevent the re-occurrence of an incident and to permit the authorities to deal efficiently with such re-occurrences.

[27] Exhibit 10 is an email concerning searches on the SAMPIS, CPIC and DMV sent to the members of the Gagetown guardhouse after Corporal Hunter's meeting with Master Warrant Officer Murphy. It reads as follows:

"Troops Pay Attention. It has been brought to my attention, that some members are conducting searches that are unrelated to police activity. You all know the policy with regard to this... need I say more. Do not get caught doing personal searches on these avenues."

While not necessarily the best example on how to communicate clear and precise orders to subordinates, i.e. "You all know" and "need I say more," it would appear from the evidence of Master Corporal Calleja and Master Seaman Smith that it was understood that members of the guardhouse could not conduct personal searches on the databases as opposed to not getting caught doing such personal searches.

[28] It would appear that, since common sense and experience vary from one individual to another, explicit directions had to be promulgated within the guardhouse to establish a norm concerning the use of the DMV database.

[29] Corporal Hunter testified during the plea in bar motion. He testified he had told Warrant Officer Cochrane that he had called a commissionaire and had asked the commissionaire information about New Brunswick license plates. Corporal Hunter was interviewed by Sergeant Shannon, a CFNIS investigator, on 21 April 2010 (see Exhibit 12), approximately 10 weeks after his meeting with Master Warrant Officer Murphy. During that interview, he stated that he came into the dispatch office and performed the search himself and that the dispatcher was present. Corporal Hunter has thus provided two different stories to authorities and the court has not been provided any evidence that would explain the reason for these different versions.

[30] Corporal Hunter also stated in his interview with Sergeant Shannon that he wanted to help his future father-in-law and that he would not have done it for "someone off the street." He stated he realized after the fact that he might have done something

wrong. When told by Sergeant Shannon the information on the DMV computer was protected information such as the information found on the CPIC terminal, Corporal Hunter replied that he did not know at the time and that he still did not see it as that. He also stated he had no issues with the approach taken by Master Warrant Officer Murphy because he knew he had done something wrong.

[31] I do not find Corporal Hunter to be credible. While it is true he did not attempt to hide his actions, one does not have to hide his actions to be found guilty of an offence. It is clear from the testimony of each witness that the DMV computer could only be used for official military police duties. Contrary to the views of defence counsel, I do not find Corporal Hunter's conduct to be exemplary. Corporal Hunter approached Warrant Officer Cochrane because he felt compelled to do so after his conversations with two of his fellow corporals at the time namely, Corporal Calleja and Leading Seaman Smith. Corporal Hunter knew it was wrong to obtain the information on the DMV for unofficial purposes. He knew he had done something wrong before he met Master Warrant Officer Murphy; he just does not want to admit it.

[32] To convict an accused, a court must determine whether the prosecutor has proven the essential elements of the offence beyond a reasonable doubt. In the present case, the prosecutor alleges Corporal Hunter's use of the DMV computer contravened DAOD 6001-1 in two manners. Firstly, this was an unauthorized use since it would reflect discredit upon DND or the CF. Secondly, this use was a prohibited use since that it was contrary to a provincial law; specifically subsection 6(2) of the New Brunswick *Protection of Personal Information Act*.

[33] The prosecutor has stated there is no concrete evidence that Corporal Hunter was paid for this information and he further stated that the issue of money is irrelevant and not an element of the offence. As such, I will not consider any possible remuneration as a relevant issue in determining whether Corporal Hunter is guilty or not guilty of an offence.

[34] The Oxford Concise Dictionary 10th Edition defines "discredit" as "loss or lack of reputation". There has been no evidence presented to the court concerning the loss of reputation by the Department of National Defence or the CF as a consequence of Corporal Hunter's unauthorized search of the DMV database. While the evidence indicates the DMV terminal's username is associated with the CFB Gagetown guardhouse, simply stating that fact is not enough.

[35] This is not the case of a police officer obtaining information for a criminal organisation or a terrorist organisation. It is not the case of a police officer systematically abusing an official database for personal gain. It is the case of a junior member of the military police misusing an official database and the immediate reaction of his peers and superiors.

[36] I find the prosecutor has not presented this court with evidence that proves beyond a reasonable doubt that the unauthorized use of the DMV computer by Corporal

Hunter brought discredit upon DND or the CF, I also find that a reasonable person apprised of all the facts would conclude Corporal Hunter's chain of command had taken the necessary measures to protect the reputation of the Canadian Forces.

[37] The prosecutor also alleges the use was a prohibited use since it is contrary to a provincial law, in this case subsection 6(2) of the New Brunswick *Protection of Personal Information Act*. Subsection 6(2) reads as follows:

A person to whom a public body discloses personal information on terms that limit the further use or disclosure of the information, and who wilfully contravenes those terms, commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category F offence.

[38] The prosecutor has provided the court with a printed copy of this provincial legislation that appears to have been printed on 21 April 2010 and that is indicated as being consolidated to 31 March 2001. There is no evidence before this court that the New Brunswick Department of Motor Vehicles, if that is the correct name for that department, is a public body as defined at section 1 of the *Protection of Personal Information Act*.

[39] The prosecutor submits that the court may accept the testimony of the military police witnesses that one could only use this computer for official purposes as the terms that limit its use. The prosecutor would thus have the court conclude that Corporal Hunter's use of the DMV computer is contrary to subsection 6(2) of the *Protection of Personal Information Act*.

[40] There is no evidence that Corporal Hunter has been convicted of an offence under the *Criminal Code of Canada*, any other federal statute or regulation or the *Protection of Personal Information Act* in relation to his use of the DMV computer. The prosecutor has not presented any evidence pertaining to the "terms that limit the further use or disclosure of the information" provided by the DMV terminal that would have originated from the New Brunswick Department of Motor Vehicles. Based on the evidence before the court, I find the prosecutor has not proven beyond a reasonable doubt that Corporal Hunter's use of the DMV computer is a prohibited use as described in DAOD 6001-1.

[41] I will now examine whether the use of the computer is in contravention of Annex B to the Land Force Information System Security Orders. The prosecutor argued at length that paragraphs 2, 5, 6, 12 and 15 of Chapter 1 of the Land Force Information System Security Orders clearly support the principle that Land Force computers can only be accessed and used to perform authorized tasks.

[42] Paragraph 2 of Chapter 1 stipulates that "Users are only required to read Annex B IS Security Briefing for Users/Statement of Understanding and Compliance". This court has not been provided with any evidence that demonstrates that Exhibit 13, the Land Force Information System Security Orders, have ever been published by Corporal Hunter's Commanding Officer or have been brought to Corporal Hunter's attention (see

art 4.26 of the QR&O). Furthermore, it appears the prosecutor only obtained a copy of that document the evening before his last day of evidence. Therefore, the court finds that any mention of the contents of Exhibit 13 is totally irrelevant to the present case.

[43] The court allowed the defence to re-open its case and introduce a Line Check Search result report obtained by Corporal Hunter from the Atlantic Canada On-Line internet site (see Exhibit 14). Upon payment of a nine-dollar fee, Corporal Hunter entered the Vehicle Identification Number (VIN) of his vehicle and obtained certain information associated to that VIN; that is to say, the registration history of the vehicle and the name, address and date of birth of the debtor. The DMV terminal found at the guardhouse provides much more information on a vehicle or the owner of the vehicle than what is provided by the Atlantic Canada On-Line internet site. Master Corporal Calleja and Mr Cooper testified this terminal provides information on the driver's license, such as whether it is suspended or expired, and the history of traffic violations. They testified that only authorized persons, military police members and commissionaires could access that terminal and only for official military police purposes. It is clear that the Atlantic Canada On-Line internet site provides a service to citizens but it does not change how one must view the DVM terminal and its purpose in light of the information it provides and the persons who are authorized to access that information.

[44] Paragraph 3 of Annex B stipulates that "LF IS and assets shall only be accessed and used to perform authorized tasks" (see Exhibit 6). Corporal Hunter verified the license plates provided by his father-in-law for his father-in-law. This verification had nothing to do with his duties as a military police member. He abused his privileged position as a peace officer to access a government databank for the benefit of an individual. Any reasonable person using his or her common sense can clearly come to this conclusion without needing a specific document on that issue. Master Warrant Officer Murphy, Warrant Officer Cochrane, Master Corporal Calleja, Master Seaman Smith, Corporal Stewart and Sergeant Shannon all came to that conclusion. Corporal Hunter would have the court believe he did not until his meeting with Master Warrant Officer Murphy. As stated previously, the court does not believe he did not know he was doing something wrong when he obtained that information.

[45] Based on the evidence before this court, I find the prosecutor has proven beyond a reasonable doubt that Corporal Hunter's use of the DMV computer is a breach of Annex B of Land Force Information System Security Orders.

[46] What is the prejudice to good order and discipline resulting from the conduct? Paragraph 2 of section 129 of the *National Defence Act* reads as follows:

An act or omission constituting an offence under section 72 or a contravention by any person of

- (a) any of the provisions of this Act,
- (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or

- (c) any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[47] Section 129 clearly sets out that the contravention of any instruction or order published for the general information and guidance of the CF or any part thereof is deemed to be prejudicial to good order and discipline. The prosecution need only prove the contravention to establish the prejudice to good order and discipline. Annex B of Land Force Information System Security Orders is an instruction published for the general information and guidance for the Army. The court has already found the prosecution has proven beyond a reasonable doubt that Corporal Hunter contravened Annex B of Land Force Information System Security Orders.

FOR THESE REASONS, THE COURT:

[48] **FINDS** Corporal Hunter not guilty of charge No. 1.

AND

[49] **FINDS** Corporal Hunter guilty of charge No. 2.

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