Citation: *R. v. Ex-Corporal D.D. Beek,* 2005CM32

Docket: C200532

STANDING COURT MARTIAL
CANADA
EDMONTON, ALBERTA
1 COMBAT ENGINEER REGIMENT

Date:24 September 2006

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

HER MAJESTY THE QUEEN
v.
EX-CORPORAL D.D. BEEK

DECISION ON APPLICATION TO QUASH SUMMONSES

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[1] This is an application to quash two summonses to witnesses issued under the *National Defence Act*.

[2] Former Corporal Beek is charged with a number of offences contrary to the *Controlled Drugs and Substances Act* which are made service offences by section 130 of the *National Defence Act*. At his trial by Standing Court Martial, and prior to plea, he applies by written Notice of Application for a declaration that section 165.14 of the *National Defence Act* is of no force and effect by reason of sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and for an order quashing the convening order in this case, or in the alternative, a stay of proceedings.

[3] Section 165.14 of the *NDA* authorizes the Director of Military Prosecutions (DMP) to determine:

> ... the type of court martial that is to try the accused person....

That is, whether a Standing, a Disciplinary, or a General Court Martial. The determination is to be made at the time the DMP prefers a charge for trial at court martial.

[4] The written Notice of Application is marked as Exhibit M1-1 in these proceedings. It is dated 9 March 2006 and was made returnable before this court on 23 May 2006 at Edmonton.

[5] On 10 May 2006, defence counsel caused summonses under section 249.22 of the *National Defence Act*, to be served upon two witnesses from whom he required viva voce evidence on the application. The witnesses are Captain(N) MacDougall, who is the Director of Military Prosecutions, and Lieutenant-Colonel Fullerton, who is the Deputy Director of Military Prosecutions.

[6] When the court convened on 23 May 2006 as scheduled, Mr. Barber, a counsel with the federal Department of Justice, appeared and advised the court that he appeared on behalf of the Attorney General of Canada, and that he was instructed to apply to this court to quash the summonses to Captain(N) MacDougall and Lieutenant-Colonel Fullerton. Over the objection of defence counsel, I ruled on 25 May 2006 that I would hear Mr. Barber's application to quash the summonses.

[7] On 25 May and 5 June, I heard argument on the application, and on 6 June, I ruled that the summonses to the two named witnesses would be quashed. At that time I undertook to give reasons for my ruling. These are those reasons.

[8] The court can compel the evidence of any witness:

> It is the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law.[1]

[9] In criminal proceedings either party may obtain a subpoena to compel the attendance of necessary witnesses. The power is found in section 698 of the *Criminal Code* which reads in subsection (1):

> 698. (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

[10] In proceedings under the Code of Service Discipline contained in the *National Defence Act* a witness may be summoned to appear before a court martial under the terms of section 249.22(1) which reads:[2]

> **249.22** (1) Every person required to give evidence before a court martial may be summoned by a military judge, the Court Martial Administrator or the court martial.

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[1] Per Smith M.R. in *Butler v. Moore* quoted in Mewett and Sankoff, *Witnesses*, 2005, p.5-2.
[2] See Queen's Regulations and Orders for the Canadian Forces, Art.111.09

[11] There is no statutory or regulatory standard governing the issuance of a summons to a witness under the *NDA*, and in practice a summons is ordinarily issued to a witness by the Court Martial Administrator simply upon the request of a party. Nevertheless, it is obvious that the power to issue a summons to a witness exists for the purpose of obtaining the evidence of a witness that is relevant to an issue before the court, and cannot be exercised arbitrarily or for an improper purpose.

[12] A subpoena under the *Criminal Code* will be quashed unless it is made to appear that the witness is likely able to give material evidence.[3] "Material" simply means "relevant" evidence.[4] Once the subpoena is challenged the onus is upon the party who obtained it to establish, on a balance of probabilities, that the witness is likely to give material evidence.[5]

[13] In my view the test for the quashing of a summons to a witness under the *NDA* is the same as the test prescribed in section 698 of the *Criminal Code* for offences contrary to that statute. Counsel for the accused concedes in his written argument that the issue on this application to quash is whether the witnesses are likely to give material evidence.[6]

[14] In the course of his argument, counsel for the accused specified the areas in which he wishes to examine both witnesses. Those areas relate generally to the policies and practices of the DMP when deciding upon the type of court martial to be convened in a specific case, including any legislative policy or directives to the DMP, and the specific policies and considerations used within the Military Prosecution Service to determine what type of court martial is to be convened. As well, counsel wishes to explore whether the criteria used are subjective or objective, and whether there is a policy on offering the choice of type of court martial to an accused. In addition, counsel wishes to question the witnesses about a policy document called 16/06, Exhibit M1-5 before me, that apparently came into use after the present court was convened as a Standing Court Martial, any safeguards in place to prevent the misuse of the power, and any instructions to military prosecutors on the application of the new policy. Counsel wishes to enquire whether certain factors such as the likelihood of conviction, and the cost and convenience are considered, and how representations from an accused are evaluated by the prosecution. He wishes to know whether the new policy was applied in the present case, or to other cases that are presently in the system, and if not, why not. He also wishes to know whether the practice in other countries was considered in the development of the present policy, and the relevance, if any, of the rank of the accused, the seriousness of the offence and the penalty to be sought, and if relevant, how those factors are applied in coming to a determination under section

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[3] *R. v. Harris* (1994) 93 C.C.C. (3d) 478 (Ont. C.A.) leave to appeal to SCC refused.
[4] *R. v.Regan* (1997) 113 C.C.C. (3d) 237 (N.S.C.A.)
[5] *R..v. Yarema* (1996) 27 O.R. (3d) 177 (Ont. Gen. Div.)
[6] Exhibit M1-3, Defence Response to Application by DMP and DDMP to Quash Summonses, page 3

165.14.

[15] The anticipated evidence of Lieutenant-Colonel Fullerton is in the same areas as those I have listed. In addition, I am told by counsel that Lieutenant-Colonel Fullerton could give evidence of the basis upon which the decision to proceed by Standing Court Martial was made in the present case.

[16] It is not disputed that the proposed witnesses are knowledgeable in the areas of the proposed inquiry. But the issue is, are the areas of inquiry relevant to the issues raised in the constitutional challenge?

[17] Relevance is conditioned on the matters in issue as raised by the Notice of Application. In this case, the application relies upon the right to life, liberty and security of the person protected by section 7 of the *Charter*, and the right to a fair hearing guaranteed by section 11(f) of the *Charter*. Thus the essential issues are whether a principle of fundamental justice or the right to a fair hearing is violated by this statutory power. If a *Charter* violation is found, the applicant seeks an order quashing the Convening Order of this Court or a stay of proceedings. The issue here is whether the remedies sought are appropriate and just in all the circumstances.

[18] In support of the summonses in this case it is argued, citing ***Mackay v. Manitoba***,[7] that *Charter* violations should not be argued in a factual vacuum. In that case the Supreme Court of Canada was dealing with a provision of a Manitoba provincial statute that provided for the payment from public funds of a portion of election expenses if the candidate or party received a sufficient number of votes. It was argued that the funding of some political parties who obtained sufficient votes violated the right to freedom of expression guaranteed by section 2(b) of the *Charter*. The court noted that there was a complete absence of evidence as to the harmful effects, if any, upon the applicant's exercise of the freedom of expression as a result of the statutory provision in question, and declined to rule on the question of constitutional validity in the absence of evidence.

[19] In my view, the wide principle stated in *Mackay* does not apply to the present case. Here, there is no suggestion that the effects of the legislation upon the exercise of the *Charter*-guaranteed rights of the accused are in issue. And even if they were, it is not suggested that the proposed witnesses have any relevant evidence to offer on the point.

[20] I agree with the submission of counsel for the proposed witnesses that the policy of the DMP as to when and in what circumstances the DMP will choose one type of court martial over another is irrelevant to a determination as to whether the

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[7] [1989] 2 S.C.R. 357

power to decide conferred by section 165.14 is constitutionally valid.

[21] No administrative policy or practice, however fair in its application, could validate a statute the policy was designed to implement if the statute itself were unconstitutional as violating a *Charter*-guaranteed right. Thus, in *R. v. Smith*[8] the Supreme Court of Canada considered the *Charter*-guaranteed right not to be subjected to cruel and unusual punishment and struck down a provision of the *Narcotic Control Act* that provided for a minimum penalty of seven years imprisonment for the offence of importing a narcotic. Lamer J, as he then was, with whom Dickson CJC concurred, was especially concerned about the application of the minimum sentence to a hypothetical case in which a young first offender drives into Canada in possession of a single joint of marijuana who, under this provision, would be liable to such a grossly disproportionate sentence. The Crown sought to justify the legislative provision by arguing that in such circumstances the prosecution would exercise its discretion to prosecute only for a lesser offence and avoid the minimum sentence provision. Lamer J wrote, paragraph 68:

> 68. In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.
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> 69. In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act*, *1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.

[22] Conversely, no policy instrument or administrative practice, however vicious, arbitrary, unfair or unwise, would render an otherwise constitutional statutory provision invalid. Thus, in *R. v. Smythe*[9] the Supreme Court of Canada considered whether a provision of the *Income Tax Act* that empowered the Attorney General to elect under subsection 132(2) to proceed with tax evasion charges by way of indictment with a minimum penalty upon conviction of two months imprisonment was constitutionally valid. The accused challenged the statute under several provisions of the *Canadian Bill of Rights* that guaranteed the right to equality before the law. It was argued that the statute conferred an unfettered discretionary power upon the prosecution to decide the manner of prosecution and that there was no standard set out in the statute 'to guide or control this unfettered discretionary power" to treat different cases differently. Delivering the judgment of the Court, Fauteux CJC upheld the validity of

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[8] [1987] 1 S.C.R. 1045
[9] (1971) 3 C.C.C. (2d) 366 (SCC)

the statute, holding at page 370:

> In my opinion, appellant's views fail to recognize that the provisions of s. 132(2) do not, by themselves, place any particular person or class of persons in a condition of being distinguished from any other member of the community and that, applicable without distinction to everyone, as indeed they are, these provisions simply confer upon the Attorney-General of Canada the power of deciding, according to his own judgment and in all cases, the mode of prosecution for offences described in s. 132(1). Appellant's arguments also fail to recognize that *the manner in which a Minister of the Crown exercises a statutory discretionary power conferred upon him for the proper administration of a statute is irrelevant in the consideration of the question whether the statute, in itself, offends the principle of equality before the law.* (emphasis added)

[23] In my view the proffered evidence of the witnesses is irrelevant to the issue of whether section 165.14 of the *National Defence Act* violates either section 7 or 11(d) of the *Charter*. I am not satisfied that the evidence of these witnesses is likely material.

[24] The summons to Lieutenant-Colonel Fullerton is also resisted on the ground of privilege. Since I have found that the proffered evidence of the witness is irrelevant to the issues on this application, it is unnecessary to deal with the question of whether the evidence of this witness would be privileged.

[25] For these reasons, therefore, the summonses to both Captain(N) MacDougall and Lieutenant-Colonel Fullerton were quashed.

COMMANDER P.J. LAMONT, M.J.

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