

Citation: *R. v. Master Corporal W.B. Dunphy*, 2005CM53

Docket: C200553

**STANDING COURT MARTIAL
CANADA
ALBERTA
CANADIAN FORCES BASE/AREA SUPPORT UNIT EDMONTON**

Date: 14 February 2006

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

HER MAJESTY THE QUEEN

v.

**MASTER CORPORAL W.B. DUNPHY
(Accused)**

**DECISION RESPECTING AN APPLICATION MADE UNDER SUBPARA-
GRAPH 112.05(5)(e) OF THE QUEEN'S REGULATIONS AND ORDERS ON
AN ALLEGED OF THE RIGHT GUARANTEED BY 11(d) OF THE CANADIAN
CHARTER OF RIGHTS AND FREEDOMS.**

(Rendered Orally)

[1] In this Standing Court Martial, as a preliminary matter and prior to plea, the accused, by counsel, brings an application under Queen's Regulations and Orders article 112.05(5)(e) by written Notice of Application dated 21 November 2005 and signed by counsel, Major Thomas.

[2] The application, shortly put, challenges the constitutional validity of the Standing Court Martial system established under the *National Defence Act* on the basis that the tribunal is not an independent and impartial tribunal as guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms*.

[3] The application, as made to me, is similar to an application that was brought before me in the case of *Master Corporal Parsons* in Greenwood. In that case, Master Corporal Parsons was represented by Major Appolloni, who filed a Notice of Application in somewhat different terms to the Notice of Application that is before me, but essentially seeking the same relief. The application before me is marked as Exhibit M1-1.

[4] It is the present position of counsel on behalf of the applicant that the court should proceed by incorporating the record that was developed in the *Parsons* case into the proceedings involving Master Corporal Dunphy before me. By record of the case, I understand counsel to be referring to both the evidence that was led in the course of the application in the case of *Master Corporal Parsons*, as well as the submissions of counsel. Those submissions were made both in writing and orally.

[5] The prosecutor in the present case agrees with the defence suggestion that the record led in the *Parsons* case should simply be incorporated into the proceedings before me. I am told that both counsel have familiarized themselves with the course of proceedings in the *Parsons* case. I understand that it is the intention of counsel to avoid the inefficiencies which would be occasioned by having to rehear the evidence, which was largely documentary, in the *Parsons* case, as well as rehearing the argument that was addressed to me in that case by Major Appolloni on behalf of the defence, and by Major Holman on behalf the prosecution.

[6] I agree that proceeding in the manner suggested by counsel would avoid those inefficiencies that would necessarily be entailed by scheduling court time for the hearing of evidence which is bound to be the same as the evidence heard in the *Parsons* case, and by hearing the submissions which counsel have told me would be, in all respects, identical.

[7] In particular, counsel for the prosecution has explicitly and expressly foregone the right that the prosecution would have to mount a defence based upon section 1 of the *Canadian Charter of Rights and Freedoms*, knowing, as counsel now do, that my ruling was to find certain provisions of Queen's Regulations and Orders to be unconstitutional.

[8] As I indicated, I am content to proceed with this motion in the case of Master Corporal Dunphy in the manner suggested by counsel. In my view, a further notice to the Attorneys General of the application in this case is not required. I have required that the briefs of argument filed in the *Parsons* case be filed before me in the case of Master Corporal Dunphy, and both those documents have been, or copies of those documents, have been obtained by counsel and filed before me.

[9] Accordingly, in this case of Master Corporal Dunphy, I have concluded that the provisions of Queen's Regulations and Orders, dealing with the renewal of the appointments of military judges and the relief of military judges from the performance of military duties, under article 19.75, failed to respect the independence of the military judiciary required by section 11(d) of the *Charter*. There will, therefore, be a declaration to that effect. In those respects, therefore, the application of Master Corporal Dunphy succeeds. In all other respects the application fails and is dismissed.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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