Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140319

Docket: CMAC-562

Citation: 2014 CMAC 4

CORAM: SAUNDERS J.A.
DESCHÊNES J.A.
ROBERTSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN J.T. WRIGHT

Respondent

Heard at Halifax, Nova Scotia, on December 13, 2013.

Judgment delivered at Ottawa, Ontario, on March 19, 2014.

REASONS FOR JUDGMENT BY:	SAUNDERS J.A.
CONCURRED IN BY:	DESCHÊNES J.A.
DISSENTING REASONS BY:	ROBERTSON J.A.

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REASONS FOR JUDGMENT

SAUNDERS J.A.

[1] The Crown appeals the respondent Captain J.T. Wright's acquittal on four offences under the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA), all of which related to an allegation that he had obstructed justice by submitting fabricated evidence in an earlier proceeding.

[2] At the opening of his trial by Standing Court Martial, Capt Wright moved to exclude certain evidence on the basis that his right to be secure against unreasonable search or seizure

under s. 8 of the *Canadian Charter of Rights and Freedoms* (*Charter*), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 had been violated.

[3] After hearing the evidence and considering counsels' submissions, Lieutenant Colonel d'Auteuil, the Military Judge assigned to preside at the Standing Court Martial, allowed Capt Wright's application, found that there had been a serious breach of Capt Wright's s. 8 *Charter* rights, and ordered that the impugned evidence be excluded because its admission would bring into disrepute the administration of justice.

[4] When the trial resumed, about three months later, the Crown announced that in light of the judge's decision, the prosecution would not be calling any evidence. The defence then moved for dismissal on the basis that there was no evidence to support a *prima facie* case against Capt Wright. The motion was granted. Capt Wright was found not guilty on all four charges.

[5] In a Notice of Appeal filed May 15, 2013, the Crown appealed Capt Wright's acquittal alleging two errors on the part of the presiding judge: first, in deciding that Capt Wright's s. 8 *Charter* rights had been breached; and second, in excluding the evidence pursuant to s. 24 of the *Charter*.

[6] Notwithstanding the able and comprehensive submissions by counsel for the appellant, I am not persuaded that the trial judge erred in finding a *Charter* breach, or in deciding that the impugned evidence ought to be excluded. I would dismiss the appeal.

[7] Before undertaking an analysis of the issues I will begin with a brief summary of the circumstances which led to these proceedings. Further elaboration of the material facts may be found in the analysis that follows.

Background

[8] The respondent, Capt Wright is a member of the Regular Forces, 14 Software Engineering Squadron, stationed at Canadian Forces Base Greenwood, Nova Scotia.

[9] To follow the chronology it is important to understand that there were two separate proceedings taken against Capt Wright. While those proceedings are linked and provide the catalyst to the issues on appeal, the offences for which he was charged in the two proceedings are different. In these reasons I will refer to the first proceeding as Capt Wright's "summary trial" and the second proceeding as his "Standing Court Martial".

[10] I will start by describing the circumstances which led to his summary trial. On November 22, 2011, Capt Wright was charged with three offences contrary to the NDA. Two charges alleged that he had absented himself without leave during the period October 27-28, 2011. The third charge alleged that during the period October 26-28, 2011, Capt Wright had failed to comply with a direction issued by another officer and had therefore conducted himself to the prejudice of good order and discipline. A summary trial was conducted on January 31, 2012, by the Commanding Officer of Capt Wright's unit, Colonel J.A. Irvine. No recording or transcript of the proceedings was undertaken, but there is a 2½ page typed Record of Disciplinary Proceedings (RDP) wherein Col Irvine listed the several factors which prompted him to say that "Reasonable Doubt exists" and conclude that:

> Based on the above factors, I elected to find the mbr not guilty of all charges…

[11] After Capt Wright's acquittal on those three charges under the NDA, questions arose as to whether he may have fabricated evidence submitted in his defence. Warrant Officer M.D. Way was tasked to investigate.

[12] WO Way was not a police officer. He was a member of the respondent's unit. WO Way had conducted the original investigation into Capt Wright's summary trial. It was WO Way who had concluded that the respondent was absent without official leave (AWOL). He had laid the charges which led to the summary trial. Now he was asked to investigate whether Capt Wright had fabricated evidence at that trial.

[13] On February 6, 2012, WO Way attended at the Military Police Wing in Greenwood to report that Capt Wright had fabricated evidence while being prosecuted at his summary trial. Later that same day WO Way was interviewed by Master Corporal Ferris, a member of the military police. During the interview WO Way provided the following information to MCpl Ferris:

> a. at his summary trial, the Respondent produced two pieces of evidence, both of which were e-mails;
>
> b. the first e-mail, purportedly sent on 17 October 2011, appeared to inform a number of individuals, including a certain Captain MacKinnon, that the Respondent would be absent on 27 October (i.e., the day he was allegedly absent without leave);
>
> c. the second e-mail, purportedly sent by the Respondent to his wife on 27 October, 2011, suggested that he was actually at work that day and would be arriving at home late;
>
> d. WO Way contacted Captain MacKinnon and asked if he had received an e-mail from the Respondent on 17 October.

Captain MacKinnon had such an e-mail and forwarded it to WO Way. The wording of that e-mail was very similar to the wording of the e-mail that the Respondent had introduced as evidence at his summary trial. There were, however, two notable differences:

(1) some of the addressees were different, and

(2) the e-mail that Captain MacKinnon had received indicated that the Respondent would be working from home on 17 October 2011 as opposed to 27 October 2011; and

e. this led to the conclusion that the Respondent had fabricated evidence used in his summary trial.

[14] MCpl Ferris also met with Mr. Engelberts, the Information Systems Security Officer for 14 Wing Greenwood. Mr. Engelberts said he could access any Canadian Forces (CF) member's Department of National Defence (DND) e-mail account if he were served with a Production Order.

[15] On February 13, 2012, based in the information provided by Mr. Engelberts and WO Way, MCpl Ferris prepared an Information to Obtain (ITO) for a Production Order and presented it to Nova Scotia Provincial Court Judge Claudine MacDonald. The judge refused to grant the order, as MCpl Ferris had worded the alleged offence as being the fabrication of evidence to be used in a "concluded judicial proceeding". Judge MacDonald correctly pointed out that s. 137 of the *Criminal Code* (R.S.C., 1985, c. C-46) contemplates that the fabrication of evidence be used in an "existing or proposed" judicial proceeding.

[16] Based on the judge's endorsement, MCpl Ferris concluded that the only issue with her first ITO had been the use of the word "concluded". On February 14, 2012, she prepared a second ITO. In the second version the officer amended the word "concluded" to read "existing"

and added a paragraph at the end of the ITO in which she noted that her previous attempt to obtain a Production Order had been denied. She obtained legal advice before submitting the second ITO. This time Judge MacDonald granted the order.

[17] The information obtained following execution of the Production Order led to Capt Wright being formally charged on August 3, 2012, with four offences under the NDA. The text of the Charge Sheet signed by the authorized officer, Lieutenant Commander D. Reeves alleged that Capt Wright, on January 31, 2012, at Canadian Forces Base Greenwood:

i. obstructed justice contrary to s. 139(2) of the *Criminal Code* by:

> "... wilfully attempt to defeat the course of justice in a judicial proceeding by submitting as evidence in a Summary Trial a false email dated 27 October 2011 titled "Update"" and

ii. (as an alternative to the first charge)

 committed an act to the prejudice of good order and discipline when he:

> "... submitted as evidence in a Summary Trial a false email dated 27 October, 2011 titled "Update""

iii. (as an alternative to the fourth charge)

 obstructed justice contrary to s. 139(2) of the *Criminal Code* when he:

> "... wilfully attempt to defeat the course of justice in a judicial proceeding by submitting as evidence in a Summary Trial a false email dated 17 October, 2011 titled "Re: DNDLearn automated e-mails""

iv. (as an alternative to the third charge)

 committed an act to the prejudice of good order and discipline when he:

> "... submitted as evidence in a Summary Trial a false email dated 17 October, 2011 titled "RE: DNDLearn automated e-mails""

[18] It was the prosecution of these four offences which led to the second proceeding taken against Capt Wright, that being the Standing Court Martial in December, 2012. It was there that six pieces of e-mail correspondence became the focus of the respondent's *Charter* challenge and now form the basis of this appeal.

[19] At the start of his court martial on December 10, 2012, but before a plea was entered, Capt Wright made an application (supported by prior, proper notice) seeking the court's Order under s. 24(2) of the *Charter* to exclude the evidence on the basis that it had been obtained in violation of his right to be secure against unreasonable search or seizure guaranteed by s. 8 of the *Charter*.

[20] The Military Judge, LCol d'Auteuil, granted Capt Wright's application. He began his reasons by identifying the impugned evidence which consisted of six pieces of e-mail correspondence:

> Exhibit VD1-10, an email from Captain Wright dated 27 October, 2011;
>
> Exhibit VD1-11, a chain of email for which the last one is from Major Wosnitza and dated 17 October 2011;
>
> Exhibit VD1-12, a chain of email for which the last one is from Captain Wright and dated 17 October 2011;
>
> Exhibit VD1-13, a chain of email for which the last one is from Captain Wright and dated 28 October 2011;
>
> Exhibit VD1-14, a chain of email for which the last one is from Major Wosnitza and dated 28 October 2011;

> Exhibit VD1-15, a chain of email for which the last one is from Major Wosnitza and dated 17 October 2011; and (AB vol 2, p. 292)

[21] In a comprehensive and well-reasoned decision LCol d'Auteuil based his conclusion that the respondent's s. 8 *Charter* rights had been breached on three principal findings. First, the judge found that the Production Order was invalid. I will describe his reasons for coming to that conclusion in the analysis section of my decision.

[22] Second, apart from several flaws which invalidated the Production Order, the judge said that the manner in which the evidence had been seized was abusive because its execution went beyond the scope of the Production Order. As a result, the search was over broad and violated the respondent's constitutional protections guaranteed under the *Charter*.

[23] Finally, for a variety of reasons, the judge found that the state's misconduct was serious. So too was the impact of the breach upon the respondent's *Charter*-protected interests. Balancing those findings against society's interest in having the case heard on its merits, LCol d'Auteuil determined, after considering all of the circumstances, that the admission of this evidence would bring the administration of justice into disrepute.

[24] The decision to exclude the evidence was delivered at the conclusion of the *voir dire* on January 22, 2013. The case was then set over to April 15, 2013, to resume Capt Wright's trial. On that date Capt Wright was arraigned and entered pleas of not guilty to all four charges. The Crown then declared its position. We see this exchange:

> PROSECUTOR: Yes, good morning, Your Honour. As discussed with Your Honour and my friend, the prosecution in light of the decision with regards to evidence in this matter will not be providing any evidence – will not be calling a case, Your Honour.

> MILITARY JUDGE: So you're not calling any evidence?
>
> PROSECUTOR: That is correct, Your Honour.
>
> MILITARY JUDGE: That is correct. Okay. So consequently you expect this court to provide the finding of not guilty on the four charges?
>
> PROSECUTOR: That is absolutely correct, Your Honour.
>
> MILITARY JUDGE: Major Boutin.
>
> DEFENCE COUNSEL: Your Honour, obviously defence moves for a no-*prima facie* case; there's no evidence before this court.
>
> MILITARY JUDGE: Yeah. So-okay. So consequently, I will make it short, Captain Wright, please stand up.
>
> So considering that the prosecution made the decision not to call any evidence concerning the charges before this court, then the court finds Captain Wright not guilty of the first, second, third and fourth charge. Please be seated.
>
> So at this time the proceedings of this court martial in respect of Captain Wright are terminated. Thank you very much.
>
> AT 850 HOURS, 15 APRIL 2013, THE TRIAL IS TERMINATED.

Issues

[25] On appeal to this Court Martial Appeal Court (the "CMAC", or "this Court") the parties have confined their submissions to three principal issues, they being whether the Military Judge erred in:

i. concluding that the Production Order was invalid;
ii. finding that the seizure was abusive; and
iii. excluding the impugned evidence pursuant to s. 24(2) of the *Charter*.

[26] Before addressing these issues I must consider the appropriate standard of review, first in terms of the Military Judge presiding over the respondent's court martial whom we characterize in such circumstances as the "reviewing judge", and then from our perspective as a CMAC.

Standard of Review

(a) *The Standard of Review by the Military Judge*

[27] In *R. v. Garofoli*, [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421 [*Garofoli*], the Supreme Court of Canada described the judge's role when reviewing a wiretap authorization:

> [56] The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[28] While *Garofoli,* above, involved a wiretap authorization, the same test has been found to apply to the review of Production Orders. As such, the law obliged LCol d'Auteuil to give considerable deference to the earlier decision of Judge MacDonald who had authorized the Production Order.

[29] The Military Judge clearly understood his role and the legal principles which applied to the exercise of that mandate. He explained in his reasons:

> It must be noted that when a court conducts a review of the issuance of a search warrant, it is conducting a judicial review of this decision. Consequently, there is no question here of proceeding *de novo*. Instead, the question to be determined is whether, when the warrant was issued, the judicial authority had

> the necessary evidence to be satisfied that the prerequisite conditions existed. If the answer is that there was no such evidence, the court's intervention is warranted.
>
> As stated by the Supreme Court of Canada in *R. v. Morelli*, 2010 SCC 8, at paragraph 40:
>
> [40] In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place. [Emphasis in the original]

(b) *The Standard of Review by this Court sitting as a CMAC*

[30] Two standards of review are engaged at the secondary appellate level. On the one hand, the articulation and application of the proper legal test by the reviewing judge is a question of law and will be reviewed by this Court on a correctness standard. On the other hand, if the reviewing judge applied the correct legal principles and made findings of fact or drew inferences from those facts, then those findings are reviewable by this Court on a more deferential standard and we are bound not to intervene unless we are satisfied that they are the product of palpable and overriding error.

[31] With these standards of review in mind I will now address the issues on appeal.

Analysis

[32] From his assessment of the record and the testimony he heard during the *voir dire*, LCol d'Auteuil found several crucial flaws in the process surrounding the search of the respondent's

e-mail account. These findings were essentially fact-driven and in my respectful opinion did not result from any palpable and overriding error.

[33] As noted earlier, LCol d'Auteuil's decision that Capt Wright's s. 8 *Charter* rights had been violated was based on three principal findings. The first of these was that the Production Order issued by the provincial court judge was invalid. He gave four reasons for that determination. First, he found that the ITO did not disclose an offence, as it described the alleged fabrication as occurring *before* a judicial proceeding existed. Second, he found that the ITO contained no reliable evidence that the person subject to the Production Order had possession or control of the data. Third, the judge found that the ITO contained neither specifics as to where the data could be found, nor any indication of the retention period for the data. Fourth, the date of the alleged offence noted in the ITO was different from that stated in the Production Order.

[34] To understand the importance of the e-mails from the prosecution's perspective it will be helpful to recall the particulars of the charges against the respondent at his summary trial and reference some of the detail from Col Irvine's reasons for acquitting Capt Wright. Again I would emphasize the lack of a transcript of the proceedings as well as an actual decision. All we have as a record of what transpired are the clipped, abbreviated notes presumably prepared by Col Irvine and set out in the RDP.

[35] The two AWOL offences were said to have occurred on the same date and time. The only difference was the place or event from which Capt Wright was said to have been absent without authority. In the first he was said to have been AWOL from his unit between 1300 hours on Thursday, October 27 and 0900 hours on Friday, October 28. The second charge stipulated that during that exact same timeframe he was AWOL from an equipment training course. The third

offence was for a different charge during a different time period. There, Capt Wright was charged with failing to follow directions from the Major in charge of the course by failing to check e-mails and the Operations board for changes in the schedule between October 26-28, 2011.

[36] From the content of Col Irvine's typed notes we get a good appreciation for his reasons in acquitting Capt Wright. His report begins:

> ... Summary Trial for 290 Capt. J. Wright
> Factors effecting judgement of Not Guilty as rendered by Col. J.A. Irvine, Presiding Officer.

In deciding to acquit Capt Wright on the first AWOL charge it is obvious that Col Irvine based his decision on "evidence" which led him to conclude that Capt Wright's chain of command was aware that he would be writing exams at home and had been excused from duties at work during those hours. Other indicators favouring Capt Wright in the eyes of Col Irvine were the fact that Capt Wright's name had not been placed on a distribution list in a "warning e-mail" and two supervisors present during the training session had not made any effort to contact Capt Wright to have him report for training. As for that part of the infraction said to have occurred in the early morning hours of Friday, October 28 Col Irvine described how the respondent had been given a flexible work schedule to care for his children and that no one could verify whether on October 28 Capt Wright was subject to a work day or "an excused period" whereby he would not be required at work until 0900 hours.

[37] At this point I want to elaborate on my deliberate reference to the "evidence" before Col Irvine. I have intentionally put the word "evidence" in quotation marks. Without a verbatim transcript of the proceeding, or even a list of "witnesses" who appeared at the summary trial, it is

impossible to say in fact, or with any confidence who appeared; whether any "evidence" was actually proffered (and if so by whom); what exactly was declared by Col Irvine to be admissible; or whether any individuals actually gave evidence under oath.

[38] Col Irvine uses phrases like "He had advised his chain of command ..." or "...he advised his instructor of his whereabouts ...", but it is not clear to me whether such a "fact" was simply inferred by Col Irvine from the materials before him, or whether Capt Wright had in fact testified at his summary trial.

[39] The RDP is replete with many such examples where "neutral" language makes it impossible to discern how and through whom the "evidence" cited by Col Irvine came to be.

[40] I simply mention that fact now because it lends supports to one of the respondent's main arguments for attacking the merits of the Crown's appeal. I will have more to say about that later.

[41] As for the second charge of being AWOL from his course, Col Irvine repeated the same factors which led him to acquit but added:

> 2) Reasonable Doubt exists because
>
> a) This had exactly the same conditions as Charge 1 above, except that the case for reasonable doubt is even stronger since the language of the charge is more specific WRT the duties required of the mbr.
>
> b) As discussed, the mbr was conducting military duties from his home during the trg and he had advised a mbr of his chain of command that he would be doing this. He had at least implicit permission to be at home during this period.

(I will assume that "WRT" is code for "with respect to" and "mbr" is obviously "member").

[42] In acquitting Capt Wright on the third charge, of conducting himself to the prejudice of good order and discipline by failing to follow the direction of Major Larsen, Director of the Training Course, Col Irvine noted that Capt Wright's name was not on the distribution list sent out at 1650 hours on Wednesday October 26 reminding people to report for training the next day. From this I infer that in the mind of Col Irvine, Capt Wright could hardly be blamed for "missing" a change in schedule if he had never been informed in the first place, and no supervisor had made any effort to contact him to either confirm his whereabouts or his work schedule. Additionally, Col Irvine noted that the respondent would be taking his exams from home during the afternoon of October 27, had been excused by his chain of command from duties at work during this time and that the same uncertainty prevailed as to whether Capt Wright was on a fixed, or flexible work schedule that day.

[43] From all of this it is obvious that there were many factors which led Col Irvine to conclude that Capt Wright ought to be acquitted on all charges. From my review of this record, only one such "factor" related to any e-mail created by or coming from the respondent's account. On the first charge of being AWOL we see this comment by Col Irvine in the RDP:

> ... Reasonable Doubt exists because:
>
> a) He had advised his chain of command that he would be conducting AFOD exams from his home during the PM of 27 Oct 11 (an AFOD testing coordination <u>email that was cc'd to Captain Dunwoody was presented as evidence during summary trial</u>) ...
> [Emphasis added]

[44] As to the third charge of failing to follow orders, Col Irvine writes in the RDP:

> 3) Significant reasonable doubt existed WRT this charge.

a) The mbr was not on the dist list of the email, sent at ~1650 hrs on 26 Oct 11, tasking pers to be present for trg at 0900 the next morning. He as [sic] at work that afternoon, and had sent an email from his account (copy presented into evidence at the summary trial). Given this evidence, it is reasonable to expect that he would have seen the email with the change in sched had he been on the dist list.
[Emphasis added]

[45] Again, from this record, one cannot divine how this e-mail said to have been copied to Captain Dunwoody was "introduced" or "presented" at the trial, whether through the prosecution or the defence, or some other means. This too will become an important point when I come to address one of the respondent's main arguments on appeal.

[46] I have mentioned the particulars of the three charges facing Capt Wright at his summary trial as well as Col Irvine's reasons for acquitting him in considerable detail because a clear appreciation of these surrounding circumstances is required in order to understand the various challenges advanced by Capt Wright when attacking the validity of the Production Order during the *voir dire* at his court martial. I will turn to that now.

[47] While acknowledging that the Military Judge stated the law correctly, the appellant complains that he improperly applied it. Respectfully, I disagree. In a thoughtful and carefully worded decision LCol d'Auteuil recognized that the first point he had to address was whether Capt Wright enjoyed the protection of s. 8 of the *Charter* while serving as a member of the CF. He accepted the submissions of both counsel that in light of the Supreme Court of Canada's recent decision in *R. v. Cole*, 2012 SCC 53, [2012] S.C.J. No. 53, while, as here, a CF member might have a diminished expectation of privacy when accessing DND computers for their own personal use, they were nonetheless entitled to the protections afforded by s. 8 to be secure

against unreasonable search or seizure. No objection has been taken in this appeal to that conclusion on the part of the Military Judge.

[48] He then turned his attention to the defects in the ITO which counsel for Capt Wright argued invalidated the Production Order.

[49] The Military Judge recognized that in considering the merits of the attack on the ITO and the resulting Production Order he was bound to apply the test enunciated by the Supreme Court of Canada in *R. v. Morelli*, 2010 SCC 8, [2010] S.C.J. No. 8. Put simply, his inquiry and mandate as the reviewing judge was to determine whether there was sufficient credible and reliable evidence before Judge MacDonald (the authorizing judge) which would permit her to find grounds to believe that an offence had been committed and that evidence of that offence would be found at the time and place specified.

[50] The Military Judge went on to refer to the statutory basis for granting a Production Order found in s. 487.012(3) of the *Criminal Code* and then went on to explain in detail the six reasons which led him to conclude that the evidence presented to Judge MacDonald by MCpl Ferris in her (second) ITO dated February 14, 2012, was not sufficient to establish reasonable and probable grounds to believe that an offence had been committed.

[51] After carefully considering the record as well as the testimony of witnesses who were cross-examined during the *voir dire*, LCol d'Auteuil identified a variety of mistakes which in his opinion constituted crucial defects in the process and invalidated the Production Order. In my respectful view, all of the Military Judge's reasons are sound and find ample support in the

record. They are largely findings of fact or inferences drawn from the facts and do not reflect any palpable and overriding error that would cause me to intervene.

[52] The first defect noted by the Military Judge can be seen in the ITO sworn by MCpl Ferris. She declared that she had reasonable grounds to believe that on October 27, 2011, Capt Wright had, with intent to mislead, fabricated e-mails to be used in an existing judicial proceeding contrary to s. 137 of the *Criminal Code*. However, the fact is that on October 27, 2011, there was no "existing" proceeding implicating Capt Wright. The only "proceeding" was the summary trial over which Col Irvine presided, but that did not take place until January 31, 2012. Further, the fact is that Capt Wright was not charged with the three offences which led to his summary trial until November 22, 2011. Thus, MCpl Ferris was clearly wrong when she deposed in her ITO that on October 27, 2011, Capt Wright had broken the law by intentionally fabricating e-mails to be used as evidence in an existing proceeding. Rather, the truth was – as found by LCol d'Auteuil – there were no existing judicial proceedings involving or implicating Capt Wright on October 27, 2011.

[53] On cross-examination at the *voir dire*, MCpl Ferris said that based on the information she had received she really did not know when the alleged fabrication had occurred. She acknowledged that she had failed to declare that uncertainty in her ITO. She said she never met with the authorizing judge in person. She admitted that she had since come to realize that the alleged offence could have occurred much later; in other words, at least in her mind, anytime during the period from October 27, 2011 and the date of the summary trial on January 31, 2012. When asked why she had not included that declaration in her ITO, MCpl Ferris acknowledged that this was another mistake on her part.

[54] MCpl Ferris also prepared the Production Order that was issued by Judge MacDonald. But, the date of the alleged offence she inserted in the Production Order was different than the date in the ITO. The operative recital in the Production Order states:

> Whereas it appears on the oath of Corporal Ashley FERRIS, a Peace Officer **THAT THERE ARE REASONABLE GROUNDS FOR BELIEVING THAT** the Informant does believe ... **THAT** Captain Jonathan WRIGHT on **October 17th** 2011 .... did:
>
> With intent to mislead fabricate emails with intent that they should be used as evidence in an existing judicial proceeding .... [Emphasis added]

[55] Under cross-examination at the *voir dire* MCpl Ferris admitted that her reference to Capt Wright breaking the law on October 17 was another mistake on her part.

[56] These significant errors obviously troubled LCol d'Auteuil. For example, he specifically noted the serious discrepancy between the date of the alleged offence in the ITO as compared to the date stipulated in the Production Order. He allowed counsel to explore the matter in cross-examination. As he explained in his reasons:

> Finally, the date alleged of the commission of the offence in the ITO and the one in the production order is not the same. I authorized the applicant to cross-examine MCpl. Ferris on this very specific issue and the latter indicated that she did not notice the discrepancy on this matter before being in court and that, as a matter of reality, she did not know when the alleged offence was committed. She admitted that it could have been any time after the 17th of October, 2011.

[57] From all of this, we now have four conflicting reference points which apparently, in the mind of the police officer, constituted an "existing" proceeding. October 17th; or October 27th; or

the period between October 27, 2011 and January 31, 2012; or the period between October 17, 2011 and January 31, 2012.

[58] I mention these as examples of the serious errors LCol d'Auteuil identified which led him to conclude that there was insufficient credible and reliable evidence to support the issuance of the Production Order in this case. These were not the only crucial flaws. His reasons describe the other serious mistakes made by the investigating officer in gathering and presenting the information to the authorizing judge.

[59] I agree with LCol d'Auteuil that these were not trifling technicalities. On the contrary, these were technical matters where precision is expected, rigor is demanded and complete and accurate disclosure is required. Evidently this was the first time the officer had been involved in the preparation of an ITO and Production Order. Clearly inexperience played a role in the flawed process that came to taint this case.

[60] Of course there are cases where minor errors can be excised by the reviewing judge and the remaining parts of the ITO still form a sustainable whole, often buttressed by amplification evidence at the hearing. But this case is not one of those. Here one assumes that in the mind of LCol d'Auteuil no amount of cutting would save the host of pervasive and insurmountable flaws which characterized this investigation. Obviously there was nothing in the testimony of MCpl Ferris or Mr. Engelberts which would help the Crown shore up its case. On the contrary, their evidence added further support to Capt Wright's complaint that his *Charter* rights had been trampled. See for example *R. v. Araujo*, 2000 SCC 65, [2000] S.C.J. No. 65; *R. v. Campbell*, 2011 SCC 32, [2011] S.C.J. No. 32.

[61] The Military Judge then turned his attention to the significant flaws that surrounded Mr. Engelberts' search of the respondent's e-mail account.

[62] Section 487.012(3)*(c)* of the *Criminal Code* requires the authorizing judge to be satisfied on Information on Oath that there are reasonable grounds to believe that the person specified in the Production Order has possession or control of the data. In my opinion LCol d'Auteuil applied the correct standard of review in concluding that the evidence could not support a finding that Mr. Engelberts possessed or controlled the data. His conclusion finds ample support in the record.

[63] The evidence of Mr. Engelberts revealed that he had no possession or control of the data. As the Military Judge found, Mr. Engelberts:

> clearly indicated to the court that while he had such access, he did not possess and control any email account.

[64] Defence Email System (DEMS), not Mr. Engelberts, controlled and possessed the server on which the e-mails were kept. All Mr. Engelberts had was restricted access, because he required further authorizations from DEMS. As LCol d'Auteuil explained in his reasons:

> The testimony of Mr. Engelberts clearly indicated to the court that while he had such access, he did not possess and control any email account. Reality is that the server on which were kept emails was under the possession and control of a different entity and he had to request permission in order to get access. He had to request permission twice because such access could be given only by those who possess and control the email account on behalf of the Department of National Defence. Permission was requested for emails that were created for less than 30 days and another one was necessary for emails that were created for more than 30 days. [Emphasis added]

[65] In summary, Mr. Engelberts testified that he did not possess or control the data. He required authorization from DEMS to access the data. Mr. Engelberts' responsibility was limited to running the hardware; whereas DEMS was the organization responsible for the data.

[66] Moreover, MCpl Ferris' unqualified statements were misleading. She affirmed that Mr. Engelberts could "access" the respondent's e-mail account and that he "held" it. She did not disclose that Mr. Engelberts required authorization, despite her knowledge of that fact. She also failed to inform the authorizing judge that the e-mails could have been irretrievable in certain circumstances as explained to her by Mr. Engelberts. She understood that the e-mails could not be retrieved if the respondent had deleted them. This was a material fact because, in the alleged circumstances of this case, there would logically be a clear incentive to delete alleged three-month old incriminating e-mails.

[67] From this and other evidence I am satisfied the Military Judge was correct in finding that the police officer had not fulfilled her obligation to make full and frank disclosure of the material facts. The material facts failed to disclose that Mr. Engelberts required further authorization despite the fact MCpl Ferris was well aware of the restrictions on Mr. Engelberts' access. Accordingly, the authorizing judge would not have concluded that Mr. Engelberts had possession or control of the data if she had been told that Mr. Engelberts required further authorization from higher authority and that much of the data they were searching for was probably irretrievable.

[68] The Military Judge then turned his attention to the second principal issue raised by the defence that the search was conducted in an abusive manner and amounted to a violation of Capt Wright's s. 8 *Charter* rights.

[69] On this record there was ample support for the Military Judge's finding that the search and production of the respondent's personal data was abusive because its execution went beyond the scope of the Production Order. These critical flaws are canvassed very well in the respondent's factum, which I accept and will reproduce here verbatim (omitting the footnote citations):

> (1) The PO Limited the Search and Production to Specific Emails
>
> 38. The PO authorized the search and production of specific emails: only emails "outgoing" and/or "incoming" at specified dates linked to a specified account – nothing more. The PO did not authorize the search and production of any email drafted at anytime.
>
> 39. The PO authorized the production of the following emails:
>
> (i) All outgoing emails addressed to Captain McKinnon [sic], on October 17th, 2011, in relation to the Department of National Defence account (DWAN) Jonathan.Wright@forces.gc.ca;
>
> (ii) All incoming and outgoing emails addressed to and from email address s22825@yahoo.ca on October 28th, 2011, in relation to DWAN account Jonathon.Wright@forces.gc.ca;
>
> (iii) All outgoing emails addressed to Major Wosnitza on October 17th, 2011, in relation to DWAN account Jonathon.Wright@forces.gc.ca;
>
> (iv) All outgoing emails on October 27th, 2001 in relation to DWAN account Jonathon.Wright@forces.gc.ca;
>
> (v) All outgoing emails addressed to Captain Dunwoody on October 17th, 2011, in relation to DWAN account Jonathon.Wright@forces.gc.ca;
>
> (vi) All incoming and outgoing emails addressed to and from address s687i@unb.ca on October 27th, 2011, in relation to DWAN account Jonathon.Wright@forces.gc.ca

(2) The Search and Production Went Beyond those Specific Emails

40. The military judge found that in an attempt to be thorough, Mr. Engelberts had conducted a search wider than that provided for in the PO. He did not confine his search and production to the emails requested. Mr. Engelberts accessed an email account that did not match the email address as stated in the PO Jonathon.Wright@forces.gc.ca). For this reason alone, all data provided by Mr. Engelberts were not in compliance with the PO.

41. On his own initiative he used "fairly broad criteria when trying to find the emails listed in" the PO although he knew the PO was very specific. In spite of his difficulties, he never thought to ask the police officer for any guidance or ask that another PO be requested. He used "a lot of different methods to try and find" what he was looking for. His search went deep into unrequested metadata information. Canvassing all this information took him between 10 to 12 hours.

42. In particular, he produced the following emails which fell outside the scope of the PO:

VD1-10. VD1-10 was a printout of data representing an email that was neither incoming nor outgoing. It was located in the respondent's "Drafts folder" and was never sent. The search and production of this email was not authorized under paragraphs (iv), (vi) or any other paragraph of the PO.

VD1-11. VD1-11 was a printout of data representing one incoming email from Major Wosnitza. It was incoming because it was located in the respondent's inbox, not his "Sent Items folder". Mr. Engelberts agreed that VD1-11 itself was not an email authorized under paragraph (iii), or any other paragraph of the PO, even though an email addressed to Major Wosnitza could be found within its content. Simply put, any information within VD1-11 (which represents one single email record) cannot change the fact that it was incoming data, not ongoing.

VD1-13. VD1-13 was a printout of data representing one email sent from the respondent to Major Wosnitza on October 28th, 2011. VD1-13 itself was not authorized

> under paragraph (iii), or any other paragraph of the PO, because it was sent on October 28th, 2011. As in the case of VD1-11, any information within VD1-13 (which represents one single email record) cannot change the fact that it was sent on October 28th, 2011.
>
> ***VD1-15***. VD1-15 was a printout of data representing one incoming email from Captain McKinnon [sic]. It was located in the respondent's "Inbox". It also was not authorized under paragraph (i), or any other paragraph of the PO, because it was incoming, not outgoing.
>
> 43. The military judge was alive to the need to guard against overproduction of electronic media searches. For the above reasons, he correctly found the execution of the PO was abusive and contrary to s. 8 of the *Charter*.

[70] From all of this I would endorse the Military Judge's conclusion that:

> Considering that a production order is a search warrant from a judicial authority to seize specific data in a specific location, by providing more than requested by the production order, Mr. Engelberts when (sic) beyond what he was told to do, and then made that seizure abusive.
>
> It is my conclusion that the applicant established on a preponderance of probabilities that the evidence, Exhibits VD1-10 to VD1-15, was obtained in a manner that infringed his right to be secure against unreasonable seizures as specified in section 8 of the *Charter*.

[71] LCol d'Auteuil then turned his mind to the final issue, that being whether the admission of the impugned evidence would bring the administration of justice into disrepute. Once again I see no error in his analysis or conclusion. He articulated and applied the correct legal test enunciated by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, [2009] S.C.J. No. 32 [*Grant*]. He explained, after a thoughtful review of the evidence, how he came to view and weigh the seriousness of the breach, its impact, and the importance of having the case heard on

its merits. After referring to the Court's three-part test in *Grant*, above, LCol d'Auteuil explained:

> This specific set of circumstances demonstrated that MCpl. Ferris was not very familiar with the search warrant topic. She sought legal advice on this matter but it was not very helpful. She presented to the judge facts that were not supporting the alleged offence and she did not provide to the judge the full and necessary disclosure that would allow this judicial authority to assess properly who was in possession and control of the data she was looking for. Even though it appears clearly to me that she did not do that with any bad faith, her conduct was somewhat reprehensible because her lack of knowledge and care while doing such thing could not make her honestly and reasonably believed that she was respecting the applicant's right under section 8 of the *Charter*. She could have done better in the circumstances, first by identifying the correct offence for justifying the presentation of the ITO, and also by making herself and the judge better understand who had possession and control of the data.
>
> Also, I am of the opinion that this constitutional infringement is serious. Despite the fact that the context is about an offence in a work environment, an expectation of privacy still exist in the meaning of section 8 of the *Charter*. Essentially, it belongs to the state to respect minimal requirements, such as identifying the right reason for looking for evidence, by providing full information of those who possess and control the information and by making sure that the seizure is conducted within the parameter imposed by the production order, such as just providing the data identified and not more than that. Any Canadian citizen, including Canadian Forces members, expects that the state will respect those minimal requirements that are articulated in the *Criminal Code*.
>
> I am of the opinion that the truth-seeking function of the court martial process would be better served by the exclusion of the evidence. The importance of this evidence is not very high. It is possible for the prosecution to establish its case by bringing to court those who attended the Summary Trial and received the emails and those who were sending or receiving the emails. Essentially, the exclusion of the evidence seized does not preclude the prosecution to try to introduce it by witnesses who saw it at any other place.

> In the context of trying to avoid condemnation by a Summary Trial of being absent of work without leave, proving an offence such as obstructing justice with evidence obtained in a manner that infringed the right of the applicant to be secure against unreasonable seizures as specified in section 8 of the *Charter* would impact on the long term perception of the public of the Military Justice system.
>
> In the context of this case, allowing a misleading justice offence being proved with evidence obtained through a deficient process, which did not respect the *Charter*'s right of the applicant could impact on the perception that the public would have of the Military Justice system.
>
> This weighing process and the balancing of these concerns lead me to conclude that the evidence must be excluded.
>
> Then, I conclude that having regard to all the circumstances the admission of this evidence in the proceedings would bring the administration of justice into disrepute.
>
> For these reasons, the court grants the application.

[72] In my respectful opinion, LCol d'Auteuil correctly applied the law, considered the proper factors, and made reasonable findings amply supported in the record. I would therefore, as the law requires, defer to his determination under s. 24(2) of the *Charter*. See for example *R. v. Buhay*, 2003 SCC 30, [2003] S.C.J. No. 30; *R. v. Côté*, 2011 SCC 46, [2011] S.C.J. No. 46; *R. v. Vu,* 2013 SCC 60, [2013] S.C.J. No. 60. As my colleague, Justice Deschênes aptly observed in *R. v. Christie*, 2013 NBCA 64, [2013] N.B.J. No. 428:

> [59] A consideration of all the circumstances leads me to conclude that admitting the evidence would bring the administration of justice into disrepute. The main reason relates to the seriousness of the conduct of the officer in clear violation of the appellant's ss. 8 and 9 rights. ... the Court must dissociate itself from this conduct. ... concern is more on the impact over time of admitting evidence obtained in violation of protected rights and less with the particular case.

[73] Before concluding these reasons I wish to deal with two miscellaneous, but nonetheless important points.

[74] On appeal to this Court, as an initial argument, the respondent cited the case of *United States of America v. Fafalios*, 2012 ONCA 365, [2012] O.J. No. 2394 [*Fafalios*], as authority for the proposition that because the Crown in this case had decided not to call evidence at Capt Wright's court martial after receiving an unfavourable ruling during the *voir dire*, that the Crown was now barred from challenging Capt Wright's acquittal, on appeal. This proposition, according to the respondent, is especially true in this case because as part of his decision the Military Judge included a direct and important reminder to the prosecution team:

> I am of the opinion that the truth-seeking function of the court martial process would be better served by the exclusion of the evidence. The importance of this evidence is not very high. It is possible for the prosecution to establish its case by bringing to court those who attended the Summary Trial and received the emails and those who were sending or receiving the emails. Essentially, the exclusion of the evidence seized does not preclude the prosecution to try to introduce it by witnesses who saw it at any other place...

[75] Capt Wright's counsel says that because the Crown did nothing to "perfect" its case against the respondent in the intervening three months, it should now be denied any chance to appeal this "interlocutory" ruling.

[76] With respect, I am not persuaded by the respondent's argument. I do not understand the Ontario Court of Appeal's decision in *Fafalios,* above, to stand for any such general, sweeping authority. In any event, the circumstances in that case are entirely different from what occurred here. *Fafalios,* above, was a case that involved extradition proceedings between Canada and the United States. There, the Crown had ignored previous court orders compelling production. The

Ontario Court of Appeal obviously considered such conduct to be egregious and so serious an abuse of process as to invoke the court's inherent jurisdiction to dismiss the appeal without considering its merits. Respectfully that factual scenario and disposition have nothing to do with this case.

[77] The next point concerns the "credibility" and "reliability" of the evidence presented by the police officer to the authorizing judge. While not figuring prominently in LCol d'Auteuil's reasons, it is worth noting that MCpl Ferris did little if anything to independently verify or corroborate the reliability of the information relayed to her by WO Way which, after all, formed the very foundation of the ITO she presented to the authorizing judge. She relied entirely on WO Way who had laid the charges which led to the respondent's summary trial. Whatever "evidence" WO Way had, was never sworn to in an affidavit, or tested under cross-examination. When questioned at the *voir dire*, MCpl Ferris admitted that she never inquired as to how WO Way had obtained the e-mails or came to be in possession of them. She said she took him at his word. From this I would agree with Capt Wright's counsel's argument to this Court that there was no evidence the impugned e-mails had ever been "fabricated" or introduced, proffered or otherwise "used as evidence" at his summary trial. Such an allegation was of course an essential element of the offence as charged.

Conclusion

[78] After a thorough and careful consideration of all of the evidence the Military Judge concluded that the process surrounding the search of Capt Wright's personal data was seriously flawed and that the execution of the Production Order was abusive and amounted to a violation of the respondent's *Charter* rights. He correctly applied the legal test established by the Supreme

Court of Canada in *Grant*, above, before concluding that the administration of justice would be better served by the exclusion of the impugned evidence in this case. He specifically reminded the prosecution of other means at its disposal in pursuing these charges against the respondent if so advised. Ultimately the Crown chose not to call evidence and the charges against Capt Wright were dismissed.

[79] For all of these reasons I see nothing in this case to warrant our intervention. I would dismiss the appeal. I conclude by stating again for the record our appreciation to all counsel for the quality of their advocacy.

"Jamie W.S. Saunders"
J.A.

"I agree.
Alexandre Deschênes J.A."

<u>ROBERTSON, J.A.</u> (DISSENTING REASONS)

[80] In my respectful opinion, the Military Judge (the "reviewing judge") erred in finding a breach of s. 8 of the *Charter*. Accordingly, I would allow the appeal. While my colleagues conclude otherwise, I share their views with respect to the reasons offered for dismissing the respondent's argument based on *United States of America v. Fafalios*, 2012 ONCA 365, [2012] O.J. No. 2394. This leaves for consideration the appellant's submissions and the validity of the grounds upon which the reviewing judge set aside the Production Order.

[81] The essential facts are as follows. On November 22, 2011, Capt Wright was charged with several offences under the NDA, including a charge of being "absent without leave" on October 27, 2011. On January 31, 2012, he was tried by "summary trial" and found not guilty. The trial was presided over by Capt Wright's Commanding Officer, Col Irvine.

[82] At trial, Capt Wright produced two e-mails in support of the defence he was not absent without leave on the day in question. The first was dated October 17, 2011, and was sent from Capt Wright to Capt MacKinnon, with copies to Major Wosnitza and Capt Dunwoody (the October 17 e-mail). That e-mail indicated Capt Wright would be working from home on October 27, 2011. The second e-mail was sent from Capt Wright to his wife on October 27, 2011, but is not material to the present appeal.

[83] Following the acquittal, Col Irvine instructed the original investigating officer, WO Way, to inquire into the veracity of the e-mails. In response, WO Way spoke with Capt MacKinnon with respect to the October 17 e-mail he had received. That conversation led WO Way to believe the e-mail tendered at trial was dissimilar to the one Capt MacKinnon had received in two

material respects: some of the addresses were different and Capt MacKinnon's e-mail indicated Capt Wright would be working from home on October 17, 2011, not on October 27. This led WO Way to believe Capt Wright had fabricated evidence, contrary to s. 130 of the NDA, and, by incorporation, s. 137 of the *Criminal Code*. The latter reads in part: "Everyone who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed … is guilty of an indictable offence".

[84] WO Way took this information to MCpl Ferris, of the Military Police, who prepared and swore the ITO based on what WO Way had stated. Ultimately, a judge of the Provincial Court of Nova Scotia (the "authorizing judge") issued a Production Order, dated February 14, 2012. Succinctly stated, the Order sought copies of e-mails that fall within one of three categories. The first is comprised of all outgoing e-mails addressed from Capt Wright's DND e-mail account to Capt MacKinnon, Maj Wosnitza and Capt Dunwoody, and dated October 17, 2011. The second is comprised of all outgoing e-mails from Capt Wright's DND account and dated October 27, 2011. The third category is comprised of all incoming and outgoing e-mails with respect to two e-mail accounts (Yahoo and UNB). The e-mails in this category are restricted to those dated October 27 and 28, 2011.

[85] The Production Order provided the prosecution with six e-mails. Capt Wright was then charged with obstructing justice under s. 139(2) of the *Criminal Code*. At the start of the court martial, he sought to have the e-mails excluded, pursuant to ss. 8 and 24(2) of the *Charter*. In granting the application, the reviewing judge articulated four reasons for holding the Production Order invalid. Additionally, he held the seizure itself was "abusive". Moving to s. 24(2), the reviewing judge held that although MCpl Ferris had not acted in bad faith, her conduct was

"somewhat reprehensible" and the *Charter* infringement was "serious". Finally, the reviewing judge held the excluded evidence was not important to the Crown's case.

[86] My analysis begins with the standard of review to be applied when assessing an authorizing judge's decision to grant a Production Order. The law is settled. In assessing the ITO, the reviewing judge must determine whether there was sufficient, credible and reliable evidence to permit the authorizing judge to find reasonable and probable grounds to believe an offence had been committed and the same type of grounds to believe the information sought would be found on the servers in the possession of Capt Wright's employer, DND. Conversely stated, the standard of review is not whether the reviewing court would have issued the Production Order. See *R. v. Vu*, 2013 SCC 60, [2013] S.C.J. No. 60; *R. v. Morelli*, 2010 SCC 8, at para. 40, [2010] S.C.J. No. 8, quoting *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.J. No. 65, at para. 54.

[87] The reviewing judge identified four grounds for invalidating the Production Order. Two of the grounds constitute "errors" which, in my view, reflect a misunderstanding of the law. Both errors are tied to the "date" on which the offence was supposedly committed, that is to say, the date on which the evidence was supposedly fabricated. In my view, it is unnecessary for the ITO to specify a date of fabrication. While time may be an essential element of the offence, it is not essential to the issuance of a Production Order. That Order is an investigative tool which allows the police to determine whether in fact a document was fabricated and the date of fabrication. Accordingly, the date of fabrication specified in the ITO and the Production Order can be expunged without even turning to amplification evidence.

[88] The third ground raises a question of law involving the interpretation of s. 487.012(3)(*c*) of the *Criminal Code*. That provision requires the issuing judge to be satisfied there are reasonable grounds to believe that the person who is subject to the Production Order "has possession or control of the documents or data". In the present case, the reviewing judge concluded "there was no reliable evidence that might reasonably be believed for supporting the fact that Mr. Engelberts had possession or control of the data". That ruling flowed from the fact that, following issuance of the Production Order, Mr. Engelberts needed permission of a superior to gain access to the e-mail accounts on two separate occasions. In short, the reviewing judge effectively interpreted s. 487.012(3)(*c*) of the *Criminal Code*, as requiring there be reasonable grounds to believe the named person in the ITO had an "unfettered" or "unrestricted" right of access to the information being sought. I am of the respectful view that the interpretation placed on s. 487.012(3)(*c*) of the *Criminal Code* is one the provision cannot reasonably bear.

[89] The fourth ground for invalidating the Production Order flows from the failure of the ITO to refer to the location of the servers and to the retention period with respect to stored e-mails. With great respect, these matters lack relevancy to the task facing the authorizing judge – to determine whether there was credible evidence to support the allegation an offence had been committed under s. 137 of the *Criminal Code* and, correlatively, whether there were reasonable grounds to believe the information being sought was in the possession of DND. Finally, I respectfully disagree with the reviewing judge's finding that the ultimate search was "abusive" because the Production Order produced additional e-mails. In fact, the additional e-mails are tied directly to the e-mails identified in the Production Order (part of the e-mail conversation) and, in any event, the additional e-mails could have been expunged without attracting legal consequences. Obviously, my perfunctory conclusions require elaboration.

[90] I agree with the prosecution's opening submission. The reviewing judge was under an obligation to adopt a common sense approach to reviewing the ITO. This was stated most forcefully in *R. v. Chan*, [1998] O.J. No. 4536 (C.A.), at para. 4, 40 W.C.B. (2d) 143: "a line-by-line word-by-word dissection of the document in an effort to show that some of the grounds standing alone do not support the existence of reasonable grounds is not the correct approach and the determination must be made with regard to the totality of the circumstances". See also *R. v. Sanchez*, [1994] O.J. No. 2260 (Gen. Div.), at para. 20, 20 O.R. (3d) 468 [*Sanchez*]. In my respectful opinion, the reviewing judge's reasons for invalidating the Production Order cannot withstand appellate review.

[91] Turning to the validity of the Production Order, the ITO alleges Capt Wright committed the offence on October 27, 2011, the date the respondent was absent from work without leave. The reviewing judge concluded that as there was no existing judicial proceeding (court martial) or ongoing investigation on that date, s. 137 of the *Criminal Code* did not come into play. As the ITO did not disclose an offence, the reviewing judge held the "judicial authorization" should not have issued. In my view, both the reviewing judge and MCpl Ferris fell into error in assuming that it was necessary for the ITO to identify a specific date on which the offence of "fabrication" occurred. The purpose of a Production Order is to allow investigators to seize, examine and present evidence which is relevant to events which may give rise to criminal liability. At this stage, there is no legal requirement to identify a specific date on which the offence may have been committed. Indeed, it is only when the investigation leads to the laying of criminal charges that it may be necessary to specify the date of the offence or a range of dates. In that regard, it does not automatically follow that time is an essential element of every offence. It depends on the wording of the statutory provision.

[92] The accepted principle is that the date of the alleged offence need not be proven unless time is an essential element or there is a specified limitation period. Where time is an essential element, or is crucial to the defence, as when an accused defends the charge by providing evidence of an alibi, it must be proven as charged. In *R. v B.(G.)*, [1990] S.C.J. No. 58, [1990] 2 S.C.R. 30, it was held that in those cases where time is not an essential element of the offence, the information or indictment need only provide an accused with enough information to enable him or her to defend the charge. If the time specified in the information conflicts with the evidence, the variance is not material and the information need not be quashed. See also *R. v. Picot*, 2013 NBCA 26, [2013] N.B.J. No. 114, at para. 38.

[93] Arguably, when it comes to an offence under s. 137 of the *Criminal Code*, time is an essential element of the offence, and, therefore, the charge or information must set out a date or range of dates on which the offence occurred. But at the investigatory stage, it may be virtually impossible to isolate the date on which the “fabrication” may have occurred. That is why MCpl Ferris sought a Production Order: to see whether any of the e-mails were fabricated with the intent of being used as evidence in a judicial proceeding, existing or proposed. What the authorizing judge had to focus on was whether there was logical relationship between the date when the offence might have been committed and the date of the e-mails for which the Production Order is being sought. On the facts of this case, there was an obvious and rational connection between the two.

[94] The prosecution’s argument that a Production Order is an investigative tool is persuasive. The argument starts with the premise that the order is used to obtain information concerning an alleged offence and, thus, it is hardly surprising that an investigator has yet to learn of all the

relevant details when it comes to drafting the ITO. The level of precision that is required in a charging document is not required in relation to an ITO. This is true even where an essential element of an offence, such as identity, is concerned. See *Sanchez*, above.

[95] On the *voir dire*, MCpl Ferris conceded the fabrication "could have been any time after the 17th of October, 2011". But even that concession is not accurate. Here is my reasoning. Based on the facts as set out in the ITO, one can reasonably infer that if the October 17 e-mail had been altered, the alteration would have been perfected sometime between the date Capt Wright was charged with the offence (November 22, 2011) and the date of his summary trial (January 31, 2012). I say this because it is reasonable to infer that one would not be motivated to fabricate evidence until one is charged with an offence. Of course, the e-mail could have been altered on an earlier date if, for example, Capt Wright had learned of the investigation leading up to the charge laid on November 22, 2011. Finally, there is a third possibility. If the e-mail had been altered, it could have been altered on an earlier date and for a purpose unrelated to the summary trial on the charge of absent without leave. If that were the case, Capt Wright would have a complete defence to the charge under s. 137 of the *Criminal Code*. But all of this is irrelevant to the question facing the authorizing judge: whether there was credible evidence to permit the authorizing judge to find reasonable and probable grounds for believing evidence had been fabricated for use at Capt Wright's summary trial.

[96] The prosecution is correct in its submission that MCpl Ferris should have abstained from speculating with respect to the date of the offence/fabrication. Her attempt to do so was at worst driven by honest mistake. For purposes of s. 137 of the *Criminal Code*, it would have been acceptable had the ITO used the phrase "on a date at present unknown". If one expunges MCpl

Ferris' reference to the date of the offence, the question of whether there is credible evidence upon which the authorizing judge could have based her decision to grant the Production Order must be answered affirmatively. There was credible evidence that the e-mail presented at the summary trial, and addressed to Capt MacKinnon and others, was materially different from the e-mail Capt MacKinnon had received. That of itself supports the authorizing judge's implicit finding of reasonable and probable grounds to believe an offence had been committed under s. 137 of the *Criminal Code*.

[97] In summary, the reviewing judge erred in law in declaring the Production Order invalid simply because the ITO specified the date of the offence as October 27, 2011. In my view, there can be no legal requirement to specify a date of fabrication for purposes of obtaining a Production Order in relation to an offence under s. 137 of the *Criminal Code*. Accordingly, the reference to October 27, 2011, as the date of the offence, was made in error. More importantly, that date can be expunged without impacting on the authorizing judge's decision to issue the Production Order. This takes me immediately to the reviewing judge's second ground for invalidating the Order. While the ITO identifies the date of the offence as October 27, 2011, for some unexplained reason the Production Order specifies October 17, 2011. Once again, the error is patent on the face of the record and immaterial or extraneous to the question of whether the authorizing judge had credible evidence to support the allegation of reasonable and probable grounds to believe an offence had been committed.

[98] The reviewing judge's third ground for invalidating the Production Order rests on his conclusion the ITO contained no reliable evidence that the person subject to the Order had "possession or control of the information or data" within the meaning of s. 487.012(3)(*c*) of the

Criminal Code. The essence of the provision is that the authorizing judge must be satisfied there are reasonable grounds to believe the person named in the ITO has possession or control of the data. In this case, the person so named is Mr. Engelberts. The reviewing judge concluded that while he had access to the requested e-mails, he did not "possess and control" any "e-mail account". Rather possession and control rested with a "different entity". Those conclusions rested on the fact that, on two separate occasions, Mr. Engelberts had to request permission to access the e-mail accounts: "Permission was needed for e-mails that were created for less than 30 days and also for e-mails that were created for more than 30 days." This led the reviewing judge to hold: "Then, it is my conclusion that the [reviewing] judge could not issue the Production Order because there was no reliable evidence that might be reasonably believed for supporting the fact that Mr. Engelberts had possession or control of the data." This leads one to ask a fundamental question: What is the degree of control or possession needed to satisfy the requirement set out in s. 487.012(3)(*c*) of the *Criminal Code*?

[99] The prosecution concedes that nowhere in the ITO does it explicitly state that Mr. Engelberts had "possession or control of the documents or data". However, an authorizing judge: "…is entitled to draw reasonable inferences from stated facts and an informant is not obliged to underline the obvious (*Sanchez*, above, at para. 30)." The ITO in question made the authorizing judge aware of the following information. Prior to applying for the Production Order, MCpl Ferris spoke with Mr. Engelberts who is a "security officer" attached to "14 Wing Greenwood". Mr. Engelberts indicated he could access any "Canadian Forces member's Department of National Defence account" when served with a Production Order. Mr. Engelberts also stated a member's account could be "disabled to the member" if the member's Commanding Officer agreed. Capt Wright's Commanding Officer so agreed and the account was disabled by the time

the Production Order issued. MCpl Ferris concluded her ITO by stating that she believed that within Capt Wright's DND account, "held by Mr. Engelberts, 4 Hangar Ad Astra Way, 14 Wing Greenwood, N.S., BOP 1N0, there will be e-mails related to information that will assist in this investigation."

[100] In my respectful view, the authorizing judge had before her reasonable grounds to believe that Mr. Engelberts had "sufficient" possession or control with respect to the information being sought. On the other hand, the reviewing judge adopted a narrow interpretation of s. 487.012(3)(*c*) of the *Criminal Code*, one that effectively requires the authorizing judge to have reasonable grounds to believe the person named in the Production Order possesses an "unrestricted" or "unfettered" right of access to the information or data. The prosecution respectfully argued that if one follows the reviewing judge's reasoning down the path of logic, one would have expected MCpl Ferris to work her way through DND, beginning with the Minister, to determine who has the delegated and unrestricted authority to access the Department's servers. This situation is to be contrasted with the prosecution's argument that the statutory condition can be satisfied if there are reasonable grounds to believe the person named in the order has "sufficient" possession or control of the information being sought.

[101] As a matter of interpretation, one is forced to ask why the requirement of "unfettered" or "unrestricted" control or possession is necessary for purposes of issuing a Production Order. Correlatively, one has to ask what legislative purpose is achieved if a Production Order is invalidated because of the failure of the ITO to name a person with an unrestricted or unfettered right of access to information or data. The record before us does not provide an express or implicit answer to that question and I am at a loss to think of one. In my view, to insist that only

those persons with unfettered or unrestricted access to the Department's servers should have been named in the ITO is to impose a condition precedent without a purpose. Moreover, Capt Wright advanced no argument that his rights were compromised when the ITO identified Mr. Engelberts as the person who would be performing the search.

[102] With great respect, the reviewing judge's implicit interpretation of s. 487.012(3)(*c*) of the *Criminal Code* reflects a rigid formalism which the law abandoned long ago. One need only turn to s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 to confirm that understanding: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In my respectful view, there was ample evidence upon which the authorizing judge could find reasonable grounds to conclude that Mr. Engelberts had "sufficient" possession or control of the documents for which production was being sought, and, therefore, the spirit and intent of the legislation was respected. Correlatively, this leads me to conclude the reviewing judge erred in adopting a narrow interpretation of s. 487.012(3)(*c*) of the *Criminal Code*.

[103] Even if I am in error on this interpretative point, Capt Wright has not explained why, as a matter of policy, the Production Order should be declared invalid. After all, Mr. Engelberts did in fact retrieve the information being sought. In other words, even if the reviewing judge's interpretation of s. 487.012(3)(*c*) of the *Criminal Code* were accepted, I am not prepared to accept that mere breach of a statutory condition is a sufficient basis for invalidation. Surely, there must be some evidence of prejudice to the accused or a basis for drawing a reasonable inference of possible prejudice, based on the underlying facts. In the present case, there is neither evidence

nor argument of prejudice. In my respectful view, that omission provides an additional ground for finding reversible error on the part of the reviewing judge.

[104] The fourth ground for invalidating the Production Order rests on the failure of the ITO to refer to the place where the e-mails were being stored (*i.e.*, the location of the servers) and to the retention periods for e-mails. In her amplification evidence, MCpl Ferris admitted that she knew about these matters and yet she made no reference to them in the ITO. The reviewing judge concluded non-disclosure of these matters was grounds for invalidating the Production Order. In my respectful view, the omission cannot be classified as "materially misleading" or even "factually incomplete" as those terms are understood in the jurisprudence. The omission would be significant if the information were somehow relevant to the issuance of the Order. However, neither the reviewing judge nor Capt Wright explained the relevance of the omitted information.

[105] It is important to recognize what this case is not about. This is not a case where the Production Order authorizes a search and seizure of a personal computer located at the home of the accused and instead the police seize the one found at the accused's place of work. This is a case in which the police are seeking to access the computer records of the accused's employer. It is an IT employee of the employer that is being obliged to conduct the search for the information identified in the Production Order. With great respect, the physical location where the employer stores its electronic information is of no moment when it comes to the decision which the authorizing judge in this case was required to make.

[106] I agree with the prosecution that the failure of MCpl Ferris to include the omitted information had no bearing on the issuance of the Production Order. Simply stated, the matters of server location and retention periods are extraneous to the legal task confronting the

authorizing judge: to determine whether there was credible evidence on which to find reasonable and probable grounds to believe an offence had been committed and whether there were reasonable and probable grounds to believe the information being sought was within the possession and control of DND. With respect to those determinations, it should have made no difference whether the Department's servers were located in Greenwood, Nova Scotia or in Ottawa, Ontario, provided that Mr. Engelberts could access the relevant e-mails accounts. Correlatively, the matter of retention periods is of no substantive significance when it comes to issuance of the Production Order. In my respectful view, the reviewing judge erred in law in holding otherwise.

[107] Collectively and individually, the reasons which the reviewing judge advanced for holding the Production Order invalid are open to challenge on the ground they reflect a "line-by-line treasure hunt for error". More importantly, his ultimate finding that there was "no sufficient credible and reliable evidence" to permit the authorizing judge to find reasonable and probable grounds for believing an offence had been committed is infused with reversible error.

[108] This leaves for consideration the reviewing judge's finding that the search which Mr. Engelberts conducted was "abusive". This finding was based on the fact that Mr. Engelberts also retrieved e-mails outside the parameters of the Production Order. In addition to the documents listed in that Order, Mr. Engelberts provided related e-mails (Exhibits VD1-10 to VD1-15, inclusive). Upon receipt, MCpl Ferris did not notice that Mr. Engelberts had submitted more than requested. Based on "preponderance of probabilities", the reviewing judge summarily concluded the additional documents were obtained "in a manner that infringed [Captain Wright's] right to be secure against unreasonable seizures".

[109] In my respectful view, the reviewing judge erred in concluding the seizure was abusive. I should point out that intuitively one would think a finding of "abusive conduct" is a question of fact or, at best, a question of mixed fact and law. In this case, however, the finding raises a question of law. It is easiest to explain why the reviewing judge erred, and why the finding of abusive conduct raises a question of law, by reference to additional facts that have been outlined in these reasons.

[110] Under the Production Order, Mr. Engelberts was authorized to obtain all outgoing e-mails from Capt Wright, related to his DND account, and addressed to Maj Wosnitza and dated October 17, 2011. As it should happen, attached to those outgoing e-mails are the incoming e-mails from Maj Wosnitza. In short, the outgoing and incoming e-mails were really part of one document (a "conversation" so-to-speak). But it is important to note that at least one e-mail in each chain met the conditions specified in the Production Order. Indeed, had the prosecution failed to produce all of the e-mails in the chain, Capt Wright could have properly complained that evidence flowing from only the e-mails he had sent could be misleading if read out of context. What is equally troubling is the fact the so-called additional e-mails are peripherally related to the offence set out in s. 137 of the *Criminal Code*. They are of the stuff one would expect in any employment context and, above all else, they do not contain any information that is of a personal nature and over which Capt Wright could expect a measure of privacy. In conclusion, in my respectful view there is no evidential foundation for the reviewing judge's finding that the seizure was overly broad. If I am in error on this point, the reviewing judge should have ordered the surplus e-mails be expunged.

[111] In conclusion, the reviewing judge erred in finding a breach of the respondent's rights under s. 8 of the *Charter*. Accordingly, it is unnecessary to decide whether the evidence ought not to have been excluded under s. 24(2). I would allow the appeal and set aside the decision of the reviewing judge so as to allow a new trial on all charges.

[112] Section s. 245(2) of the NDA provides for a right of appeal to the Supreme Court, without leave, on any question of law on which a judge of the Court Martial Appeal Court dissents. Mirroring s. 677 of the *Criminal Code*, Rule 35(4.1) of the *Court Martial Appeal Court Rules* (SOR/86-959), states that where there is a dissenting opinion on a question of law, the grounds for the dissent shall be specified in the judgment issued by the Court. I have identified the following questions of law: (1) Within the context of s. 137 of the *Criminal Code*, is it necessary to specify in the ITO a date of fabrication and, if not, does the fact that both the ITO and Production Order refer to an erroneous date invalidate the latter?; (2) Does s. 487.012(3)(*c*) of the *Criminal Code* require evidence that the person named in the ITO has an "unrestricted" or "unfettered" right of access to the information being sought?; (3) Is the failure to disclose in the ITO the physical location of the employer's servers, on which e-mail information is stored, and the retention period for e-mails so stored, a valid basis for setting aside the Production Order?; and (4) Is a search for emails "abusive" because attached to the email being sought are the related emails that form part of "the chain" of conversation? I have answered "no" to all four questions.

"Joseph T. Robertson"

J.A..

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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