Date: 20070129

Docket: CMAC-491

Citation: 2007 CMAC 1

CORAM: **HUGESSEN J.A.**
WEILER J.A.
DAWSON J.A.

BETWEEN:

MASTER CORPORAL W.B. DUNPHY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

Docket: CMAC-492

CORPORAL PARSONS, D.R.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 18, 2007

Judgment delivered at Ottawa, Ontario, on January 29, 2007

REASONS FOR JUDGMENT BY THE COURT:

HUGESSEN J.A.
WEILER J.A.
DAWSON J.A.

Date: 20070129

Docket: CMAC-491

Citation: 2007 CMAC 1

CORAM: **HUGESSEN J.A.**
WEILER J.A.
DAWSON J.A.

BETWEEN:

MASTER CORPORALW.B. DUNPHY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

Docket: CMAC-492

CORPORAL PARSONS, D.R.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

BY THE COURT

1. Overview

[1] These appeals are not factually related but they raise a common issue under paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B, to the *Canada Act 1982* (U.K.), 1982 c. 11 (the Charter): the independence of the tribunal that tried them. The same military judge decided both cases and incorporated his reasons on the paragraph 11(*d*) motion from the *Parsons* case in his *Dunphy* decision. Although the military judge declared that the appointment renewal provisions of military judges violated paragraph 11(*d*) of the Charter he declined to grant an individual remedy pursuant to subsection 24(1) of the Charter. Both Parsons and Dunphy were found guilty of one count of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act,* R.S., c. N-4. They are appealing their convictions. By way of cross-appeal the Crown appeals the declaration that paragraph 11(*d*) was violated and the declaration of invalidity pursuant to section 52 of the Charter. For the reasons that follow we are in substantial agreement with the military judge's conclusion that the articles in question violate the Charter and his conclusion that no individual remedy should be afforded.

[2] The appellant Parsons raises additional grounds of appeal relating to his conviction at trial. We find it necessary to deal only with the ground of appeal alleging that the trial judge erred in recalling Parsons after counsel's closing submissions and he had reserved his decision. The Crown concedes that the trial judge erred and we would allow the appeal on this ground. In view of the disposition we propose to make, it is not necessary to deal with the other grounds of

appeal raised. We deal with the additional ground of appeal at the outset and, to put our decision in context, a brief summary of the evidence follows.

2. The Evidence respecting Parsons

[3] On February 4, 2004, the military police executed a search warrant on Corporal Parsons's residence. The validity of this search was challenged at trial, and, after holding a *voir dire*, the military judge found it to have been properly authorized. The police found a Nikon D1X digital camera and related paraphernalia. The camera had been ordered and supplied to the Department of National Defence (DND) and shipped to the Base Supply at CFB Greenwood in June of 2003, where Parsons was employed as a supply technician. He was the last person to be seen with the camera when it went missing.

[4] Parsons testified and denied stealing the camera. He explained that he had an interest in photography and had handled the camera. He said that he had attempted to buy a similar camera from Carsand-Mosher, a camera equipment outlet in Halifax, in late December 2003, but that their offered price of $4000 plus tax was too high. He gave evidence that, while in the store, he met a man trying to sell camera equipment to the outlet, and bought the camera at issue from him for $3800. He obtained a hand-written receipt from the seller. He testified that he did not know that he possessed the camera that had gone missing from the supply chain. Parsons was cross-examined on his evidence. Following this, the defence closed its case and both counsel made closing submissions. The Court closed to determine its findings on February 1, 2006, and reopened on February 3, and pursuant to article 112.32 of *Queen's Regulations and Orders for the Canadian Forces*, (QR&O), the judge recalled Parsons to the stand. The military judge asked Parsons if he had played any part in preparation of the receipt, which Parsons denied. The

military judge then directed Parsons to print his name "Dwayne Parsons" on a piece of paper above the words "no warranty transferred or expressed." Parsons spelled the words "warrinty" and "transfered". The same misspellings occurred in the handwritten receipt that had been entered into evidence.

[5] Although the military judge acquitted Parsons of the charge involving theft of the camera, he found him guilty of the charge involving possession of stolen property. The military judge disbelieved Parsons' story of the chance meeting with the man at the camera store. He emphasized how the evidence disclosed that the seller of the camera misspelled the words "warranty" and "transferred" on the receipt document in exactly the same way that Parsons misspelled the two words in writing before the Court. Based on the length of time between when the camera went missing and when it was found in his possession, the military judge inferred that Parsons knew that the camera was stolen.

3. Argument and Disposition of the Appeal respecting Parsons

[6] The appellant submits that the military judge erred by wrongly exercising his discretion to recall and cross-examine the accused after the defence had closed its case. The Crown concedes that the military judge erred in doing so.

[7] We accept the Crown's concession. A judge has limited discretion to call witnesses without the consent of the parties. While a judge may ask questions to resolve a misunderstanding or to clarify issues, in this case there was nothing in need of clarification. A judge should never recall a witness after the defence has closed its case when it would cause

prejudice to the accused. Here the military judge compromised the fairness of the trial by taking on a role that properly belonged to the prosecutor.

[8] We disagree with the Crown's submission that, in light of the evidence adduced prior to the recall, the military judge's decision would inevitably have been the same and Parsons was therefore not prejudiced. The military judge did not reject Parsons' evidence outright. He took two days to consider the evidence before recalling Parsons. The impugned evidence is at the core of the military judge's reasons for conviction. Parsons was prejudiced.

[9] Ordinarily the remedy would be to order a new trial. On the record before us, however, but for the military judge's error, Parsons would have been entitled to an acquittal. In the unusual circumstances of this case, therefore, we agree with the appellant that a new trial would not be fair and would engage paragraph 11(*d*) of the Charter. As a result, we order that the appeal be allowed that the finding of guilt be set aside and that the proceedings be stayed. As this is sufficient to dispose of Parsons' appeal we need not address the other grounds of appeal.

[10] We now turn to the Dunphy appeal.

4. The Dunphy Appeal

[11] Although the military judge struck down the articles pertaining to the renewal appointment of military judges, the military judge was not one who had been reappointed. In addition, having struck down the articles such that, in his opinion, he now had security of tenure, the military judge held there was no longer a violation of paragraph 11(*d*) of the Charter.

[12] The only issue in Dunphy's appeal is whether the military judge erred by not granting Dunphy a Charter remedy pursuant to subsection 24(1). During argument of this appeal his counsel conceded that he was not entitled to an individual remedy and that the appropriate remedy was a declaration of invalidity pursuant to subsection 52(1). That is sufficient to dispose of this appeal. Accordingly, we order that the appeal be dismissed.

5. The Crown's Cross-Appeals in Parsons and Dunphy concerning the Military Judge's Declaration of Invalidity

[13] We now propose to deal with the cross-appeals by the Crown. The military judge declared that certain sections pertaining to the reappointment of military judges pursuant to the QR&O were of no force and effect. He held that articles 101.15(2), 101.15(3) and 101.17(2) of the QR&O, which provide for the composition of the Renewal Committee and the factors that it must and must not consider in making its recommendation as to whether or not a military judge should be reappointed, gave rise to a reasonable apprehension that the military judge would be unable to decide the case before him without interference from external actors. For ease of reference, the articles in issue are reproduced below.

> 101.15 – ESTABLISHMENT OF RENEWAL COMMITTEE
>
> (1) A committee to be known as the Renewal Committee is hereby established for the purpose of subsection 165.21(3) of the *National Defence Act.*
> (2) The Committee consists of three members appointed by the Governor in Council as follows:
>
> (*a*) a judge of the Court Martial Appeal Court nominated by the Chief Justice of the Court;

(*b*) a barrister or advocate with standing at the bar of a province, other than an officer or non-commissioned member, nominated by the Minister of Justice; and

(*c*) a person other than a legal officer or an officer or a non-commissioned member referred to in section 156 of the *National Defence Act*, nominated by the Minister of National Defence.

(3) The Chairperson of the Committee shall be the person nominated under subparagraph 2(*a*).

(4) Each member holds office for a period not exceeding four years.

101.17 – RECOMMENDATION BY RENEWAL COMMITTEE

(1) The Renewal Committee shall deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

(2) In making a recommendation, the Renewal Committee shall consider as a minimum the following:

(*a*) the requirements of the Office of the Chief Military Judge, including:

(i) any planned change in strength which will increase or reduce the establishment within the unit of the Chief Military Judge,

(ii) the official language requirements within the unit of the Chief Military Judge, and

(iii)the need to maintain a minimum level of continuity within the unit of the Chief Military Judge having regard to the fixed term appointments and projected retirements of other currently serving military judges;

(*b*) any compelling military requirement to employ the military judge after the completion of the current term of appointment in a non-judicial capacity elsewhere in the Canadian Forces; and

(*c*) the military judge's physical and medical fitness to perform military duties as an officer of the legal classification.

(3) The Committee shall not consider the record of judicial

> decisions of the military judge.
>
> (4) The Committee shall submit its recommendation to the Governor in Council no later than two months before the expiration of the appointment of the military judge.

[14] Assuming that the cross-appeal has not been rendered moot by our disposition of the appeals and is properly before us, we offer the following comments.

[15] In determining whether or not a military judge has security of tenure, the test to be applied is an objective one. Would a reasonable and right-minded person, informed of the relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically -and having thought the matter through- conclude that a military judge presiding at a court martial is at liberty to decide the case that comes before him on its merits without interference by any outsider with the way in which he conducts his case and makes his decision. See *R. v. Valente,* [1985] 2 S.C.R. 673 at paras. 12-13 and 22; *R. v. Lippé,* [1991] 2 S.C.R. 114 at para. 57.

[16] In *R. v. Généreux*, [1992] 1 S.C.R. 259 at para. 86 Lamer C.J. said:

> Officers who serve as military judges are members of the military establishment and will probably not wish to be cut off from promotional opportunities within that career system. It would therefore not seem reasonable to require a system in which military judges are appointed until the age of retirement.

[17] Subsequently, in *R. v. Lauzon,* [1998] C.M.A.J. No.5, para. 27 this Court held:

> In our view the fact that the posting of an officer to a military trial judge position is renewable does not necessarily lead to the conclusion that institutional independence is lacking if the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions.

[18] The time has come to reconsider this decision.

[19] The evidence filed before the military judge indicates that the rationale behind *Généreux*, above, and *Lauzon,* above, no longer exists. It is no longer true that a posting to a military judge's position is merely a step in a legal officer's career and that military judges would necessarily want to maintain their connections with the Canadian Forces to preserve their chances of promotion. A military judge doesn't receive a Performance Evaluation Report which is necessary for career advancement. Further the military judge could come back into the chain of command and find him/herself subject to a person he or she had tried. In addition, a return to regular military service would entail a significant financial loss.

[20] With the evolution of time court martial courts have become quite different from the way they were. At General Courts Martial the military judge is no longer an adviser but now performs a role akin to a judge in the civilian courts; that is even more so at Standing Courts Martial such as the ones from which these appeals are brought.

[21] Although the legislation sets out certain factors that the Renewal Committee must and must not consider, it is clear that the Committee's decision is not limited to those factors. Quite apart from the lack of transparency that results, the articles in question cannot act as a sufficient

legislative restraint to remove concerns respecting security of tenure. As former Chief Justice Lamer observed in his last report, at p. 1406 of the Appeal book volume VII: "...institutional safeguards are currently not in place to protect a military judge from a reasonable apprehension of bias should it be determined that the military judge's term not be renewed."

[22] He concluded by recommending that military judges be awarded security of tenure until retirement subject only to removal for cause on the recommendation of an Inquiry Committee.

[23] We agree with his recommendation that military judges be awarded security of tenure until retirement subject to removal for cause. The deficiencies noted by the military judge in the judgments appealed from would cease to have any relevance if those recommendations were followed. We also note that the current provisions will become a dead letter if Bill C-7 is passed.

[24] Accordingly, we are in substantial agreement with the conclusion of the military judge and would order that the cross-appeal be dismissed.

"James K. Hugessen"
Hugessen J.A.

"Karen M. Weiler"
Weiler J.A.

"Eleanor R. Dawson"

Dawson J.A.

COURT MARTIAL APPEAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**CMAC-491 and CMAC-492**
STYLE OF CAUSE:	**Master Corporal W.B. Dunphy v. Her Majesty the Queen** **Corporal Parsons D.R. v. Her Majesty the Queen**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 18, 2007
REASONS FOR JUDGMENT BY:	HUGESSEN J.A. WEILER J.A. DAWSON J.A.
DATED:	January 29, 2007

APPEARANCES:

Major Edmond Thomas Lieutenant Colonel D. Couture	FOR THE APPLICANT
Major R.F. Holman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Directorate of Defence Counsel for the Canadian Forces, Ottawa, Ontario	FOR THE APPLICANT
Directorate of Military Prosecutions Office of the Judge Advocate General Ottawa, Ontario	FOR THE RESPONDENT