COURT MARTIAL

Citation: *R. v. Thibault,* 2015 CM 1001

Date: 20150113
Docket: 201431

Standing Court Martial

2nd Division Support Base Valcartier
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Corporal Thibault, A.J.R., Accused-Applicant

Before: Colonel M. Dutil, C.M.J.

[OFFICIAL ENGLISH TRANSLATION]

By court order made under section 179 of the *National Defence Act (NDA)* and section 486.4 of the *Criminal Code of Canada*, information that could identify the person described in this Court Martial as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION RESPECTING A PLEA IN BAR OF TRIAL (ARTICLE 112.24 OF THE *QUEEN' S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES (QR&O)*)

(Orally)

[1] Corporal Thibault raises a plea in bar of trial pursuant to subparagraphs 112.24(1)(*a*) and (*e*) of the *QR&O,* to the effect that the Court has no jurisdiction and the charge does not disclose a service offence. He is charged with having committed the following offence:

[TRANSLATION]

First charge Section 130 N.D.A.	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE* *Particulars*: In that he, on or about 20 August 2011, at Sainte-Catherine, Province of Quebec, sexually assaulted Corporal A.B.G.

[2] This motion comes on the heels of recent decisions of the Court Martial Appeal Court regarding the constitutionality of paragraph 130(1)(*a*) of the *National Defence Act* and the requirement to establish a nexus with military service so that a court martial may exercise its jurisdiction (*R. v. Moriarity /Hannah*, 2014 CMAC 1, 20 January 2014, leave to appeal granted by the Supreme Court of Canada on 24 July 2014, 35755; *R. v. Vézina*, 2014 CMAC 3, 7 March 2014, leave to appeal granted by the Supreme Court of Canada on 24 July 2014, 35873; *R. v. Arsenault*, 2014 CMAC 8, 13 June 2014, leave to appeal granted by the Supreme Court of Canada on 11 December 2014, 35946; *R. v. Larouche*, 2014 CMAC 6, 30 April 2014; and *R. v. Royes*, 2014 CMAC 10, 30 October 2014).

[3] The unique aspect of this case is that the applicant not only challenges the constitutionality of the statutory provision, but also raises a lack of the military nexus required so that the Court may exercise its jurisdiction.

[4] Apart from the judicial notice under section 15 of the *Military Rules of Evidence*, the facts supporting the plea in bar of trial are limited and were submitted jointly. First, the parties filed a document from the Department of National Defence and the Canadian Armed Forces, Exhibit R1-3 entitled "Statement of Defence Ethics". This statement requires a commitment by the Department of National Defence and its employees, and the Canadian Armed Forces and its members, "to apply the highest ethical standards in all decisions and actions, whether at home or abroad". Second, the parties filed an agreed statement of facts to establish the circumstances of this case. For a better understanding of the case, I will reproduce said agreed statement of facts [*The agreed statement of facts is reproduced as presented in Exhibit R1-2.*]:

[TRANSLATION]

Agreed Statement of Facts

1. The complainant, Cpl A.B.G., joined the Canadian Forces on 20 May 2005, in the Reserve Force, Military Police occupation. Cpl A.B.G. transferred to the Regular Force on 6 October 2009, in the same occupational group.

2. Cpl A.B.G. is trained and currently serves as a military police officer, at 2nd Canadian Division Support Base – Detachment St-Jean. She is a member of 5 Military Police Regiment.

3. In the course of her career, Cpl A.B.G. may be posted to any national defence establishment in Canada or abroad.

4. As a military police officer, Cpl A.B.G. may be deployed on missions in which the Canadian Armed Forces (CAF) participate, in support of deployed troops.

5. Cpl A.B.G. was deployed to Afghanistan, from 25 November 2010 to 28 June 2011.

6. Cpl Alexandre Thibault joined the Regular Force on 24 July 2002. He is a member of 2 Battalion, Royal 22e Régiment. He has been deployed twice, from 25 July 2007 to 20 February 2008, and from 11 November 2010 to 28 June 2011.

7. During training for the build-up to ROTO 3-10 and the deployment to Afghanistan in 2011, Cpl Thibault was posted to the military police.

8. After Cpl A.B.G. and Cpl Thibault were deployed to Afghanistan, they became friends, as they were both in the same group at the Cyprus decompression centre.

9. Cpl A.B.G. developed a relationship of trust with Cpl Thibault and shared her feelings regarding the difficult situations she was experiencing.

10. When she returned to Canada, Cpl A.B.G. tried to contact him two or three times to talk about their mutual passion for Jeep brand vehicles. They never met.

11. On 19 August 2011, Cpl Thibault allegedly invited Cpl A.B.G. to join him at his cousin's home in Sainte-Catherine (South Shore of Montréal), for purely social reasons, as he was helping his cousin move in that same day. Cpl Thibault was visiting the area, as he lived in Québec City. Cpl A.B.G. was living in Brossard at the time.

12. Cpl A.B.G. came to the new home of Cpl Thibault's cousin and ended up sleeping over there. Cpl A.B.G. was unable to drive her car because she had been drinking alcohol.

13. According to Cpl A.B.G., the alleged incident occurred during the night from 19 to 20 August 2011. The Court will have to

analyze the alleged incident in this case unless the Court allows this motion.

14. On 16 January 2012, Cpl A.B.G. filed a complaint with the inter-municipal police department in Roussillon. She met with a Roussillon police investigator on 26 January 2012.

15. Cpl A.B.G. felt betrayed by a brother in arms and thought that she could no longer trust members of the Forces. She went to civilian police because she had no confidence in the military.

16. Because of the incident alleged by Cpl A.B.G., she specifically told her career manager that she did not want to be posted to 2nd Canadian Division Support Base – Valcartier because Cpl Thibault is there. She refuses to work in any establishment where Cpl Thibault could be. The nature of her duties carries an additional risk of running into him, as she may have to respond to calls or engage in police action that would bring her into contact with Cpl Thibault.

17. Cpl A.B.G. is now afraid of Cpl Thibault.

18. When the case was referred to the Director of Military Prosecutions, Brigadier-General Jean-Marc Lanthier, the referral authority in this case, stated: [TRANSLATION] "Sexual violence in any form, particularly between two members, must be reported and punished because it erodes the social values that members hold dear, particularly because it violates the physical and psychological integrity of victims and has damaging consequences for them, their families and society as a whole. Furthermore, this sort of behaviour affects morale, discipline and cohesion in the Canadian Armed Forces (CAF). Members must at all times feel safe with their co-workers".

[5] In *Larouche*, (*supra*, paragraph 2, at paragraph 8), Justice Cournoyer states at the outset that he fully agrees with the approach and conclusions of Chief Justice Blanchard in *Moriarity/Hannah* regarding the overbreadth of paragraph 130(1)(*a*) of the *NDA* and the violation of section 7 and paragraph 11(*f*) of the *Canadian Charter of Rights and Freedoms.* He also defines this nexus with military service in light of decisions of the Court Martial Appeal Court over the last 30 years. Justice Cournoyer then notes as follows, at paragraphs [21] to [23]:

> [21] An offence set out in section 130 of the NDA may be tried under the *Code of Service Discipline* when it is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the Canadian Forces. Such an offence is an offence under military law within the meaning of section 11(*f*) of the Charter and must be tried before

> a Canadian military tribunal because it pertains directly to the discipline, efficiency and morale of the military.
>
> [22] This is the interpretation that has been adopted by this Court over the last thirty years. No compelling reason has ever been provided for the Court to depart from this interpretation, which has stood the test of time.
>
> [23] The military nexus test is part of the "pith and marrow" of Canadian military law. It is not appropriate today to perform a new constitutional surgery.

[6] The applicant submits that the test set out by the Court Martial Appeal Court requires a two-step assessment. The first step involves determining whether the offence is connected with military service in its nature and in the circumstances of its commission, while the second, once the first step has been completed, involves assessing whether said offence would tend to affect the general standard of discipline and efficiency of the Canadian Forces. This approach is not in dispute.

[7] The charge sheet alleges that the complainant and the accused are non-commissioned members. The agreed statement of facts indicates that they met during training for the build-up to ROTO 3-10 in 2011 and that they were deployed to Afghanistan from the end of November 2010 to the end of June 2011, he as an infantryman and she as a military police officer. As a result of the deployment to Afghanistan, they became friends because they were in the same group of members at the Cyprus decompression centre. The complainant developed a closer relationship of trust with him and shared her feelings regarding the difficult situations she was experiencing. There is nothing to indicate that this relationship of trust was other than a personal one between the two individuals. When they returned to Canada, the complainant tried to contact Corporal Thibault a few times, unsuccessfully, to discuss their shared passion for Jeep brand vehicles. It was not until 19 August 2011 that Corporal Thibault allegedly invited the complainant to come join him at his cousin's home in Sainte-Catherine, near Montréal, when he was helping her move. He was living in Québec City at the time, while the complainant was living in Brossard. The invitation was purely for social purposes. The complainant therefore went to the cousin's new home. It was a relaxing evening, with alcohol being served. At the advice of the accused's cousin, they both agreed to sleep over. The incident allegedly occurred during the night and is the subject of the charge before this Court. On 16 January 2012, the complainant went to the local police to file a complaint. She said that she felt betrayed by a brother in arms and could no longer trust members of the Forces, which is why she went to the local police. The complainant performs military police duties and may be posted anywhere, and she says that she is now afraid of the accused and does not want to serve anywhere he might be.

[8] In *Moriarity/Hannah* (cited above), at paragraph [65], the late Chief Justice Blanchard reminded us not to apply a rigid framework when analyzing the nexus with military service:

> Further, I agree with Justice McIntyre that it is not possible to enumerate all of the circumstances in which there would be a nexus to the military, so that the exercise is

> best determined on a case-by-case basis. This Court has in the past provided guidance in a number of its judgments on how the nexus doctrine is to be applied to the circumstances of a particular case. By way of examples, I reference: *Catudal v. R.* (1985), 4 C.M.A.R. 338; *R. v. MacEachern* (1986), 24 C.C.C. (3d) 439; *Ryan v. R.* (1987), 4 C.M.A.R. 563, *R v. Ionson* (1987), 4 C.M.A.R. 433 affirmed [1989] 2 S.C.R. 1073 (S.C.C.), and *R. v. Brown* (1995), 5 C.M.A.R. 280.

[9] The prosecution thus concludes that the requisite nexus is present, relying in particular on *MacEachern* and *Ionson.* It raises, among other things, the combination of the military status of the complainant and the accused, the very nature of the offence of sexual assault and its impact on morale, discipline and cohesion in the Canadian Armed Forces, in light of the statements made in paragraph 18 of the agreed statement of facts. In *R. v. MacEachern* (1986), 24 C.C.C. (3d) 439, Justice Addy, writing for the Court, states the following regarding the military nexus and the particular circumstances of the case, at pages 442-445:

> Since the *MacKay* case our Court has recognized the principle that a military nexus is required to create jurisdiction: see *R. v. MacDonald* (1983), 6 C.C.C. (3d) 551 , 150 D.L.R. (3d) 620 (C.M.A.C.), and in *R. v. Catudal* as yet unreported, court file C.M.A.C. 218, decision dated January 18, 1985 [since reported 18 C.C.C. (3d) 189 , 63 N.R. 58].
>
> There seems to be little doubt, having regard to the *MacKay* case and to the two last-mentioned decisions, that the specific offence of possession of which the appellant stands convicted must be established as having been service connected in order for the conviction to be upheld.
>
> I do not feel, however, that the Relford factors or anything approaching a comprehensive series of tests listing the existence of various factors should be laid down. On the contrary, each case should be considered according to its particular circumstances. Suffice it to say that the nexus must be real although it need not be physical or tangible. In my view, a nexus capable of truly affecting the morale, the discipline or the efficiency of the military would suffice. As stated by MacIntyre J. at pp. 161-2 of the *MacKay* case:
>
> > The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis.
>
> Turning to the facts of the present case, on the one hand the appellant was not in uniform and was on leave in his home town several hundred miles from his former military base or from any military base for that matter, when the alleged offence was committed. On the other hand, there is evidence that an investigation concerning drugs at HMCS Iroquois which the appellant had just left as a steward, was being carried out and that, as a result of that investigation, two military policemen felt that it was

necessary to drive some six to eight hours for the sole and express purpose of interviewing the accused in connection with the investigation being carried out at the time. They were concerned enough about the involvement of the accused to make arrangements with the R.C.M.P. before they left for Dingwall to have an interrogation room available at Ingonish, which is about a one-half hour drive from Dingwall. One of the two investigating policemen when asked on cross-examination at trial by counsel for the appellant whether he suspected his client of drug involvement, replied:

> I never suspected that he had any drugs. We had a suspicion that he may have been involved in several drug incidents on board the ship, and in addition, we had reason to believe that he had information that would lead us to who was directly involved. That's the reason why we went to Dingwall.

It is also of some significance that the appellant had been contacted by telephone in Dingwall by someone on board ship and warned that the military police would be driving to Dingwall to interview him. He, indeed, was expecting them and knew beforehand why they were coming. They were most anxious to see the accused as he was not to return to the ship but was to proceed directly to Canadian Forces Base North Bay on the expiry of his leave. Finally, the vehicle which he entered and in which the drugs were ultimately found, although not the actual property of the Department of National Defence, had, nevertheless, been rented by the military police on behalf of the department for the purpose of conducting this investigation and more specifically of driving to Dingwall to interview the appellant. The military, at the time, undoubtedly had a proprietary interest in the vehicle and it must be regarded as military property *pro tempore.*

All the above circumstances, in my view, are sufficient to establish the required nexus for jurisdiction. Because of the particularly important and perilous tasks which the military may at any time, on short notice, be called upon to perform and because of the team work required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern and interest in seeing that no member of the forces uses or distributes drugs and . . . ultimately eliminating its use, may be more pressing than that of civilian authorities. The existence of a drug-related offence, in the context of the particular exigencies of military service, is one of the many factors which must be taken into consideration in deciding whether jurisdiction exists. It is, indeed, an important factor. I do not, however, for one moment agree with certain pronouncements of some military U.S. tribunals to the effect that, because of the devastating effect of drugs in the forces, any involvement or use of drugs whatsoever by a member of the military constitutes by that very fact a sufficient nexus for its tribunals to assume jurisdiction.

[10] The Court agrees with the prosecution that the offence of sexual assault is closely tied to military service and that all forms of sexual violence, particularly between two members of the Forces, must be reported and punished because they erode the social values that members hold dear, particularly because they violate the physical and psychological integrity of victims and have damaging consequences for them, their families and society as a whole. The very nature of the offence is just one of the elements required to find that the offence falls within the jurisdiction of military justice in a particular case. The circumstances surrounding the offence are just as important. Unlike in *MacEachern*, apart from their military status and the fact that they knew each

other, there is no reason to believe that their military status played any role in the circumstances surrounding the commission of the offence. Of course, the occasion that gave rise to their friendship was a work-related meeting. However, apart from this, nothing in the events that preceded the alleged sexual assault related to military service. For example, they did not work together, not even in the same city. They were of course likely to run into each other in their careers, but no more so than other members in different careers or occupations. The evidence before the Court simply shows that their meeting on 19 August 2011 was strictly personal, for social purposes. The meeting took place in the private residence of a third person who had no connection to military service, apart from being the cousin of Corporal Thibault. Perhaps the facts on which the sexual assault itself is based could provide relevant evidence of a sufficient nexus with military service. Unfortunately, the only relevant information appears in paragraph 13 of the agreed statement of facts, which states as follows:

> [TRANSLATION]
> According to Cpl A.B.G., the alleged incident occurred during the night from 19 to 20 August 2011. The Court will have to analyze the alleged incident in this case unless the Court allows this motion.

[11] The prosecution could have provided additional evidence to counter the plea in bar of trial had it seen fit to do so. It did not. The evidence therefore does not support the assertion that such circumstances are sufficient such that this offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the Canadian Forces.

FOR THESE REASONS, THE COURT:

[12] **ALLOWS** the plea in bar of trial in accordance with article 112.24 of the *QR&O*.

AND

[13] **TERMINATES** the proceedings.

Counsel:

Major G. Roy and Major P. Doucet, Canadian Military Prosecution Service
For the respondent, Her Majesty the Queen

M. Morin, Directorate of Defence Counsel Services
Counsel for the applicant, Corporal A.J.R. Thibault