COURT MARTIAL

Citation: *R v A.M.*, 2014 CM 1018

Date: 26072014
Docket: 201347

Standing Court Martial

2nd Canadian Division Support Base, Valcartier
Courcelette, Quebec, Canada

Between:

Private A.M., Applicant

and -

Her Majesty the Queen, Respondent

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

OFFICIAL ENGLISH TRANSLATION

[CORRECTED REASONS][1]

MOTION FOR THE APPOINTMENT OF GOVERNMENT-PAID COUNSEL OUTSIDE THE CANADIAN FORCES (ROWBOTHAM ORDER)

(Orally)

[1] The applicant is asking the Court to issue an order requiring the Canadian Forces authorities and the Department of National Defence to pay the fees of the advocate representing her before this Standing Court Martial, namely, Micheline Montreuil. Even though the legislative and regulatory framework dealing with the delivery of legal services in court martial proceedings, the parties recognize that the issue must be examined in light of the principles developed in *R v Rowbotham* (1988), 41 CCC (3d) 1 (C.A.O.) [*Rowbotham*].

[1] Corrected reasons aim to protect the private life of the applicant.

[2] Other than the facts and issues of which the Court took legal notice under section 15 of the *Military Rules of Evidence*, the evidence filed in support of this motion relies on the applicant's testimony and the facts appearing in Exhibit R2-1. According to the facts relevant to this motion, the applicant is the subject of proceedings before this Court Martial following the laying of charges by the Director of Military Prosecutions in response to a charge sheet signed by one of his representatives on 24 May 2013, which contains seven counts for incidents that occurred on Canadian Forces Base Wainwright, Alberta, on or around 23 September 2012. The charges essentially concern offences against individuals, including military police officers, namely, assault causing bodily harm, resisting a peace officer in the exercise of his duties, behaving with contempt towards a superior and one offence of drunkenness.

[3] The events leading to these charges are likely the result of a previous, particularly difficult, situation for Private A.M., where one or more individuals stole from her a video of a sexual nature that was on her cell phone. This video was quickly and widely diffused on social networks. The video undoubtedly caused considerable harm to the health and reputation of the applicant, who will eventually be released from the Canadian Forces for reasons that have not yet been pronounced. It is clear that the applicant's career in the Canadian Forces has been seriously jeopardized. The applicant testified on the events surrounding the diffusion of the video and on her perception that her chain of command had abandoned her in this whole matter. She undoubtedly no longer trusts her superiors or the Canadian Forces. This Court Martial was convened on 28 April 2014 and began on 5 May 2014. Also according to the evidence, Private A.M. retained counsel from Defence Counsel Services to represent her before this Court Martial, but he had to withdraw from the case in June or July 2013. The Director of Defence Counsel Services assigned a second counsel to the applicant on or around 4 September 2013, but this second counsel asked the Court to authorize him to be removed from the record because of a misunderstanding with the applicant as soon as the proceeding before this Court Martial began on 5 May 2014. The request was granted, and the Court was informed that Micheline Montreuil would be representing the applicant from then on. Private A.M. testified that she had lost all confidence in her second counsel because they did not agree on how to resolve this issue. The Applicant chose to retain an advocate with civilian experience because she no longer trusted counsel from Defence Counsel Services, from the military justice system or the military. She added that she did not want to be represented by military counsel, but also stated that she had not been denied the services of a military counsel working for Defence Counsel Services created under section 249.19 of the *National Defence Act*. Private A.M. testified at length about the events that followed the diffusion of her personal video and the measures taken by her chain of command until today, which she considers to be inadequate. There is no doubt that she is very bitter and that she has lost confidence in her unit; also, her mental health is still very affected by the whole matter. She described her current financial situation. She owes $35,000 for a car that she no longer has. In December 2013, she bought a house for $220,000, with a deposit of $10,000 that she drew from her RRSPs and that represented the amount she was paid in severance pay. She has temporary custody of her 23-day old niece as her sister has temporarily lost her parenting rights because of serious problems. She has no interest or

investment income. Her military pay is about $56,000 a year, which she will receive until her release from the Canadian Forces. Her spouse is also a member and is stationed at Valcartier. She has a high-school diploma and ended her testimony by stating that she did not contact her financial institution or any other person to help her pay the fees of her current counsel and that she did not know anyone who would be able to help her. Lastly, the Court notes that Ms. Montreuil's approached the Director of Defence Counsel Services verbally to have him pay her fees and that he refused.

[4] The applicant submits that the circumstances of this case, including all the events relating to the video and the actions of her chain of command both before and after the laying of the charges before this Court, make it impossible for her to receive a fair trial if the fees of her civilian lawyer are not paid for by the state. The applicant also submits that the complexity of this case and her mental health make it impossible for her to represent herself. She is not eligible under the provincial legal aid system and does not want to be represented by a military counsel working for the Director of Defence Counsel Services. She chose to be represented by Ms. Montreuil, at her own expense, but is now asking the Court to order the Canadian Forces, the Department of National Defence or the Director of Defence Counsel Services to cover these costs because she does not believe that she will receive a fair trial in the circumstances or full answer and defence.

[5] To begin with, there is no general right to assistance from counsel paid for by the state of Canada. However, in some cases, the Court may conclude that representation by counsel is essential and suspend the proceeding until the services of a counsel paid for by the state are provided. The Court may allow the application of an accused who is not represented by counsel and who is seeking the assistance of counsel at the expense of the state if the following three conditions are met:

(a) the accused is not eligible for or was denied legal aid and has exhausted all of his or her rights of appeal; the accused cannot have been denied legal aid as a result of his or her own actions or negligence;

(b) the accused cannot afford to pay for counsel; and

(c) representation by counsel is essential to ensure a fair trial.

[6] The burden is on the accused to establish that he or she does not have the means to retain counsel and that representation by counsel is essential to ensure a fair trial. To justify such a measure, the accused must establish that it is highly likely that the trial will be unfair in the absence of counsel. The courts must, however, strive not to apply too strict a test and not to place excessive weight on the effect of the order on the legal aid system.

[7] The *National Defence Act* has established its own legal aid system for any person who is liable to be charged, dealt with and tried under the Code of Service Discipline (Part III of the Act) by enacting the provisions in Section 12, sections

249.17 to 249.21. Among other things, it entitles any person who is liable to be charged, dealt with and tried under the Code of Service Discipline to be represented in the circumstances and in the manner prescribed in regulations made by the Governor in Council (section 249.17), and it sets out that the Director of Defence Counsel Services provides, and supervises and directs the provision of, legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline, assisted by persons who are barristers or advocates with standing at the bar of a province (sections 249.19 and 249.21). Section 101.20 of the Queen's Regulations and Orders for the Canadian Forces (QR&O) sets out the legal services provided under section 101.22 of the QR&O, which concerns representation of the accused by counsel before a Court Martial, including counsel to be appointed by the Director of Defence Counsel Services, counsel retained at the accused's own expense, and the accused representing him or herself.

[8] The Court has great empathy with the applicant and accepts that she may well believe that she will not receive a fair trial if she is defended by military counsel. But this belief is not supported by the evidence that was filed before this court. Military counsel, and civilian barristers and advocates retained by the Director of Defence Counsel Services or at the accused's own expense, regularly plead before the Court Martial. Military counsel regularly and vigorously argue before the Court Martial Appeal Court and the Supreme Court of Canada. The subjective perception of the applicant alone, that she will not be defended according to the highest ethical standards by military counsel and that her case is so complex that military counsel do not have the skills to provide full answer and defence, is not sufficient. There is no evidence at all that this could reasonably be the case.

[9] The facts of this case are clear. Private A.M. was not denied the services of counsel by the Director of Defence Counsel Services: on the contrary. She herself said that she did not want to be represented by military counsel because she did not trust them. That is her decision, and we must respect it. However, in the circumstances, this decision cannot be interpreted as meaning that she was denied legal aid under the *National Defence Act*. This factor cannot be assessed in relying solely on the applicant's subjective perception that she does not trust the professional services of a military counsel with standing at the bar of a province because that counsel wears a uniform and she invariably associates him or her with the military institution that she alleges treated her unfairly. A reasonable person who is aware of the guarantees of the institutional independence of defence counsel acting under the authority of the Director of Defence Counsel Services appointed under section 249.18 of the Act, the ethics governing the barristers and advocates of the provincial bar associations and the absence of any relation between the chain of command of any accused and military counsel is not based on any factual or legal foundation. This is mere speculation. The applicant is fully entitled to retain counsel of her own choice at her own expense. This, however, is not a reason that meets the first criterion of the test adopted since the *Rowbotham* decision. Consequently, the court does not have to assess the other two criteria.

[10] The Court will, however, perform a review that falls outside the specific framework of *Rowbotham* as there may be rare cases where the appointment of counsel through the legal aid system, including the system created under the *National Defence Act*, would not suffice to ensure a fair trial, such as in cases where the accused can establish that the only chance of his or her receiving a fair trial is by being represented by a given counsel or where the accused is unable to find competent counsel willing to accept legal aid fees and conditions, in the context of the *National Defence Act* naturally. To justify such a measure, the accused must produce detailed and exhaustive evidence. When assessing this evidence, the Court must keep in mind that the accused only has a right to competent counsel, but not to the most experienced or best counsel available. Again, the applicant did not establish on a balance of probabilities that counsel appointed by the Director of Defence Counsel Services would not be effective in guaranteeing her a fair trial. The Court cannot ignore the test applicable in such matters and amend the applicable law by using its broad discretion in a non-judicial manner simply because it empathizes with the accused's situation. This would be a serious error in law.

FOR THESE REASONS, THE COURT

[11] **Dismisses** the motion to order that the fees of Private A.M.'s counsel, Micheline Montreuil, be paid for by the Canadian Forces, the Department of National Defence or the Director of Defence Counsel Services.

Counsel:

Major G. Roy, Canadian Military Prosecution Service
Counsel for the respondent

Micheline Montreuil
Counsel for the applicant, Private A.M.