COURT MARTIAL

Citation: *R. v. Bourassa*, 2014 CM 3017

Date: 20140916
Docket: 201384

General Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Captain S. Bourassa, Applicant

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR DECISION ON PLEA IN BAR MOTION

(Orally)

[1] Captain Bourassa has been charged with three counts of disobedience of a lawful command of a superior officer contrary to section 83 of the *National Defence Act* during incidents that all occurred on 30 June 2013 in the area of Ottawa, province of Ontario.

[2] Through a plea in bar motion filed by counsel for Captain Bourassa, and before denying or admitting his guilt on each count, Captain Bourassa objected to the trial on the ground that the matter raised by the counts does not fall under the Court's jurisdiction. Essentially, he submits that the referral process for the initial charges laid and listed on the Record of Disciplinary Proceedings is fundamentally flawed, thus proscribing this Court from dealing with the charges on the charge sheet before it.

[3] This preliminary motion is presented under subparagraph 112.05(5)(*b*) of the *Queen's Regulations and Orders for the Canadian Forces* (hereafter QR&O) as a

question of law or of mixed law and fact to be determined by the military judge presiding at the Court Martial, as specified under article 112.07 of the *QR&O*.

[4] The evidence produced in support of this motion consists of the following:

(a) the notice of motion dated 28 August 2014;

(b) the Record of Disciplinary Proceedings (RDP) signed and dated by Lieutenant-Colonel Spaans dated 21 August 2013;

(c) a letter from the unit commanding officer at the referral authority dated 6 September 2013;

(d) a letter concerning the referral of the charges dated 30 September 2013;

(e) the testimony of the applicant, Captain Bourassa, and of Lieutenant-Colonel Spaans; and

(f) the judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

[5] On 21 August 2013, two charges were formally brought against Captain Bourassa by Lieutenant-Colonel Spaans, as confirmed by the RDP (Exhibit VD1-2). On the same day, at 1340 hours, Lieutenant-Colonel Spaans informed the accused of his right to be tried by Court Martial and of the requirement to make his decision known by 1340 hours on 22 August 2013.

[6] As appears from the RDP and confirmed by the applicant's and Lieutenant-Colonel Spaans' testimony, Captain Bourassa communicated his decision to be tried by court martial at 1243 hours on 22 August 2013, that is, a little less than an hour before the period of not less than 24 hours set to make such a decision. He confirmed to the Court that he had the opportunity to consult Defence Counsel Services and that he did indeed do so, that he made this choice after contacting legal counsel and that he had not changed his mind about wishing to be tried by court martial since then.

[7] The circumstances that led to Captain Bourassa's communicating his decision are a little unclear. Captain Bourassa reported to the Court that Lieutenant-Colonel Spaans had approached him shortly before a weekly meeting regarding an order group held at 1300 hours, that the Lieutenant-Colonel had asked him to make his decision known and that the administrative formalities, completing the relevant section of the RDP in writing, took place in a room.

[8] For his part, Lieutenant-Colonel Spaans testified that the applicant had come to see him in his office, where he happened to be because of a cancelled meeting, and had told him that he was ready to give his decision as to whether he wished to be tried by court martial. Lieutenant-Colonel Spaans had been aware that the 24 hours were not up,

but given that Captain Bourassa said that he was ready and wished to transmit his decision despite this, he recorded the decision in the RDP.

[9] Article 108.17 of the QR&O sets out the procedure for election to be tried by court martial. Paragraph 2 of this provision describes the reasonable period of time to be granted to make such a decision and the desired goals. It reads as follows:

> (2) Where the accused has the right to be tried by court martial, the officer exercising summary trial jurisdiction shall, before commencing a summary trial, cause the accused to be informed of that right and given a reasonable period of time, that shall be in any case not less than 24 hours, to:
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> a. decide whether to elect to be tried by court martial;
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> b. consult legal counsel with respect to the election (*see article 108.18 – Opportunity to Contact Legal Counsel on Election*); and
>
> c. make his decision known in the manner stipulated by the officer exercising summary trial jurisdiction.

[10] Paragraph 108.17(3) of the QR&O clarifies as follows:

> (3) The accused shall in writing confirm his election and that he:
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> a. has discussed the matters set out in paragraph (5) of article 108.14 (Assistance to Accused) with his assisting officer; and
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> b. has had an opportunity to consult legal counsel in respect of the election.

[11] A reading of article 108.17 of the QR&O reveals that this is an essentially procedural provision designed to set out the steps leading an accused's election to be tried by court martial. More specifically, the purpose of providing a minimum of 24 hours is to give the accused an opportunity to decide whether to be tried by court martial, to consult legal counsel about this decision and to make his or her decision known in the manner stipulated.

[12] During these 24 hours, the accused can learn more about the nature and gravity of the charges against him or her and about the differences between a summary trial and trial by court martial. Moreover, the accused is entitled to be assisted by legal counsel and to consult legal counsel during this period in order to help him or her better grasp and understand these issues and, ultimately, to make a more informed election.

[13] The answer I must therefore answer with respect to the circumstances raised by the applicant is the following: does the failure to respect the minimum period of 24 hours prescribed in paragraph 180.17(2) of the QR&O during which an accused cannot be asked to communicate his or her election of whether or not to be tried by court martial render any subsequent proceedings null and void?

[14] The applicant in this matter submits that the period imposed by paragraph 108.17(2) of the QR&O cannot be waived implicitly or explicitly and that failure to respect the period had a major impact on the validity of the decision made by Captain Bourassa to the extent that any resulting proceedings have been nullified.

[15] The respondent agrees that the provision prevents any authority from requiring a response before the 24 hours expire in order to allow an accused to discuss the election to be tried by court martial with his or her assisting officer and legal counsel. However, according to the respondent, nothing stops the accused from making his or her decision known before expiration of this period or obliges the authority concerned to accept the election only upon expiration of the period.

[16] To answer the question, I must first interpret the meaning and the scope of the term "shall" in the wording of the provision that stipulates that the officer exercising trial jurisdiction shall cause the accused to be given a reasonable period of time that shall be not less than 24 hours to make his or her decision as to whether he or she wishes to be tried by court martial known.

[17] The scope of the term "shall" is defined in article 1.06 of the QR&O, which reads as follows:

> In QR&O
> a. "may" shall be construed as being permissive and "shall" as being imperative; and
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> b. "should" shall be construed as being informative only.

[18] Therefore, simply by interpreting the wording in light of the meaning of the term "shall" as defined in the QR&O, it becomes clear that the officer exercising trial jurisdiction is obliged to give not less than 24 hours to allow the accused to reflect, consult and communicate his or her decision on whether or not to be tried by court martial. This period is necessary because the regulations require it to be this way.

[19] Does the failure to respect this minimum period, in the event that the election was communicated earlier than minimally required, that is 24 hours, automatically nullify the subsequent proceeding?

[20] In *R. v. Couture*, 2008 CMAC 6, the Court Martial Appeal Court noted that in some cases, failure to comply with an imperative prescribing rule does not necessarily render any subsequent procedures null and void if it was not strictly followed. The Court clearly expressed the fact that the requirements of the rule in question and the consequences of the failure to comply with it must be assessed in the context of the matter.

[21] In *R. v. Couture*, the Court concluded that despite the fact that a person having the authority to lay charges failed to read the legal advice obtained, as required by the QR&O, and laid a charge, did not affect the validity of any subsequent procedures. The

Court noted that the person had read the facts relevant to his decision and that the charges and the entire file had been reviewed by a representative of the Director of Military Prosecutions, who signed the charge sheet containing the charges before the Court Martial. The Court concluded that nothing in the circumstances suggested that the failure to comply caused the accused harm.

[22] An officer exercising summary trial jurisdiction over a person who is subject to the Code of Service Discipline must offer this person the option of being tried by another military tribunal, the court martial. So that this election can be made, the officer must give the accused not less than 24 hours to allow him or her to assess what he or she is facing and to consider a number of other important factors: the nature and gravity of the charges, the differences between the two military courts with respect to issues such as powers of punishment, the rights to representation, the rules governing reception of evidence and the right to appeal. During this time, the accused must be able to consult the assisting officer or legal counsel.

[23] In my opinion, Captain Bourassa was able to consult the necessary people, including legal counsel, and to make a fully informed election. Ultimately, he has always wished to be tried by court martial for the charges laid against him, and he has established no reason why it could or should have been otherwise.

[24] Following the reasons in *Couture*, I therefore conclude that despite its imperative nature, failure to comply with the 24-hour minimum period prescribed in paragraph 108.17(2) of the QR&O during which an accused cannot be required to communicate his or her decision as to whether or not to be tried by court martial does not necessarily render any other subsequent procedures dealing with the charges null and void.

[25] In the present circumstances, I find that this failure did not harm the applicant and that, in fact, after consulting the necessary people and having the time to weigh the advantages and disadvantages, he has obtained what he wished, to be tried by court martial.

[26] The applicant submitted the decision in *R. v. Laity*, 2007 CM 3011, in which I concluded that the failure of the person authorized to lay charges to sign the RDP meant that no charges had been laid, thus rendering null and void all subsequent procedures. Essentially, I concluded that the person authorized to lay charges was required to authenticate and that failure to comply with this requirement rendered the charge sheet and any subsequent procedure invalid.

[27] The decision in *Laity* is not the same as the circumstances in the present matter, while respecting the letter and the spirit of the later decision of the Court Martial Appeal Court in *Couture*. In *Laity*, a substantive defect resulted in rendering the charge null and void.

[28] In the present matter, a defect in form could have rendered all subsequent procedures null and void, but, in the particular circumstances of this case, did not have this effect.

FOR ALL THESE REASONS, THE COURT

[29] **DISMISSES** Captain Bourassa's motion.

Counsel:

Major J.E. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major J.L.P.L. Boutin, Defence Counsel Services
Counsel for Captain S. Bourassa