COURT MARTIAL

Citation: *R. v. Simms*, 2015 CM 4007

Date: 20150416
Docket: 201449

General Court Martial

Between:

Her Majesty the Queen

- and -

Master Warrant Officer A.W. Simms, Accused

Before: Commander J.B.M. Pelletier, Military Judge

DECISION ON TIMING OF THE HEARING AND DETERMINATION OF A PROPOSED *CHARTER* APPLICATION BY THE ACCUSED

INTRODUCTION

[1] On 12 November 2014, an officer authorized by the Director of Military Prosecutions preferred five charges against the accused, Master Warrant Officer A.W. Simms. Four of these charges allege that on 30 May 2014, at Winnipeg International Airport, the accused committed offences under section 130 of the *National Defence Act* (*NDA*); namely, assault causing bodily harm, assault on a peace officer, resisting a peace officer and uttering threats against Corporal Hall under sections 267(*b*), 270(1)(*a*), 129(*a*) and 264.1(1)(*a*) of the *Criminal Code*. The fifth charge allegedly committed at the same time and place, also laid under section 130 of the *NDA*, alleges that the accused uttered threats against Corporal Paradise, contrary to 264.1(1)(*a*) of the *Criminal Code*.

[2] A General Court Martial was convened on 15 January 2015 for the trial of the accused. The convening order specifies that I, Commander J.B.M. Pelletier, Military Judge, am appointed to preside at the trial, which is set to commence on 27 April 2015 at 17 Wing Winnipeg, Manitoba.

[3] On 12 March 2015, a document titled "Application for Hearing of a Preliminary Proceeding QR&O articles 112.03 and 112.04" was filed by counsel for the accused. It

lists five grounds in support of the application, alleging essentially that the transfer of custody of the accused from the Winnipeg Police Service to the Military Police was not properly authorized and, as a consequence, the subsequent detention by the military police became arbitrary and thus contrary to section 9 of the *Canadian Charter of Rights and Freedoms* (Charter). The remedy sought is a stay of proceedings on all charges. Counsel for the accused states, "It is proposed that this application be heard at the trial of this matter after the evidence of prosecution has been entered." He specifies that, "It is the expectation of the applicant that the trial evidence will provide a foundation supporting the grounds set out" in the application.

[4] On 25 March 2015, I presided over a telephone conference held at the request of counsel for the accused, mainly to discuss the issue of the timing for the hearing of the 12 March application. At that conference, prosecution counsel took the view that the application should not be heard at the close of its evidence as requested, but rather be heard before the start of the trial. During the ensuing discussion, concerns were raised on the practical difficulties of proving the application by means of the evidence presented before the panel of the General Court Martial and arguments were offered to the effect that the evidence in support of the application did not relate to the charges before the court. Counsel for the accused requested the opportunity to submit further arguments and case law in support of his position. I invited both counsel to prepare written arguments in support of their respective positions and requested a further teleconference for 2 April 2015 to discuss, amongst other things, timings for filing of written arguments.

[5] On 30 March 2015, an amended version of the 12 March "Application for Hearing of a Preliminary Proceeding QR&O articles 112.03 and 112.04" was filed by counsel for the accused. The substantive content is exactly the same as the previous version except for the addition of seven grounds added to the five grounds already listed in support of the application. These seven additional grounds essentially refer to the authority that Corporal Hall would have had to arrest the accused and his status as a peace officer at the time of the interaction between himself and the accused.

[6] On 2 April 2015, I presided over a telephone conference, as planned, to discuss a number of issues pertaining to the trial, including the details of how it is proposed to resolve the disagreement between parties on the issue of the timing of the *Charter* application relating to the arrest and subsequent detention of the accused. Both counsel agreed that it was appropriate for the limited issue of the timing for the hearing of that application to be determined in writing on the basis of written arguments, supported by appropriate case law, submitted under a specific schedule. I confirmed that schedule in a written order rendered later on 2 April 2015.

SUBMISSIONS OF THE PARTIES

[7] Counsel for the accused has taken the position that what he has filed thus far is not an application but merely a notice that he *could* make an application relating to the arbitrary nature of the arrest/detention of the accused. He argues this notice was given

in order to comply with the requirement of article 112.04 of the QR&O. In his submission, the issues then become as follows: (1) Does the court have the authority to direct that his *potential* defence application be filed at a particular time? and (2) If so, whether or how the court should exercise that discretion in the case at bar.

[8] On the first proposed issue, counsel for the accused argues that section 187 of the *NDA* confers a right to file an application at any time during a court martial, which cannot be fettered by rules or regulations, not even by any inherent jurisdiction the court might have to control its own process. In any event, the exercise of this jurisdiction to order counsel to file an application and argue it at the commencement of the trial would violate the accused's right to make full answer and defence.

[9] On the second proposed issue, counsel for the accused argues that if the court finds that it has a discretion to order the accused to file and argue an application, it should exercise that discretion in such a way as to allow the application to be presented and argued at the moment chosen by the accused; namely, after the evidence in chief has been lead.

[10] In a short reply, the prosecution argues that what counsel for the accused has filed on 12 and 30 March 2015 is a preliminary application under section 187 of the *NDA*, which does not allow a determination once proceedings have commenced with the initiation of the procedure at QR&O 112.05. It is argued that this is consistent with the remedy sought, a stay of proceedings, which would make the engagement of all the resources involved in a General Court Martial unnecessary. Any of the allegedly negative consequences raised by counsel for the defence are simply the result of his tactical choices. Besides objecting to the qualification of the procedure by counsel for the defence, the prosecution did not address any of the specific legal arguments raised and provided no case law in support of its position.

[11] In a response, counsel for the defence submitted that the position adopted by the prosecution on the scope of section 187 of the *NDA* is in error as it would, according to him, allow the initiation of an intended application at any time without formal notice.

ANALYSIS

[12] The submissions pertaining to this question highlight not only disagreement but also some misunderstanding on the part of the parties on the purpose and scope of section 187 of the *NDA* and QR&O 112.04 on preliminary proceedings as it relates to trials by court martial. I need first to provide my interpretation of these important dispositions and then comment on the exact meaning and effect of the application documents filed by counsel for the defence. This will allow me to conclude that, as a military judge, I do have discretion to decide on the timing of any hearing and determination of issues, including those which could be the subject of preliminary applications. I will then exercise my discretion and provide parties with the necessary direction.

The Purpose and Scope of Section 187 of the *NDA* and QR&O 112.04

[13] Section 187 of the *NDA* is a product of the fact that there is no such thing as a permanent court martial. The process leading to a court martial begins with specific charges being preferred by or on behalf of the Director of Military Prosecutions against a specific accused (*NDA* sections 165(2) and 165.16), continues with the convening of a Standing or General Court Martial to try that specific accused on those specific charges at a given time and place where proceedings are to commence (QR&O 111.01) and leads to court martial proceedings beginning (QR&O 112.05(2)), the trial formally commencing with the plea of the accused (Note to QR&O 110.10) and the trial concluding with either findings of not guilty on all charges or sentencing if required (QR&O 112.05(20) or (22)). To put it in other words, although there is a permanent Court Martial Administrator and a permanent military judiciary headed by the Chief Military Judge, there is no such thing as *the* court martial – there is the Standing or General Court Martial *of a given accused.*

[14] The purpose of section 187 of the *NDA* is to allow, on application, any military judge, or the military judge assigned to preside at a given court martial to hear and determine any question, matter or objection in respect of the charge before the commencement of the trial. The first observation that can be made is that recourse to section 187 is optional – it is triggered by an application. A second observation is that its material application is very broad; it applies to any question, matter or objection in respect of the charge. The third is that section 187 is meant to allow the military judge to hear and determine those matters before the commencement of the trial. This begs the question of when exactly does a trial by court martial commence or, in other words, what exactly is meant by the term "preliminary proceedings"? Those are "preliminary" to what? The Note to QR&O 110.10 provides that "A trial by court martial commences when the accused pleads to a charge." The order of procedure at courts martial is laid out precisely at QR&O 112.05. The plea is provided for at QR&O 112.05(6). This brings about a final observation: the very broad material application of section 187 certainly, but not exclusively, includes all of the potential grounds of questions, matters or objections found at paragraphs (3) and (5) of QR&O 112.05.

[15] Section 187 is, therefore, simply a practical tool, conferring on a military judge the authority, on application, to hear and determine any question, matter or objections in respect of the charge before the trial commences, without the need to wait for the time and place set in a convening order to begin court martial proceedings. Section 187 is not the instrument that confers to the accused the right to submit these questions, matters or objections for consideration by a military judge; the accused already had that right conferred either expressly, for instance by sections 186 or 191 of the *NDA*, or implicitly, for instance by the application of subsection 179(1)(*b*). To the extent that section 187 confers a right, it is limited to the right of a party to apply to a military judge to request that an issue be heard and determined before the commencement of the trial.

[16] The practical application of section 187 can be illustrated with the example of an accused who seeks to obtain further particulars in order to prepare a defence, as foreseen at QR&O paragraph 112.05(5)(*c*). Without the tool conferred by section 187, a military judge would have either to request the Court Martial Administrator to issue a new convening order or to wait and hear the matter at the ordered location and time when trial proceedings have been ordered to begin to determine an issue which, if granted, will certainly require the rest of the proceedings to be postponed. By using section 187 in this example, the accused can request a hearing and determination of this matter by videoconference to avoid the requirement for participants to travel, as provided for at QR&O 112.64, "Preliminary Proceedings – Video Link," which refers to QR&O 112.03 and section 187.

[17] For its part, QR&O 112.04 is a regulation made by the Governor in Council for carrying the purposes and provisions of the *NDA* into effect, as provided at section 12 of the *NDA*. It does make the practical tool of section 187 efficient, by ensuring that the military judge and the other parties are made aware of what the applicant identifies as the issue to be determined in the intended application, the evidence required and the time required to present the application. QR&O 112.04 refers to sections 187 and 191.1 of the *NDA* as well as to the potential grounds of questions, matters or objections found at paragraphs (3) and (5) of QR&O 112.05. It therefore applies to matters that have not been the object of an application under section 187. This ensures that even the matters that the military judge will go over in the order of procedure prescribed at QR&O 112.05 in the course of the court martial proceedings at the time and location ordered can be litigated efficiently, especially as it pertains to enabling the opposing party to respond without adjournment. For any court martial, this allows for an appreciation of the moment when witnesses are likely to be required, thereby limiting the expenses of having these persons needlessly waiting to be called at the location of the trial, which may be quite far from their current residence. For a General Court Martial, this ensures that members of the panel can be ordered to assemble at the time that preliminary proceedings conducted in their absence are completed, as foreseen in QR&O 111.02(2.1).

[18] Together, section 187 of the *NDA* and QR&O 112.04 allow any issue to be heard and determined at a time and through a method to be decided by a military judge, in consultation with the parties. That would likely be before the date and time set for the commencement of court martial proceedings in the convening order and, in all cases, before the commencement of the trial, the moment when the plea is received. QR&O 112.04 on its own is simply a tool to ensure that details pertaining to any issue to be raised at courts martial proceedings before the commencement of the trial is communicated to the military judge and the other side to ensure a most efficient hearing and determination.

The Application of section 187of the *NDA* and QR&O 112.04 in this Case

[19] The issue raised by counsel for the defence on the legality of the arrest and detention of the accused is a question of mixed facts and law which is covered by

section 191 of the *NDA* and QR&O 112.05 (5)(*e*) and is to be heard and determined by myself as the military judge presiding at this General Court Martial, without the presence of the members of the panel. As explained above, it is a matter which may be the subject of an application for hearing and determination before the commencement of the trial under section 187 of the *NDA*. In any event, it is a matter which, by virtue of the order of procedure promulgated in QR&O 112.05 followed by military judges presiding at courts martial, is raised before the trial commences; namely, before the accused is asked to plead.

[20] The distinction made by counsel for the accused between sending a Notice of Application in compliance with QR&O 112.04 and submitting the actual application is acknowledged. The required content of the notice does not constitute the application itself. The procedure foresees evidence and arguments to be provided verbally at a hearing, although written representations with or without oral submissions in support are not excluded and are often used, as they were with the pleadings leading to this decision.

[21] The exact nature of the documents sent by counsel for the accused on 12 and 30 March 2015 should, therefore, be that of a Notice of Application sent by counsel to comply with the requirement of QR&O 112.04. By virtue of its content, however, specifically the demand that the issue of the legality of the arrest and detention of the accused be determined at the close of the prosecution's case, I cannot consider it as an application made to me to hear and determine that issue before the commencement of the trial, as foreseen in section 187. What I consider this document to be, therefore, is a notice that there is an issue of facts and law on the legality of the arrest and detention of the accused that will require a determination from me in the absence of the panel at a time to be determined following the exchange of written arguments on which this decision is based. The timing will be decided in the paragraphs below. Following this decision, the accused will remain free to signify that he does not wish to present a *Charter* application concerning the legality of his arrest and detention by withdrawing his notice. Indeed, in the circumstances of this case, counsel for the accused labelled the decision to file such application as one of tactics and I am not prepared to interfere in the conduct of the defence.

[22] I wish to state, to avoid any misunderstanding on the part of the accused in deciding whether or not to continue with his application, that in the exercise of my power to control and prevent abuse of this General Court Martial's process, in the eventuality of a decision by the accused not to present a *Charter* application concerning the legality of his arrest and detention before the commencement of the trial, I will not allow presentation of this or a similar application at a later moment during trial, bar an extraordinary and entirely unforeseen material change in relevant circumstances.

The Discretion in the Management of the Trial Process

[23] I have concluded that section 187 of the *NDA* confers no right to submit an application at any time during trial, contrary to the argument of the accused. I have also

decided that it is still possible for the accused to decide not to submit a *Charter* application on the issue of the legality of his arrest and detention. That said, if the accused decides to continue with his application, I need to provide the parties with a determination as to the timing at which such an application must be heard and determined.

[24] As already outlined, the issue raised by counsel for the defence on the legality of the arrest and detention of the accused is a question of mixed law and fact foreseen in QR&O 112.05 (5)(*e*). Therefore, it is a preliminary matter which, in the prescribed order of proceedings at courts martial, should be heard before the plea is taken, which marks the commencement of trial by court martial. The issue I have to decide is whether I, as the military judge, possess the required discretion to depart from the prescribed order of proceedings in order to allow hearing and determination of the matter at a different time, specifically at the end of the prosecution's case as requested by counsel for the defence.

[25] Paragraph 179(1)(*d*) of the *NDA* provides that a court martial has the same powers, rights and privileges as are vested in superior courts of criminal jurisdiction with respect to matters necessary for the due exercise of its jurisdiction. As the military judge presiding this General Court Martial, I do have the jurisdiction to find that the *Charter* rights of the accused were violated in the circumstances demonstrated to me and to provide the accused with a proper remedy under section 24(1) of the *Charter*.

[26] The Supreme Court of Canada has found that courts exercising such a jurisdiction have a discretion as to when to rule on pre-trial motions (*R. v. DeSousa* [1992] 2 S.C.R. 944 at para. 17). More specifically, the court has a discretion as to when to hear and decide applications for a stay of proceedings or related relief based on alleged breaches of the *Charter*. (*R. v. La* [1997] 2 S.C.R. 680 at paragraph 27).

[27] In order to be able to conduct this inquiry fairly and effectively, therefore, I am of the view that I require the same discretion to decide when I should hear and decide an application such as the one submitted to my attention by counsel for the accused in this case, even if this requires to depart from the order of procedure prescribed in QR&O 112.05. I note that this later article is procedural in nature and should therefore not be enforced at the detriment of arriving at a proper decision on a substantive issue. I also note, anecdotally, that many military judges have in the past found that they have the same discretion and agreed to hear *Charter* motions at other times than those prescribed in QR&O 112.05.

The Exercise of the Discretion in this Case

[28] There remains the issue of how I should exercise this discretion to determine the timing of the proposed application, in the circumstances of this case. The case law provided by counsel for the defence illustrate the challenge quite accurately, especially the reasons of Barrow, J of the British Columbia Supreme Court in *R. v. Steadman* [2009] 81 W.C.B. (2d) 173. As a starting point, it is interesting to realize that the

preference expressed in the order of proceedings at courts martial found in QR&O 112.05 finds echo in some of the policy considerations recognized by courts of criminal jurisdiction which militate in favour of dealing with applications of this kind prior to trial. Among other things, it has been found that if a pre-trial *Charter* application may result in the termination of the prosecution, then it is in both the state's and the accused's interest to have that issue determined in advance in order to avoid an unnecessary trial.

[29] Indeed, in *R. v. Byron* (2001), 156 C.C.C. (3d) 312, the Manitoba Court of Appeal found that generally, preliminary motions should be heard and disposed of before or at the commencement of the trial. It found that, "It is not in the best interests of an accused, nor the state's, to go through unnecessary trials. From the point of view of an accused, they must incur the legal expenses of the trial as well as other expenses related to travel and loss of wages. They also have the stigma of the findings of guilt." (at paragraph 22) Similar considerations were expressed by the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. Pioneer Construction Inc.*, [2006] O.J. No. 1874, 79 O.R. (3d) 641 to the effect that "absent unusual circumstances" a motion to stay proceedings should ordinarily be argued before trial (at paragraph 27).

[30] On the other hand, courts have found that when resolution of a *Charter* application depends on an assessment of the effect of the breach on the trial process, it would be preferable to resolve the issue after the evidence on the trial has been heard as it is only then that the full effect of the breach on the trial process can be known (*R. v. La* [1997] 2 S.C.R. 680 at para. 27). Although it is not clear how the alleged violation could affect the trial process, in this case, I note that counsel for the defence alleges, in concluding his submissions, that "the degree of moral culpability and the details of the interaction between the accused and Corporal Hall are necessary for the court to make a determination as to whether a stay is the appropriate remedy in this case." In *R. v. Andrew (S.)* (1992), 60 O.A.C. 324, the Ontario Court of Appeal found, at paragraph 325, that unless the *Charter* violation "is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial." This is also valid for a determination of the extent of the prejudice, as decided by the Ontario Court of Appeal in *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381, at paragraph 382.

[31] Additional and compelling considerations arise when the trial is scheduled to be heard by a panel by General Court Martial. In particular, the need to minimize disruptions of the trial as it unfolds before the panel is important. On the basis of the grounds submitted by counsel for the accused, I believe that despite his best efforts to add seven grounds closely related to the elements of the two charges involving the status of Corporal Hall as a peace officer, the evidence relevant to the application could involve evidence other than that required to be introduced by the prosecution to prove the elements of the offences. This would likely lead to a contestation of the extent of cross-examination of prosecution witnesses conducted by defence counsel and a need to resolve these issues in the absence of the panel. Also, the list of contentious legal and factual issues provided by the accused in written arguments includes issues that may

just as well be elicited through direct examination of Corporal Hall. Others, including the effect on the accused of his interaction with Corporal Hall, may have to be presented by the accused himself. The argument on the application will necessarily have to address some extensive legal issues such as the peace officer status of Corporal Hall, who I understand is a member of the military police exercising duties away from base at Winnipeg International Airport.

[32] The point of all of this is that even if there could be agreement on the relevant facts, the application will take some time to argue. It will need to be followed by deliberations on my part to make and deliver a decision. This is expected to be done after the panel has heard the evidence of the prosecution, but before the evidence of defence. These elements add up to form more than a trivial interruption in the participation of members of the panel in the trial.

[33] I recognize that in any trial by General Court Martial there are unexpected and anticipated but unavoidable interruptions to the panel members' participation in the trial process. Yet, I see it as my duty to ensure that the process is respectful of panel members' time and to avoid interruption in their duties any more than necessary as such interruptions are generally not conducive to the trial process.

[34] Consequently, I have chosen to privilege a hybrid approach. I will separate the hearing of the application with its determination in an attempt to minimize the length of the disruption to the trial while ensuring that the entire prosecution evidence can be assessed in the ultimate determination of the issue of the extent of the violation and the prejudice caused to the accused in the assessment of the appropriate remedy. I have arrived at this decision in consideration of the added potential challenges for the presentation of the evidence by the accused, which are not unusual for anyone in the position of an applicant who bears an evidentiary burden. Also, I see no reason why all aspects of the application could not be argued prior to trial, with the possibility of additional submissions on the basis of the prosecution evidence actually heard during trial.

DISPOSITION AND DIRECTION

[35] For those reasons, I am directing that the accused signifies his intent to carry on with his application to challenge the legality of his arrest and detention and seek a stay of proceedings as a remedy in accordance with the Notice, dated 30 March 2015, no later than Monday, 20 April 2015.

[36] Should the accused continue with his application, it will be heard starting on Monday, 27 April 2015, on the date, time and place where the court has been ordered to convene at 17 Wing Winnipeg, in the absence of the panel of the General Court Martial. The accused will introduce his evidence and the prosecution will do the same. Counsel will then submit their arguments.

[37] I will not determine the application until the evidence of the prosecution has been entirely heard before the panel at trial. At that point, in the absence of the panel, I will allow both counsels to present supplementary submissions on the evidence heard during the prosecution's case. I will then provide my decision on the application, again in the absence of the panel.

(Original signed by)
J.B.M. Pelletier, Commander
(Presiding Military Judge)

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