COURT MARTIAL

Citation: *R. v. Thibeault*, 2014 CM 3023

Date: 20141205
Docket: 201407

Standing Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Captain J.R.N.J. Thibeault, Applicant

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

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REASONS ON A PLEA IN BAR REGARDING JURISDICTION IN RELATION TO THE MODE OF TRIAL

(Orally)

[1] This is an application for a plea in bar made by Captain Thibeault, the accused in this trial, brought pursuant to subparagraph 112.05(5)(*b*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). It is presented at the beginning of the trial, prior to the judge asking the accused to plead guilty or not guilty to the only charge on the charge sheet.

[2] Captain Thibeault, the applicant in this matter, is charged with one service offence punishable under section 130 of the *National Defence Act* for having allegedly committed, on or about 4 February 2012 at Canadian Forces Base Borden, a sexual

assault on an officer of the Canadian Forces contrary to section 271 of the *Criminal Code*.

[3] Captain Thibeault is pleading in bar of trial that this Standing Court Martial has no jurisdiction in order to dispose of the charge before it because it was not properly convened by the Court Martial Administrator. Essentially, he is claiming that despite the context of a new trial ordered by the Court Martial Appeal Court, the Court Martial Administrator should have given him an opportunity to choose to be tried by a Standing Court Martial or a General Court Martial, as specified at section 165.193 of the *National Defence Act*, which she did not. Concluding that this provision is mandatory in such a context, he invites the court to terminate the proceedings, which would provide then an opportunity for the Court Martial Administrator to convene a court martial in respect of that specific section of the *Act*.

[4] In the alternative, as a matter of remedy to such breach, he suggests to the court to consider an order by the court to the Court Martial Administrator to put Captain Thibeault to his election of the mode of trial or simply to direct that a General Court Martial be convened, the latter being his personal choice as the type of trial he would like to have for dealing with the charge.

[5] As a matter of evidence, the notice of application and an affidavit from the assistant to defense counsel, Mrs Danielle Lever, were introduced by the applicant. No witnesses were heard and no further evidence was adduced by both parties.

[6] On 24 February 2014, the Court Martial Appeal Court allowed the appeal made by the applicant regarding the same charge before this Standing Court Martial, set aside the conviction made by the previous Standing Court Martial and ordered a new trial (see *R. v. Thibeault*, 2014 CMAC 2).

[7] On 15 May 2014, being the judge assigned to the case, I presided at a pre-trial conference with both counsel to determine a trial date and review potential issues regarding the conduct of the trial. At that time, a trial date was set for 1 December 2014 and some information was provided to me by parties in relation to the nature of the evidence to be presented and potential legal issues to be raised. At the same time, I made a quick reference to the issue of election by the accused concerning the type of trial, considering that the court was not already convened and that the accused was represented by a civilian counsel who was potentially less familiar with court martial procedures.

[8] On 15 October 2014, defence counsel wrote to the Court Martial Administrator by email, seeking to formalize the choice as mode of trial by his client.

[9] On 17 October 2014, I presided another pre-trial conference during which I specified that the quick reference I made about the convening process for this Court Martial at the previous pre-trial conference was in no way indicative, one way or another, about how the process to convene that court martial should be done.

[10] On 28 October 2014, the prosecutor, Major Carrier, wrote to the Court Martial Administrator by email that, in the context, where she does not intend to allow the accused to elect as to the mode of trial, he was taking the position that such election could be offered and that a General Court Martial should be convened accordingly to the choice expressed by Captain Thibeault.

[11] The day after, on 29 October 2014, without Captain Thibeault having been notified by the Court Martial Administrator and more than 30 days before the date set for the commencement of the trial, Captain Thibeault's defence counsel communicated by email to the Court Martial Administrator that the accused was "electing to change his mode of trial to a trial by General Court Martial" pursuant to subsection 165.193(4) of the *National Defence Act*.

[12] On 30 October 2014, the Court Martial Administrator replied by email to defence counsel where she mentioned that she gave consideration to the opinion made by the prosecutor and the position taken by Captain Thibeault on the issue of the type of court martial. She concluded that, in the context, where a new trial was ordered by the Court Martial Appeal Court, she did not have any legal authority to change the mode of trial and that, as a result, a Standing Court Martial would be convened.

[13] On that same day, the Court Martial Administrator convened a Standing Court Martial to deal with the charge set out in the charge sheet dated 3 August 2012, with a translated charge sheet dated 30 April 2014 being attached to it.

[14] On 6 November 2014, defence counsel for Captain Thibeault reiterated by email to the Court Martial Administrator that his client had the right, under the *National Defence Act*, to elect trial by General Court Martial and he legally articulated his position in that fashion.

[15] The Court Martial Administrator then replied by email to him on 7 November 2014 that she was not changing her position expressed in her previous email of 30 October 2014.

[16] Further to an application made by defence counsel on 12 November 2014, for changing the venue of the trial from Canadian Forces Base Bagotville to Asticou courtroom in Gatineau, I ordered that the Standing Court Martial of Captain Thibeault be held on 1 December 2014, at the new location as requested by the accused.

[17] On the same day, I was presented in court with the current application as a preliminary matter to be dealt with prior to the date set for the commencement of the trial. I made the decision that when a preliminary matter involves a plea in bar about the jurisdiction of the court, then the matter shall be heard only once the trial has commenced, as indicated at article 112.05 of the *Queen's Regulations and Orders for the Canadian Forces*. So, I made the decision that this application could be heard by the court on 1 December 2014.

[18] On 14 November 2014, a new convening order was issued by the Court Martial Administrator reflecting the court's decision on the location of the trial.

[19] Then, on 1 December 2014, I heard the present application.

[20] The issue raised by the accused through his application can be formulated by a question in those terms: What process must be followed by the Court Martial Administrator to convene a court martial when a new trial is ordered by the Court Martial Appeal Court? Answering this question would provide a clear answer to the court about its jurisdiction. Clearly, if the answer is that a Standing Court Martial shall be convened because it was the previous type of court martial that had dealt with the charge, then this court has jurisdiction, the accused being before such type of court now. To the contrary, if a General Court Martial shall be convened because it would have been the choice of the accused through the application of the relevant provision of the *National Defence Act*, then this court has no jurisdiction and it calls for an appropriate remedy.

[21] Captain Thibeault suggests to the court, through his counsel, that it is a matter of statutory interpretation and once proper provisions of the *National Defence Act* are applied, the question finds easily its answer.

[22] From his perspective, when the Court Martial Appeal Court directs a new trial under section 238 of the *National Defence* Act, then the matter is to be treated as if no trial had been held, as indicated at section 241.3 of the *National Defence Act*, which reads as follows:

> Where the Court Martial Appeal Court directs a new trial on a charge under section 238, 239.1, 239.2 or 240.2, the accused person shall be tried again as if no trial on that charge had been held.

[23] It would mean that an accused is not bound by his or her prior election concerning the mode of trial and doing so would be contrary to the plain language of this provision.

[24] So, from the applicant's perspective, Captain Thibeault must return to the place he was in before the trial took place. It would mean that in order to convene a court martial, the Court Martial Administrator shall convene the court in accordance with section 165.193 of the *National Defence Act* and provide Captain Thibeault with an election regarding the mode of trial, which was not the case concerning the actual Standing Court Martial.

[25] In addition, he put to the court that in the context of a new trial ordered by the Court Martial Appeal Court because of ineffective assistance of counsel, such decision would not make any sense if Captain Thibeault would be bound by strategic decisions he made in consultation with that legal counsel, such as the mode of trial, and not

provided with the opportunity to choose again the mode of trial. From his perspective, it would be unfair and contrary to the interest of justice.

[26] The respondent's perspective on this issue is the same as the applicant's. Essentially, the prosecution is of the view that section 165.193 of the *National Defence Act* does apply in the circumstances of this case and must be given full effect. He takes the position that the Court Martial Administrator, once a new trial is ordered by the Court Martial Appeal Court, shall convene a court martial in accordance with the choice made by an accused when that specific provision calls for such action. He specified that if the situation would be the one provided at subsection 165.193(5) of the *National Defence Act*, no written consent would have been given by the Director of Military Prosecutions. From the prosecutor's perspective, the set of facts before the court is one calling for an application of subsection 165.193(7) of the *National Defence Act*, which would mean that the Court Martial Administrator shall give an opportunity to Captain Thibeault to choose the type of court martial before which he would like to be tried.

[27] In order to proceed with its analysis, the court must answer the following questions:

(a) What is the exact meaning of "direct a new trial by court martial on the charge" at paragraph 238(1)(*b*) of the *National Defence Act* in the context of a new trial ordered by the Court Martial Appeal Court?

(b) Does the meaning of "direct a new trial by court martial on the charge" provide that the Court Martial Administrator shall give effect to section 165.193 of the *National Defence Act*?

[28] In order to answer the first question, the court has to proceed with an examination of the legal framework for the Court Martial Administrator to convene a court martial and for the Court Martial Appeal Court to order a new trial.

[29] In the Canadian military justice system, "[a] person may be tried by court martial only if a charge against the person is preferred by the Director of Military Prosecutions." (See section 165 of the *National Defence Act*.)

[30] A charge is preferred when the charge sheet is signed by the Director of Military Prosecutions and referred to the Court Martial Administrator. (See again section 165 of the *National Defence Act*.)

[31] If the offence is not one considered by sections 165.191 (mandatory General Court Martial) and 165.192 (mandatory Standing Court Martial) of the *National Defence Act*, an accused has the right to choose to be tried between those two types of courts.

[32] Once notified in writing by the Court Martial Administrator, an accused has 14 days to notify in writing the Court Martial Administrator of his or her choice, otherwise he or she would be deemed to have chosen to be tried by General Court Martial.

[33] An accused may change his choice once if more than 30 days prior to the date set for the commencement of the trial. He or she also may, with the written consent of the Director of Military Prosecutions, change his election for a second time at any time or, if less than 30 days prior to the commencement of the trial or, even after the trial has commenced, make a new choice.

[34] It appears to the court that the Court Martial Appeal Court disposed of the appeal made by Captain Thibeault in accordance with paragraph 238(1)(*b*) of the *National Defence Act*, which reads as follows:

> **238.** (1) On the hearing of an appeal respecting the legality of a finding of guilty on any charge, the Court Martial Appeal Court, if it allows the appeal, may set aside the finding and
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> ...
>
> (*b*) direct a new trial by court martial on the charge.

[35] As indicated by the applicant's counsel, the court agrees that section 241.3 of the *National Defence Act* would find application in the present case and it implies that Captain Thibeault's matter must be treated as if no trial had been held.

[36] Now, the court could not find any other provision other than sections 238 and 241.3 of the *National Defence Act* that would apply clearly today to the present case. According to the wording of the provision, the court concludes that section 165.193 of the *National Defence Act* must find its application only when a charge is preferred. At first sight, there is nothing in the Act stating that this provision must apply in any other circumstance.

[37] So, what interpretation must be given to "direct a new trial by court martial on the charge"?

[38] As a matter of logic, and this matter not being subject to any debate or controversy, when a new trial is ordered, it is clear to the court that, in the context of the military justice system and to be able to deal with a service offence, a court martial shall be convened in order to proceed with it (see *R. v. MacLellan*, 2011 CMAC 5 at paragraph 42), which would include the obligation to convene a court martial in the context of a new trial ordered by the Court Martial Appeal Court.

[39] It is also clear from the wording of paragraph 238(1)(*b*) of the *National Defence Act* that when a new trial is ordered by the Court Martial Appeal Court, the court martial convened in respect of this judicial order shall deal with the same charge.

[40] Clearly, a new trial ordered by the Court Martial Appeal Court would mean that a court martial shall be convened to deal with the same charge that was previously before it.

[41] So, when the Court Martial Appeal Court makes such order, what about the type of court martial to be convened?

[42] Contrary to the situation that prevailed prior to 1 September 1999, where paragraphs 117.05(1) and (2) of the *Queen's Regulations and Orders for the Canadian Forces* would provide some direction on how to convene a court martial in the context of a new trial ordered by the Court Martial Appeal Court, which were repealed and never replaced, there is nothing in the regulation that would provide some indication to this court about how a court martial should be convened once a new trial by court martial on the charge is ordered by the Court Martial Appeal Court pursuant to section 238 of the *National Defence Act*.

[43] As a matter of information, paragraphs 117.05(1) and (2) of the *Queen's Regulations and Orders for the Canadian Forces* read, at the time, as follows:

> (1) Subject to paragraph (3), where a new trial is directed or ordered under sections 210, 238 or 248 of the *National Defence Act*, the Chief of the Defence Staff shall, unless trial has been dispensed with (*see subsection 210(3) of the National Defence Act*), convene or direct an appropriate convening authority to convene a court martial for the trial of the accused on the charge for which the new trial has been directed or ordered.
>
> (2) The convening authority under this article shall be deemed to have received an application for trial from a commanding officer under his command and shall convene a court martial without further investigation or consideration of the charge.

[44] Today, such regulation no longer exists and has not been replaced.

[45] Interestingly enough, the court found and asked counsel to comment on the only Court Martial Appeal Court decision on a matter similar to the one raised before this court but decided in a totally different legislative context. It was interested in hearing from the parties to what extent such decision would be binding in deciding on the present issue.

[46] In *Graveline v. R.*, CMAC-356, delivered on 6 June 1994, the Court Martial Appeal Court had to decide what type of court martial could be convened by a convening authority in the context of a new trial it had ordered.

[47] Essentially, the Court Martial Appeal Court said that full effect shall be given to paragraph 117.05(2) of the *Queen's Regulations and Orders for the Canadian Forces*. In its decision, the court confirmed the interpretation of the trial military judge to the effect that the convening authority could not make, at such stage, a new determination

on the sufficiency of the evidence in order to proceed with the charge but could exercise his discretion in relation to the type of court martial.

[48] It has to be said that, prior to 1 September 1999, the convening authority had some quasi-judicial role to play because he was essentially doing more than just ordering a court martial to be held.

[49] The convening authority was a very high-ranking member of the chain of command, making a determination on the sufficiency of the evidence to proceed with a charge and on the interest of the Canadian Forces to do so. Then, the convening authority would issue an order to the accused to appear before a specific type of court martial, identifying at the same time the legal officers who would appear as prosecutor, defence counsel and judge advocate. If the type of court martial was a general or disciplinary one, then a panel would be set and would identify the officers who would compose it.

[50] Today, the Court Martial Administrator plays a much more limited role as convening authority when she convenes a court martial. She essentially informs the accused, his or her defence counsel, the prosecutor, the military judge and members of the panel she selected, if applicable, when and where the court martial will be held. She has never been involved in choosing the type of court martial since her function was established on 1 September 1999.

[51] Returning to the decision of *Graveline*, the meaning given to it must be done with the understanding of the function of the convening authority as it was at that time.

[52] The court understands that in *Graveline*, the Court Martial Appeal Court decided that paragraph 117.05(2) of the *Queen's Regulations and Orders for the Canadian Forces* had to be enforced, and considering the nature of the discretion exercised by the convening authority at that time, would have included for him the authority to decide the type of court martial to be convened in the context of a new trial ordered by the Court Martial Appeal Court.

[53] The court concludes that this decision has no application to the present case, considering that it does not provide any indication on how paragraph 238(1)(*b*) of the *National Defence Act* should be interpreted, considering that it did enforce a provision of the *Queen's Regulations and Orders for the Canadian Forces* that no longer exists today on this very specific issue, and that the discretion and the authority was legally exercised in a totally different manner by the convening authority at the time.

[54] However, as suggested by the applicant, section 241.3 of the *National Defence Act* appears to provide some assistance in providing an answer to the question.

[55] Again, I quote:

> Where the Court Martial Appeal Court directs a new trial on a charge under section 238, 239.1, 239.2 or 240.2, the accused person shall be tried again as if no trial on that charge had been held.

[56] The applicant suggests that a plain reading of this provision is sufficient to conclude that by treating the matter as if no trial on the charge had been held, it is enough to conclude that section 165.193 of the *National Defence Act* must be given full effect, which would include that, before convening the court, the Court Martial Administrator shall provide Captain Thibeault an opportunity to elect the mode of trial.

[57] The court respectfully disagrees with this interpretation. In that context, the court reads the provision differently than the applicant. From our perspective, what it says is "as no trial had been held", not "as no court martial had been held". As a matter of procedure on the election as to the mode of trial, the difference is significant enough from the court's perspective to distinguish from what it is allowed to do or not in the context of a new trial ordered by the Court Martial Appeal Court.

[58] Still in the context of that provision, the court reads the meaning of the word "trial" as a connotation to the proceedings taking place after the accused pleads to the charge, which would prevent, when a new trial is ordered by the Court Martial Appeal Court, the application of section 165.193 of the *National Defence Act* as a matter of election of mode of trial by an accused or the opportunity to re-elect on the mode of trial with consent of the Director of Military Prosecutions.

[59] Absence of any other provision on this matter in the *National Defence Act*, such interpretation would then reflect and be consistent with the state of the law in our country on that very specific issue.

[60] In Canada, the common law has established that in the context of criminal law procedure, there is no right to re-elect after a new trial has been ordered by a Court of Appeal (see *R. v. Welsh*, [1950] S.C.R. 412, *R. v. Dennis*, [1960] S.C.R. 286, *R. v. Sagliocco*, (1979) 51 C.C.C. (2d) 188; *R. v. Cole*, (1982) 66 C.C.C (2d) 485) other than provided for by statute (see paragraph 686(5)(*a*) of the *Criminal Code* for changing from a trial before judge alone to a jury trial which must be directed by the Court of Appeal in subsection 686(5.1) of the *Criminal Code* for changing from a jury trial to a trial before a judge alone). The court had the opportunity to read a more recent Ontario Superior Court of Justice decision in *R. v. Niemi*, 2008 CanLII 82239 (ON SC) and it does not change its opinion on the current state of law, considering the actual context.

[61] The court concludes that the exact meaning of "direct a new trial by court martial on the charge" at paragraph 238(1)(*b*) of the *National Defence Act* in the context of a new trial ordered by the Court Martial Appeal Court is that the Court Martial Administrator shall convene a court martial on the same charge and with the same type of court martial.

[62] The final result for the present case is that by directing a new trial consequent to the appeal made by Captain Thibeault, the Court Martial Appeal Court ordered the Court Martial Administrator to convene a Standing Court Martial for a sexual assault charge as initially particularized by the Director of Military Prosecutions. It is the conclusion of this court that the Court Martial Administrator did properly exercise her authority in accordance with the law and the judicial decision when she convened the present Standing Court Martial.

[63] If the prosecution would have decided to not proceed again with that charge, it would have been easy for it to do so thus releasing the Court Martial Administrator from her obligation to convene a court martial to proceed with a new trial as directed by the Court Martial Appeal Court.

[64] Considering my decision on the exact meaning of "direct a new trial by court martial on the charge" at paragraph 238(1)(*b*) of the *National Defence Act*, it is clear that section 165.193 of the *National Defence Act* cannot apply in that context.

FOR THESE REASONS, THE COURT:

[65] **DISMISSES** the application made by the applicant regarding the mode of trial;

[66] **DECLARES** that this Standing Court Martial has jurisdiction to proceed with the charge on the charge sheet;

[67] **PROCEEDS** with the trial on that charge.

Counsel:

The Director of Military Prosecutions as represented by Major J.E. Carrier.

Mr T. Brown, Greenspon, Brown and Associates, Counsel for Captain J.R.N.J. Thibeault.