



## COURT MARTIAL

**Citation:** *R. v. Pear*, 2015 CM 3020

**Date:** 20150409

**Docket:** 201366

Standing Court Martial

Canadian Forces Base Petawawa  
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Warrant Officer W.L. Pear, Applicant**

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

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**DECISION ON AN APPLICATION BY THE ACCUSED ON STRIKING  
CHARGES LAID PURSUANT TO SECTION 85 OF THE NATIONAL  
DEFENCE ACT**

(Orally)

[1] Warrant Officer Pear is charged with one service offence punishable pursuant to section 97 of the *National Defence Act* for drunkenness while at a mess dinner on Canadian Forces Base (CFB) Petawawa, on or about 1 November 2012, and with two service offences punishable under section 85 of the *National Defence Act (NDA)* for having used insulting language to a superior officer at the same mess dinner.

[2] This application was made prior to the accused entering a plea pursuant to paragraph 112.05(5)(e) of the *Queen's Regulations and Orders for the Canadian Forces (QR&O)*. Essentially, Warrant Officer Pear is seeking an order from the court that charges laid under section 85 of the *NDA* be struck from the charge sheet because of the wording of Note (H), at article 103.18 of the *QR&O*.

[3] Essentially, the evidence put before the court on this issue is the affidavit of Mrs. Nicole Bélanger-Drapeau. Just to summarize briefly the facts:

- (a) an alleged incident occurred on 1 November 2012;
- (b) a complaint was made the day after, 2 November 2012, regarding this issue;
- (c) charges were laid on 22 March 2013;
- (d) the matter was referred by the referral authority to the Director of Military Prosecutions on 26 July 2013;
- (e) charges were preferred by the Director of Military Prosecutions' representative on 2 August 2013; and
- (f) this court was convened as a General Court Martial on 5 November 2014 and, I would say, reconvened as a Standing Court Martial on 22 January 2015.

[4] Does the court have authority to strike charges laid under section 85 of the *NDA*? If yes, should those charges be struck from the charge sheet as requested by the applicant?

[5] I note that, as stated by the Supreme Court of Canada in *R. v. Anderson*, 2014 SCC 41, at paragraph 1:

[T]he prosecutor's decision is a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process.

[6] Also, note (H) of article 103.18 reads as follows:

Mere abusive or violent language used by, or contemptuous behaviour on the part of, a drunken person should not be charged under section 85 of the *National Defence Act*. As a general rule, the interests of discipline would be served by laying a charge under section 97 of the *National Defence Act* (see article 103.30 - *Drunkennes*) or section 120 [and I would suspect it is a referral to section 129] of the *National Defence Act* (see article 103.60 - *Conduct to the Prejudice of Good Order and Discipline*).

[7] As stated at article 1.095 of the QR&O, a note, such as this one, is for guidance of members and has no force and effect.

[8] The decision to prefer any charge in the military justice system before a court martial is a matter of prosecutorial discretion by the Director of Military Prosecution and his representatives.

[9] The court has no authority to strike, on its own, a charge preferred by the Director of Military Prosecutions or his representative. The trial proceedings do not include a preliminary inquiry and, in the absence of such proceedings, being at trial, the court must proceed with the charges on the charge sheet.

[10] The Note has no binding effect on the court and is more a guidance for authorities who lay or prefer charges in the military justice system.

[11] He is only in the context of an abuse of process application concerning the conduct of the prosecution that the court may review the decision to prefer charges by the prosecution; and, it is from that perspective only. Here, no such thing has been claimed by the applicant; it is not an application for an abuse of process.

**FOR THESE REASONS, THE COURT:**

[12] **DISMISSES** the application made by the applicant regarding the striking of charges laid pursuant to section 85 of the *National Defence Act*.

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**Counsel:**

The Director of Military Prosecutions as represented by Major A.-C. Samson and Captain M.L.P.P. Germain

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