



COURT MARTIAL

Citation: *R. v. Pear*, 2015 CM 3021

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.

REASONS FOR A DECISION SEEKING ACCESS TO THE LIBRARY OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

(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] The applicant is seeking an order from the court to permit defence counsel to access the library of the Office of the Judge Advocate General (JAG), unchaperoned, for one week, to prepare for trial, looking for permission to consult minutes of all courts martial located in that library, including decisions made by those courts.

[3] On 26 January 2015, the applicant modified his request whereby he was no longer requesting access to the library of the Office of the JAG, but rather access to courts martial decisions. The evidence that has been put before the court on this matter

is an affidavit of Mrs. Nicole Bélanger-Drapeau, an affidavit of Mrs. Leeann Jamieson, as well as the Policy for Access to Supreme Court of Canada Court Records, and the Model Policy for Access to Court Records in Canada from the Canadian Judicial Council.

[4] Essentially, the facts are as follows:

- (a) on 22 July 2014, a letter was sent by defence counsel to the Office of the JAG requesting full access to the JAG library for one week in September 2014;
- (b) on 3 September 2014, he renewed his request by way of another letter;
- (c) in September 2014, and as noticed by defence counsel in one of his responses, an undated letter was received by his office between 8 and 12 September acknowledging receipt of the request for access to the library of the Office of the Judge Advocate General and referring him to the Office of the Chief Military Judge;
- (d) on 8 September 2014, defence counsel sent a letter to the Office of the Chief Military Judge requesting access to courts martial decisions;
- (e) on 15 September 2014, a letter was sent by the Court Martial Administrator who indicated that she was ready to provide Court Martial decisions if defence counsel identified them; which as I would comment, would be very difficult if you don't have access to anything, it's difficult to say which one you would like to have;
- (f) so he wrote back on 23 September 2014 to the Court Martial Administrator and defence counsel requested again at least access to court martial decisions; and
- (g) it is on 2 October 2014 then the Court Martial Administrator offered access to the those court martial decisions from 1971 and onward. So my understanding is there's some summary of all those decisions, so access could be provided in order to expedite research and full access would be provided to the minutes of proceedings of all those courts including decisions.

[5] Essentially, the applicant relies on subsection 179(1) of the *NDA* to invite the court to order access to courts martial decisions.

[6] Subsection 179(1) of the *NDA* reads as follows:

A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to

- (a) the attendance, swearing and examination of witnesses;
- (b) the production and inspection of documents;
- (c) the enforcement of its orders; and
- (d) all other matters necessary or proper for the due exercise of its jurisdiction.

[7] The applicant relies mainly on this very last item I mentioned, "all other matters necessary or proper for the due exercise of its jurisdiction," to invite the court to exercise its jurisdiction and order access to courts martial decisions.

[8] I would say, unfortunately, I do not agree with this view. Access to decisions is not a matter "necessary or proper for the due exercise" of the jurisdiction of this court concerning this matter before it. It is not a provision allowing authority for this court to order to somebody or some organization, not having any relation to these proceedings, to do something.

[9] If defence counsel is looking for somebody to do something, he may contemplate an injunction or a mandamus order from another jurisdiction, which this court has no authority to consider.

[10] Having some authorities that a superior court of criminal jurisdiction would have, doesn't mean that the court martial, in and of itself, is a superior court. It's a very narrow authority and I do not see anything that would be included in section 179 of the NDA as a matter of authority for this court to force or oblige somebody who is outside this arena to do something.

[11] As I suggested earlier during these proceedings so far, a person or a representative may be called as a witness in the context of a *Charter* application for violation of a *Charter* right of the accused in relation to this trial. Then, the court would have to consider those facts in the context that may be considered by this court. I'm not saying that's the way to do it. I think your lawyers have the proper skills to assess, because I don't know everything about this case. What I know is what has been put before me. What I would say, I'm not suggesting a different way to do things, but for sure it is clear for me that subsection 179(1) won't allow authority for this court to force somebody to provide access, especially when this person is not an actor clearly identified from a legal perspective as of having a role in these proceedings.

[12] So in law, the court martial has no authority to make consideration about forcing an organization such as the Office of the Judge Advocate General to provide access to court martial decisions to the defence counsel, unless being brought to this court in the context, I would suggest, on a *Charter* application or any other application relevant to

this matter, which is not the case here. It may appear inequitable, especially in the context that it is presumed that the prosecution has such access; and I mention that during the hearing. The JAG as the superintendent of the Military Justice System, would probably be in a position to address such issue, fairness of the process being an important concern for him and for all actors including the prosecutor.

[13] In any case, the defence counsel still have access to court martial decisions from 1971 onward; it suggested by the court that he exercise such access.

[14] The court finds regrettable that such situation does exist and may just wish this situation finds a suitable end, considering the perceived unfairness this matter may create about the Military Justice System approach.

[15] Are there two approaches? Is there an approach for counsel who are officers in the Canadian Armed Forces? Is there another approach for counsel who are private practice lawyers? There's two ways to view access. I don't have the answer, but it may raise, from an outside perspective, questions about how counsel are treated when they defend an accused before the court.

[16] I'm not in a context of a different application. For sure I will limit myself to my comments on this issue. And I said, I do regret that such question came before me. I thought that access to decisions and minutes of proceedings would have not been an issue in these days, but it looks like it is. Especially in a matter involving, it is called a pure military offence, those types of offences cannot be found in the civilian world, because it's a very specific to the Code of Service Discipline. When I look from a legal perspective, what is the authority of this court in relation to section 179 of the *NDA*, it is clear to me that what it is requested from Warrant Officer Pear cannot be made through that provision or through any other provision.

FOR THESE REASONS, THE COURT:

[17] **DISMISSES** the application made by the applicant seeking access to the library of the Office of the Judge Advocate General.

Counsel:

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

Mr M. Drapeau and Mr J.M. Juneau, Michel Drapeau Law Office, 192 Somerset Street West, Ottawa, Ontario, Counsel for Warrant Officer W.L. Pear