COURT MARTIAL

Citation: *R. v. Pear*, 2016 CM 3004

Date: 20160307
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.

APPLICATION MADE BY THE ACCUSED FOR AN ORDER DECLARING SUBPARAGRAPHS 60(2) AND 69(1) OF THE *NATIONAL DEFENCE ACT* OF NO FORCE AND EFFECT PURSUANT TO SECTION 52 OF THE *CONSTITUTION ACT, 1982*

(Orally)

INTRODUCTION

[1] By way of an application made to this Standing Court Martial pursuant to subparagraph 112.05(5)(*b*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Warrant Officer Pear is seeking an order from the presiding military judge to terminate the proceedings further to a declaration by the court that paragraphs 60(2) and 69(1) of the *National Defence Act* (*NDA*) are of no force or effect under subsection 52(1) of the *Constitution Act*, 1982, because both provisions are contrary to section 7 of the *Canadian Charter of Rights and Freedoms*.

[2] 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* for having used insulting language to a superior officer at the same mess dinner.

EVIDENCE

[3] As a matter of evidence, the following documents were introduced by both parties:

(a) VD5-1, the Notice of Application;

(b) VD5-2, the Notice of Constitutional Question;

(c) VD5-3, the charge sheet;

(d) VD5-4, the release message for Warrant Officer Pear, dated 1 August 2013;

(e) VD5-5, an excerpt of the legislative history of Bill C-25, an Act to amend the *National Defence Act* that received Royal Assent on 10 December 1998, discussing more specifically an amendment to section 69;

(f) VD5-6, Chapter 8: *Limitation Periods for Service Offences* (pages 73 to 77) of the Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (Dickson's Report), dated 14 March 1997;

(g) VD5-7, the Clause-by-Clause Analysis of Bill C-25, more specifically about the amendment to section 69 (clause 21), dated June 1997;

(h) VD5-8, *External Review of the Canadian Military Prosecution Service* by the Bronson Consulting Group (the Bronson Report), dated 31 March 2008;

(i) VD5-9, a copy of Statutes of Canada 1998, Chapter 35, clause 21, about section 69, assented to 10th of December 1998;

(j) VD5-10, an excerpt of the minutes of proceedings and evidence of the session in 1950 of the House of Commons related to Bill No. 133, *An Act Respecting National Defence*, dated 23 May 1950;

(k) VD5-11, an affidavit of Leeann Jamieson, dated 8 October 2015;

(l) VD5-12, an Admission of Facts by the respondent stating that:

i. On 5 June 2014, the prosecution sent a disclosure package to the accused's counsel with an additional 33 pages of documentary disclosure.

ii. On 10 June 2014, the prosecution sent a disclosure package to the accused's counsel with an additional seven pages of documentary disclosure.

iii. On 20 June 2014, the prosecution sent a letter to the accused's counsel stating that there would be no further disclosure as everything that had been requested by defence had been disclosed.

(m) VD5-13, a copy of a chart related to Chief of the Defence Staff (CDS) designated release authorities for the Regular Force;

(n) VD5-14, a copy of CANFORGEN 183/11, dated 11 October 2011, Career Transition Support Policy for Severely Injured or Ill CF Members;

(o) VD5-15, a memorandum from Chief of the Defence Staff on Consideration for Attribution of a Release Item, dated 14 July 2011;

(p) VD5-16, a written copy of the proposed area of expertise opinion to be provided by Colonel Bernd Horn;

(q) VD5-17, a copy of the Curriculum Vitae of Colonel Bernd Horn; and

(r) VD5-18, a copy of the Response to Notice of Application Challenging the Constitutionality of subsections 60(2) and 69(1) of the *National Defence Act*.

[4] In addition, the court heard the testimony of two ordinary witnesses, Lieutenant-Colonels Ducharme and Heilman, and an expert witness, Colonel Bernd Horn, who testified on discipline as it relates to efficiency and morale in the Canadian Armed Forces.

CONTEXT OF THE PROCEDURE

[5] On or about 1 November 2012, it is alleged that Warrant Officer Pear, who was a member at that time of the 2 Service Battalion, Canadian Forces, Regular Force, was drunk and used insulting language toward two persons of the rank of lieutenant during a mess dinner that took place at Reichwald Senior NCOs' Mess on Canadian Forces Base Petawawa, province of Ontario.

[6] A complaint was made on 2 November 2012 regarding the alleged inappropriate conduct of Warrant Officer Pear. Charges against Warrant Officer Pear were laid on 22 March 2013. Further to the choice made on 19 April 2013 by Warrant Officer Pear to be tried by a court martial, his commanding officer made an application to the referral authority for disposal of the charges.

[7] Charges against Warrant Officer Pear were laid in March 2013 and referred by the commanding officer of the unit on 26 April 2013. The referral authority disposed of the charges on 26 July 2013 and recommended to the Director of Military Prosecutions that the matter proceed by the way of a court martial. On 2 August 2013, the Director of Military Prosecutions preferred the three charges against the accused and initial disclosure to defence counsel on this matter was made by the prosecution on 22 August 2013.

[8] On 5 September 2013, the applicant was released from the Canadian Armed Forces under item 3(b), which is for a medical reason because he was considered unfit to serve in his trade and not otherwise employable.

[9] Further to unresolved disclosure issues between parties, a preliminary application was made by the prosecution to set a trial date. I heard and granted that application in June 2014 by setting a trial date for 13 April 2015.

[10] Meanwhile, given the number and nature of the applications to be presented by the accused at this trial, I set a new trial date further to a joint application made by the parties for an earlier commencement date, which was 26 January 2015. It is on that date that the trial started and that I heard the accused's applications. I then delivered my decisions on those applications on 9 April 2015.

[11] The matter was then postponed for trial on 26 October 2015. Meanwhile, in July 2015, counsel for the accused announced their intent to withdraw from the case. I granted an application to that effect on 3 September 2015 and a new defence counsel appeared on behalf of the accused a week later.

[12] While figuring if the parties would be ready to proceed for trial on 26 October 2015, the present notice of application was filed. I determined that this matter would be heard in November 2015 and that the trial would proceed in March 2016, if the applicant did not succeed with his current application. I then heard the present application on 4, 5 and 6 November 2015.

[13] On 18 January 2016, on my request, I heard additional arguments from both parties about the present application in light of the Supreme Court of Canada decision issued on 19 November 2015 in *R. v. Moriarity*, 2015 SCC 55. This decision discussed the very matter on the law applicable to the present matter before this court.

[14] Here is my decision today on this matter.

POSITION OF THE APPLICANT

[15] The applicant submits that subsections 60(2) and 69(1) of the *National Defence Act* violate section 7 of the *Canadian Charter of Rights and Freedoms* by depriving him of his liberty in a manner that is not in accordance with the principles of fundamental justice.

[16] He told the court that both subsections are part of a scheme that confers authority to a service tribunal to try a person charged with a service offence under the Code of Service Discipline, putting that person at risk of imprisonment. Thus, the right of liberty of that person under section 7 of the *Charter* would be engaged.

[17] Subject to the principle of fundamental justice that a law could not be broader than necessary to accomplish its purpose, the applicant suggested to the court that both subsections are overbroad.

[18] Counsel for the applicant submitted that the scope and effect of subsections 60(2) and 69(1) of the *National Defence Act* is to give jurisdiction to a court martial over military members and also former military members of the Canadian Armed Forces without any real time limit to proceed, except for offences laid under section 130 or 132 of the *National Defence Act* and for which a provision of any other federal act would provide a limitation in time in order to proceed.

[19] The applicant is of the opinion that the purpose of those provisions is to maintain discipline, efficiency and morale in the military.

[20] In proceeding with an overbreadth analysis, the court must come to a conclusion that in some circumstances, there is no rational connection between the scope and effect of those provisions and their purpose. The fact of trying former military members before a court martial would be broader than maintaining military discipline because those matters may no longer directly pertain to military discipline at all, as the time elapsed. As a matter of fact, the applicant relied on the evidence of Colonel Horn who would have expressed the fact that, in some circumstances, it is counterproductive to enforce discipline over former military members as the time passed.

[21] Accordingly, the applicant invited the court to declare that the right to liberty for Warrant Officer Pear was violated because of subsections 60(2) and 69(1) of the *National Defence Act* being overbroad and that such a violation is not justified under section 1 of the *Charter*. The applicant told the court that the only appropriate remedy is to strike down both provisions immediately.

[22] As a result, the court martial not having jurisdiction over the matter, the applicant submitted it would have no other choice than to terminate the proceedings.

POSITION OF THE RESPONDENT

[23] The respondent took the position that subsections 60(2) and 69(1) of the *National Defence Act* do not engage the right to liberty of the accused under section 7 of the *Charter*. The fact that subsection 60(2) of the *National Defence Act* establishes that a former member may still be held accountable for a matter related to the Code of Service Discipline and that there is no time limit in order to deal with it before a court martial, pursuant to subsection 69(1) of the *National Defence Act* would not, per se, engage anything in connection with the liberty of an individual, especially a former member of the Canadian Armed Forces. In reality, those provisions would not impose any kind of restriction of any sort to the liberty of such an individual and then cannot be seen as having such effect.

[24] If, for any reason, the court comes to the conclusion that those subsections engaged the right to liberty of Warrant Officer Pear under section 7 of the *Charter*, then the respondent submitted that the purpose of each of them has a rational connection with their respective effect.

[25] The respondent suggested that the purpose of subsection 60(2) of the *National Defence Act* is to hold a person accountable for an alleged service offence committed while that person was subject to the Code of Service Discipline, even after being released from the Canadian Armed Forces. The effect of this provision would be to limit accountability to those persons who were subject to the Code of Service Discipline at the time of the commission of the alleged offence. According to the respondent, the purpose and effect of this provision could not be more perfectly in harmony.

[26] About subsection 69(1) of the *National Defence Act*, the respondent submitted that because this provision does relate to the matter of a limitation period, establishing that there is none, except for service offences under sections 130 and 132 of the *National Defence Act* when it applies, then this provision does not engage the accused's liberty rights in any meaningful way and cannot be overbroad. Essentially, the respondent expressed the opinion that the *Charter* does not insulate an accused person from prosecution solely on the basis of the time that has passed. Consequently, the prosecution decided not to provide further argument about the rational connection between the purpose and the effect for this provision.

[27] Without going very deeply into this affirmation, the respondent mentioned that if the court concludes that both provisions are overbroad, it should find that they constitute a reasonable limit that can be demonstrably justified in a free and democratic society.

[28] If, for any reason, the court decides to strike down, as a matter of a remedy, both provisions, the respondent suggested that such a declaration of invalidity should be suspended for one year to allow those provisions to be amended, considering that they are essential to the proper conduct of the military justice system in order to avoid situations where military members would violate the Code of Service Discipline at will prior to their release from the Canadian Armed Forces.

[29] Finally, the respondent suggested that because the applicant is raising an issue of reasonableness in relation with the delay to proceed or the relevancy for the prosecution to prefer charges in the context of this specific case, then it must be addressed by the court only if the applicant brought the matter before it as a violation of his right to be tried within a reasonable time or as an abuse of process by the prosecution under the *Charter*. Not being actually the situation before this court, then the court would be precluded of addressing those matters in that fashion.

ANALYSIS

[30] I would like to mention that the recent decision of the Supreme Court of Canada in *R. v. Moriarity*, 2015 SCC 55, is very helpful for the court to make a determination in this case for mainly two reasons: first, because it concerns a matter similar to the one before this court, which is an overbreadth analysis of provisions of the *National Defence Act*; and second, this analysis is specific to the Canadian military law context.

Are subsections 60(2) and 69(1) of the *National Defence Act* engaged by liberty interests provided at section 7 of the *Charter*?

[31] Before proceeding with an overbreadth analysis of subsections 60(2) and 69(1) of the *National Defence Act*, the court must first determine if they are engaged by section 7 of the *Charter*.

[32] Section 7 of the *Charter* reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[33] The Chief Justice of the Supreme Court of Canada expressed in a very clear manner what is legally required by that section, when she said at paragraph 12 of the decision of *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350:

> Section 7 of the *Charter* guarantees the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. This requires a claimant to prove two matters: first, that there has been or could be a deprivation of the right to life, liberty and security of the person, and second, that the deprivation was not or would not be in accordance with the principles of fundamental justice. If the claimant succeeds, the government bears the burden of justifying the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[34] I agree with the applicant that the threshold to engage the right to liberty under section 7 of the *Charter* for an analysis of an offence provision is very low. As established in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at paragraph 90, and in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at paragraph

84, the availability of imprisonment or the risk of such a thing is sufficient to trigger an analysis under section 7 of the *Charter*.

[35] Subsections 60(2) and 69(1) of the *National Defence Act* read respectively as follows:

> 60(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).
>
> 69(1) A person who is subject to the Code of Service Discipline at the time of the alleged commission of a service offence may be charged, dealt with and tried at any time under the Code.

[36] I would agree with the respondent that both provisions do not include directly any reference to a punishment that would clearly potentially limit the liberty of a person subject to the Code of Service Discipline. However, as concluded by the Supreme Court of Canada in *Moriarity*, at paragraph 17 of the decision about paragraph 130(1)(*a*) and subsection 117(1) of the *National Defence Act*, subsections 60(2) and 69(1) of the *National Defence Act* form also part of a scheme through which a person subject to the Code of Service Discipline can be deprived of his or her liberty in a manner sufficient to engage the liberty interest of the applicant.

[37] Subsection 60(2) of the *National Defence Act* makes a continuing liability to the Code of Service Discipline for those who ceased to be a person subject to the Code of Service Discipline, but who had that status at the time of the commission of an alleged service offence. Subsection 69(1) of the *National Defence Act* specifies that any person subject to the Code of Service Discipline may be charged, dealt with and tried at any time, which would include a person considered by subsection 60(2) of the *National Defence Act*.

[38] Essentially, both provisions would then expose a person to a risk of imprisonment by allowing the infliction to him or her of a punishment provided for any service offence under the Code of Service Discipline.

Is the applicant deprived of his right to liberty under section 7 of the *Charter* in accordance with the principles of fundamental justice?

[39] As raised by the applicant and as reaffirmed by the Supreme Court of Canada in *Moriarity*, at paragraph 24:

> That a law must not be overbroad is a principle of fundamental justice. It is one of the minimum requirements for a law that affects a person's life, liberty or security of the person: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 94 et seq. A law that goes too far and interferes with life, liberty or security of

> the person in a way that has no connection to its objective is fundamentally flawed: *Bedford*, at para. 101.

[40] As clearly articulated by the Supreme Court of Canada in *Moriarity*, at paragraph 27:

> The overbreadth analysis turns on the relationship between the objective of the law and the effects flowing from the means which the law adopts to achieve it — in other words the relationship between the law's purpose and what it actually does.

What is the objective (purpose) of subsections 60(2) and 69(1) of the *National Defence Act*?

[41] As concluded by the Supreme Court of Canada in *Moriarity*, at paragraph 48, I come to the conclusion that the purpose of subsections 60(2) and 69(1) of the *National Defence Act* is the same as that of the overall system of military justice: to maintain the discipline, efficiency and morale of the military.

[42] This conclusion by the Supreme Court of Canada is binding on this court martial and I do not see any reason why it could lead this court martial to conclude differently in the circumstances of this case.

[43] Despite the fact that both challenged provisions have the same purpose, I conclude that they must be subject to a separate analysis on the issue of their respective effect, considering that one addresses who is liable, while the other provision deals with when liability must be considered.

What is the rational connection between the purpose of subsection 60(2) of the *National Defence Act* and its effect?

[44] It belongs to the appellant to demonstrate the absence of any connection, in whole or in part, between the purpose of the provision and the effect of it. As mentioned in *Bedford*, at paragraph 119:

> [T]he ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose.

[45] For determining the effect, it is suggested by the applicant to read both provisions in conjunction. Without denying that a correlation may exist between both, I would disagree with the applicant on this point. While subsection 60(2) of the *National Defence Act* addresses the question of persons subject to the Code of Service Discipline, subsection 69(1) of the same Act addresses the period of liability for those who are subject to the Code of Service Discipline. They both contemplate a different topic. I do agree that the second one makes no sense without the existence of the first one, but the contrary cannot be said. I conclude that each provision must be the subject of a distinct and specific analysis because they are unrelated on the issue considered by both provisions.

[46] In the *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, Iacobucci and Arbour JJ., for the majority stated, at paragraph 34:

> The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (citations omitted) The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

[47] Both parties suggested a purpose for this provision, which I take as being the effect of it. The applicant suggested that the impugned provision is to confer jurisdiction to court martial to enforce military discipline where the accused has been released from the Canadian Armed Forces and is now a former member of it. The respondent affirmed that the effect of such a provision is to hold persons accountable for breaches of the law who may subsequently be released members of the Canadian Armed Forces.

[48] It is interesting to note that the essence of the wording of subsection 60(2) of the *National Defence Act* has not changed since it was first adopted in 1951, as illustrated at Exhibit VD5-10. Giving to the provision its ordinary sense; the reading of it allows the court to easily conclude that the effect of the provision is to hold liable a person who allegedly committed a service offence under the Code of Service Discipline while subject to it, despite subsequently ceasing to have such status.

[49] Clearly, there is a rational connection between the purpose and the effect of subsection 60(2) of the *National Defence Act*. In order to maintain the discipline, efficiency and morale of the military, it is essential that those who were subject to the Code of Service Discipline be disciplined even if they left military service. Otherwise, it would constitute an exit way to avoid legal responsibility for the contravention of any provision of the Code, which would clearly result on an impact on the discipline, efficiency and morale of military members. It does not take much to realize that if members could avoid legal responsibility in such a way, then things may get out of hand very quickly as a matter of cohesion and control among any group of people, even more among military members.

[50] The testimony of Colonel Horn is more than convincing on this issue. To avoid second-guessing and mistrust by members of the military toward the military institution and its leaders, there must be a way to discipline those who allegedly contravene the Code of Service Discipline, even if they left the military service. Otherwise, discipline would start to erode.

[51] I conclude that the applicant failed to demonstrate the absence of any connection, in whole or in part, between the purpose of the provision and the effect of it.

What is the rational connection between the purpose of subsection 69(1) of the *National Defence Act* and its effect?

[52] The applicant told the court that the effect of subsection 69(1) of the *National Defence Act* is to confer jurisdiction, without any limit on time to proceed, to a court martial to deal with a service offence committed by a former member of the Canadian Armed Forces who was subject to the Code of Service Discipline at the time of the alleged offence. According to the respondent, I understand that the effect of such provision would be to establish the absence of any limitation period to institute proceedings against a person subject to the Code of Service Discipline.

[53] It is interesting to consider how subsection 69(1) of the *National Defence Act* evolved over the last 70 years or so. As indicated at Exhibit VD5-10, the establishment of a limitation period of three years in 1951 was the result of thoughts further to a merge of a similar provision applicable to the Navy, Army and Air service at the time. The reality at the time was that it extended that period of liability from six months to three years.

[54] It is further to a thorough review of the military justice system in the 1990s by the Special Advisory Group on Military Justice and Military Police Investigation Services (Exhibit VD5-6), that Parliament decided in 1998 to remove that three years limitation period in respect of service offences. Essentially, further to a review of the Canadian legal system and the Anglo-American military law system, the Group explained in Chapter Eight of its report that it could see no acceptable rationale for a limitation period in respect of service offences tried before a court martial.

[55] This provision was amended again in 2008 by Parliament, but the wording and principle remained the same.

[56] So, the effect of subsection 69(1) of the *National Defence Act* is to allow a person subject to the Code of Service Discipline, including a person aimed by subsection 60(2) of the *National Defence Act*, to be charged, dealt with and tried under the Code of Service Discipline at any time.

[57] The rationale between the purpose and effect of subsection 69(1) of the *National Defence Act* is to ensure the maintenance of discipline, efficiency and morale of the military by avoiding that any person subject to the Code of Service Discipline, at the time of the commission of an alleged offence, escapes liability because of the existence of a limitation period.

[58] Once again, I do not see any lack of connection between the purpose and the effect of this provision. Maintaining liability at all times on a person subject to the Code of Service Discipline is essential to the proper functioning of the military justice system. In addition, the applicant failed to demonstrate the absence of any connection, in whole or in part, between the purpose of the provision and the effect of it.

What about the combined effect of both provisions?

[59] The applicant suggested, as I mentioned previously, that the combination of subsections 60(2) and 69(1) of the *National Defence Act* has for result to expose a former member of the military to be tried by court martial after a number of years, without any real rationale for doing so. In fact, he told the court that after a certain time, the purpose of having a former member being disciplined disappeared because of the relevancy for doing it.

[60] In support of his position, he submitted to the court that the testimony of Colonel Horn provided evidence on this issue. The witness clearly said that if a former military member, who had no authority and responsibility within the Canadian Armed Forces, would be charged with a minor offence after a number of months, or worse, a number of years, it could be seen as being vindictive by the troops. He agreed that, in such circumstances, it could even be counterproductive to military discipline.

[61] The issue raised by the applicant has nothing to do with *who* or *when* a person subject to the Code of Service Discipline could be charged, which is addressed by the actual provisions under scrutiny, but has to do with *why* a person subject to the Code of Service Discipline could be charged or not.

[62] The reality is that the applicant has raised an issue that has more to do with the exercise of the discretion by the Director of Military Prosecutions to prefer the charges in this case, than with the effect of those combined provisions.

[63] This prosecutorial discretion is exercised by the authority provided to the Director of Military Prosecutions and his representative in accordance with sections 165.11 and 165.12 of the *National Defence Act*. Those provisions are not the subject of this application and their constitutionality is not at issue.

[64] What the applicant has raised has something to do with the effect of the decision made by a military prosecutor to proceed with the charges and not with the combined effect of sections 60(2) and 69(1) of the *National Defence Act*.

[65] As suggested by the prosecutor, if the applicant would like this court martial to review the prosecutorial discretion exercised by the Director of Military Prosecutions or his representative in this case, it could be raised by him as an abuse of process under section 7 of the *Canadian Charter of Rights and Freedoms*, which has not been done.

FOR THESE REASONS, THE COURT:

[66] **DISMISSES** the application made by the applicant regarding the constitutionality of subparagraphs 60(2) and 69(1) of the *National Defence Act*;

[67] **DECLARES** both provisions constitutionally valid.

Counsel:

The Director of Military Prosecutions as represented by Major A.-C. Samson and Major D. Kerr

Major B.L.J. Tremblay and Lieutenant-Commander M. Letourneau, Defence Counsel Services, Counsel for Warrant Officer W.L. Pear