



## COURT MARTIAL

**Citation:** *R. v. Whitehead*, 2016 CM 3001

**Date:** 20160112

**Docket:** 201425

Standing Court Martial

Royal Military College of Canada  
Kingston, Ontario, Canada

**Between:**

**Officer Cadet A.R. Whitehead, Applicant**

- and -

**Her Majesty the Queen, Respondent**

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

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**Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, directs that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.**

**REASONS FOR THE DECISION ON THE STATUS OF A PERSON WHO RECEIVED A STATEMENT MADE BY THE ACCUSED**

(Orally)

[1] This is an application made by Officer Cadet Whitehead to hear and determine a question of mixed law and fact brought pursuant to article 112.07 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). It is presented after the commencement of the trial, arising after the accused pleaded not guilty to both charges on the charge sheet and during the presentation of the prosecution's case.

[2] Officer Cadet Whitehead, the applicant in this matter, is charged with two service offences punishable under section 130 of the *National Defence Act* (NDA) for having allegedly committed, on or about 1 September and 1 November 2013 at Royal

Military College of Canada (RMC), Kingston, a sexual assault on two different female officer cadets of the Canadian Armed Forces contrary to section 271 of the *Criminal Code*.

[3] The prosecution would like to introduce, as evidence, a statement made by Officer Cadet Whitehead on 19 September 2013 to the padre, Major Heather Smith. This statement is in relation to the second charge on the charge sheet.

[4] The accused claimed that because the statement was made to a person in authority, the court shall hold a *voir dire* to determine the issue of voluntariness concerning the admissibility of that statement.

[5] The prosecution is of the opinion that the padre, Major Smith, was not a person in authority at the time the statement was made to her by the accused.

[6] The court came to the conclusion that a *voir dire* shall be held to determine if the accused raised a valid issue about whether Major Smith was a person in authority when the accused made the statement. Despite the fact that the padre, Major Smith, was not involved in the arrest, detention, examination or prosecution of the accused, the nature of her function, her rank and the military environment called for such a procedure in the context of this matter.

[7] During the same *voir dire*, the prosecution was given the opportunity to demonstrate that the receiver of the statement was not a person in authority. In addition, both parties told the court that if it had to proceed with the question on the voluntariness of the statement made by the accused and the violation of his rights under the *Charter*, it could do so because they consider that the necessary evidence was properly adduced during the hearing and that they had the opportunity to address those questions in their respective final addresses to the court.

[8] If the court comes to the conclusion that Major Smith is a person in authority, then the prosecution will have the burden of demonstrating, beyond a reasonable doubt, that the statement of the accused was made voluntarily.

[9] As a matter of evidence, many emails surrounding the moment the statement was made were introduced by both parties to reflect the approach taken by the Royal Military College authorities regarding this matter. Two witnesses were heard: Officer Cadet Whitehead, the accused in these proceedings, and Major Smith, the receiver of the statement.

[10] On 10 September 2013, the Director of Cadets (D Cdts), Lieutenant-Colonel Lemyre, called an urgent meeting to discuss a potential serious incident that took place in the last few days. The padre, Major Smith, participated in that meeting.

[11] Later on that day, the padre met the complainant about the incident and asked her to forward her written account of the events.

[12] D Cdts met with Officer Cadet Whitehead on the same day and informed him of allegations made against him involving the complainant. He was given restrictions: not to be in contact with the complainant, not to participate in fencing practises and to move to a different room on another squadron line on a different floor.

[13] The padre informed D Cdts that the complainant seemed to be reluctant to push forward the matter. D Cdts told her during a conversation that no disciplinary action would be taken against Officer Cadet Whitehead if allegations were not brought at his level, but that other means to settle the matter could be contemplated.

[14] On 12 September 2013, the complainant told the padre that she decided not to submit any written statement or complaint and that she did not want to pursue the matter. She agreed with the padre to give consideration to mediation with Officer Cadet Whitehead with her presence or one of the social workers if she could achieve some goals she had: being able to tell him that what he did was wrong, that he apologize and that she has some certainty that he won't do such a thing again.

[15] D Cdts met with Officer Cadet Whitehead on 13 September 2013 to ensure he would be in the right mindset for the mediation. He also informed the padre by email that he talked to Officer Cadet Whitehead.

[16] On 17 September 2013, the padre learned by email from the complainant that she met alone with Officer Cadet Whitehead, contrary to what was suggested to her by the padre, that they talked things out and that he apologized to her. She said that she also spoke with her captain and that she assured him that everything would be okay.

[17] On that same day, the padre informed D Cdts about the situation. Then, D Cdts asked the padre for her recommendation for closing the loop with Officer Cadet Whitehead.

[18] In an email to D Cdts, dated 18 September 2013, the padre suggested that she meet with Officer Cadet Whitehead in order to ask questions about the conversation he had with the complainant and his take on the situation. She also suggested that she could find out if Officer Cadet Whitehead would need any assistance or referral about the issue that triggered his behaviour toward the complainant. Then, she would be in a position to make a recommendation to D Cdts to close the loop on the matter and the lifting or modifying of Officer Cadet Whitehead's restrictions. D Cdts approved that course of action.

[19] As she expressed it, the padre wanted to convey to Officer Cadet Whitehead that he was in "a pile of shit," but also that nothing else would happen to him. She wanted Officer Cadet Whitehead's take on the conversation he had had with the complainant. Through this meeting, the padre wanted also to make sure that Officer Cadet Whitehead understood the gravity of the situation, that he was remorseful, and to know if he needed any personal support on issues that could have triggered the alleged incident.

[20] Then, the padre sent an email to Officer Cadet Whitehead inviting him to meet with her at her office the following morning, which he accepted. He was brought to her office and met her on the morning of 19 September 2013, and made a statement to her, essentially providing his side of the story of the incident with the complainant.

[21] On 20 September 2013, the padre informed D Cds by email that she had had a very good conversation with Officer Cadet Whitehead and recommended that all his restrictions be removed immediately. Officer Cadet Whitehead's restrictions were removed by D Cds and he presumably met with him that same day.

[22] In a military environment, a person in authority is a person who is authorized to exercise his authority on other Canadian Armed Forces members by virtue of his rank, function or position in order to accomplish any task or mission.

[23] In the context of disciplinary proceedings, as it is for criminal proceedings, the definition of a person in authority slightly changed and must be taken in a different way. As established by the applicable Military Rule of Evidence about the admissibility of unofficial confession, at paragraph 42(3), the definition of a person in authority goes as follows:

A person in authority is one who was in a position relative to the accused at the material time to exercise or hold out inducements of the character described in subsections (1) and (2) or was someone who might reasonably have appeared to the accused to be in such a position.

[24] The fact that a person holds a higher service rank than the person making the statement does not make him or her as a person in authority for that sole reason as established at paragraph 42(5) of the *Military Rules of Evidence*.

[25] The reality is that the legal definition in the *Military Rules of Evidence* of a person in authority does not differ from the one provided by the Supreme Court of Canada in its decisions of *R. v. Hodgson*, [1998] 2 S.C.R. 449, *R. v. Grandinetti*, 2005 SCC 5 and *R. v. S.G.T.*, 2010 SCC 20. In that very last decision, *S.G.T.*, the Supreme Court of Canada said at paragraph 22:

A person in authority is typically a person who is "formally engaged in the arrest, detention, examination or prosecution of the accused": *Hodgson*, at para. 32. Importantly, there is no category of persons who are automatically considered persons in authority solely by virtue of their status. The question as to who should be considered as a person in authority is determined according to the viewpoint of the accused. To be considered a person in authority, the accused must believe that the recipient of the statement can control or influence the proceedings against him or her, and that belief must be reasonable. Because the evidence necessary to establish whether or not an individual is a person in authority lies primarily with the accused, the person in authority requirement places an evidential burden on the accused. While the Crown bears the burden of proving the voluntariness of a confession beyond a reasonable doubt, the accused must provide an evidential basis for claiming that the receiver of a statement is a person in authority.

[26] Except in exceptional cases, such as being the *actus reus* of an alleged offence or something made under statutory compulsion, the voluntariness rule applies to a statement made by an accused to a person in authority.

[27] When the prosecution intends to introduce such a statement and that it disagrees with the accused that the receiver of the statement is a person in authority, which would normally trigger the voluntariness rule, then the onus shifts on the accused to lead some evidence of a reasonable belief by the accused that that person was a person in authority. This is what is called an evidential burden for the accused.

[28] This issue must be resolved from the viewpoint of the accused, but there must be a reasonable basis for the accused's belief that the person hearing the statement was a person in authority.

[29] Officer Cadet Whitehead provided his perspective to the court on the matter and on the meeting he had with the padre throughout his testimony.

[30] He confirmed the steps followed by authorities in order to manage that matter with him. It is also obvious that he arrived at the meeting with the padre with a different perspective than the one she had.

[31] Officer Cadet Whitehead was told by the complainant that she would have her complaint rescinded by the padre. That event took place further to her refusal to provide any written statement and prior to the second meeting he had with DCdts.

[32] Then, D Cdts confirmed at the second meeting that the complainant rescinded her complaint and that the matter would be dealt with through a mediation process to which he must attend with the padre.

[33] Officer Cadet Whitehead confirmed that he had a long conversation in his temporary room with the complainant, which is the conversation she referred to in her email to the padre on 17 September 2013. He learned from her that she would have the restrictions lifted. He felt relief and sad, but also terrified because he was unsure if she would do it.

[34] Then, when Officer Cadet Whitehead received an invitation by the padre to meet with her, it was not a surprise to him because he expected this to happen in such a way. As he said to the court, he was considering himself entering in a mediation process to resolve the matter at the lowest level. It would explain why he expected the complainant to be present at that meeting and he was surprised not to see her there. Because of that process, he felt that he had to tell his side of the story to allow mediation to happen.

[35] Officer Cadet Whitehead confirmed that he was asked by the padre about his prior one-on-one conversation with the complainant. The padre also raised the issue of drinking with him.

[36] Officer Cadet Whitehead was in his third year at the Royal Military College of Canada. His parents were part of the RMC Kingston community and he was involved in the fencing team and had additional responsibilities as the captain of that team.

[37] Clearly, considering the nature of the allegations, this was sexual misconduct with a female Officer Cadet, the fact that Officer Cadet Whitehead was stigmatized by being very quickly removed from squadron lines without any apparent reasons or warnings, this put some pressure on him. Quickly, his family and the college community realized that something was happening to him.

[38] Being told by D Cdts that he would have to meet the padre to go through the mediation process gave Officer Cadet Whitehead the impression that he had no other choice than to go and speak with her about the alleged incident with the complainant. By not participating in that process, he knew he could expose himself to other measures or sanctions and that it would not help to improve his situation.

[39] Officer Cadet Whitehead clearly knew that the padre was not involved in the chain of command and that her main role was one of support and guidance to students and the chain of command regarding the well-being of officer cadets. He also knew that she had no authority in the disciplinary process.

[40] Officer Cadet Whitehead clearly expressed to the court that he was aware that the padre was there to help the situation and that he did not feel being in an interrogation room. He was nervous, anxious and uncomfortable with the topic discussed. The padre was polite and no notes were taken. However, he still feared, at the time, the result that this meeting could have on his future, both as a student and an officer.

[41] Essentially, prior to the meeting with the padre, Officer Cadet Whitehead had a personal belief that if he did not enter into the mediation process or that this process did not go as expected by authorities, the investigation on the alleged incident would continue and he could be potentially charged. So it explains why, from his perspective, he saw the padre as a person being able to control or influence the disciplinary proceedings against him concerning the alleged incident with the complainant.

[42] In addition, at no point during that process was Officer Cadet Whitehead told explicitly by authorities at the Royal Military College of Canada that they did not intend to proceed with the disciplinary process, which would explain his viewpoint on the matter as he expressed it in court.

[43] Then, I conclude that the applicant met his onus of demonstrating there was a valid issue for consideration.

[44] Because of my conclusion, the onus then shifts to the prosecution to demonstrate beyond a reasonable doubt that the padre, Major Smith, was not a person in authority.

[45] As mentioned by Officer Cadet Whitehead, the meeting he was invited to attend by the padre was, from his perspective, for mediation purposes with the complainant. However, it is interesting to note that from padre's perspective, the meeting was for a different purpose because the stage of mediation was passed, considering the long conversation the complainant had some time prior with Officer Cadet Whitehead. This difference in both perspectives does explain well why the meeting went differently for both participants.

[46] At least, Officer Cadet Whitehead took the meeting with the padre as something about the mediation process, which would not involve anything related to the laying of charges against him as he was told by D Cds. He understood that the purpose was to settle the alleged matter between him and the complainant, not to find out about his involvement for potential proceedings against him concerning some service offences.

[47] He knew the role of the padre at the time as not being part of the chain of command and not having any authority to command or investigate in any matter. Essentially, as he said, her role was to help and support students having problems at the college. The context was relaxed, no notes were taken and no recording of any sort was made of the interview.

[48] Before entering in the meeting with the padre, Officer Cadet Whitehead knew about the complainant's intent to rescind her complaint against him because he was told explicitly by her some days prior.

[49] The padre's intent was to hear Officer Cadet Whitehead's side of the story about the long conversation he had with the complainant some days before, if he was remorseful on what allegedly happened, and if he needed some assistance with a potential personal problem that could have triggered the situation. Those three aspects were covered during that meeting. However, the difference on the perspective of the meeting by Officer Cadet Whitehead and the padre may explain why the latter was surprised by the response she was given when she asked him about what happened. She was referring to the conversation and it seems that Officer Cadet Whitehead took it as an opportunity to provide his side of the story on the allegations against him.

[50] The lack of interest of the padre in Officer Cadet Whitehead's side of the story is supported by the fact that she did not report it to the chain of command and that she recommended to DCds to lift all restrictions imposed to him despite what she was told. Clearly, she did not want to go against the wish of the complainant to not pursue the matter.

[51] Then, because of the nature of the meeting with the padre, which was mediation, and the role of padre as performing as a counsellor or therapist, which Officer Cadet Whitehead clearly knew, of the absence of any notes or recording taken during the meeting, and of the fact that he was told prior to that meeting by the complainant of her intent to not pursue the matter, I conclude that in such a context, Officer Cadet

Whitehead has no reasonable basis for believing that any disciplinary proceedings had been commenced or even considered by proper authorities.

[52] Then, it is my conclusion that the prosecution has met their onus of showing beyond a reasonable doubt that Officer Cadet Whitehead did not reasonably believe that the padre, Major Smith, could influence or control the disciplinary proceedings against him at the time he made a statement to her at the meeting.

**FOR THESE REASONS, THE COURT:**

[53] **DECLARES** that the padre, Major Smith, was not a person in authority when she received the statement made by Officer Cadet Whitehead.

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**Counsel:**

Major C.E. Thomas and Major D. Hodson, Defence Counsel Services, Counsel for the applicant, Officer Cadet A.R. Whitehead

The Director of Military Prosecutions as represented by Major M. Pecknold, Major A.-C. Samson and Major J.A. Peck