COURT MARTIAL

Citation: *R. v. Morton*, 2017 CM 4008

Date: 20170206
Docket: 201614

Standing Court Martial

5th Canadian Division Support Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Master Corporal K.P. Morton, Respondent

Before: Commander J.B.M. Pelletier, M.J.

DECISION ON AN APPLICATION FOR A CHANGE IN THE LOCATION OF THE TRIAL

(Orally)

Introduction

[1] By authority of a Convening Order delivered by the Court Martial Administrator (CMA) on 13 September 2016, the accused is to be tried by Standing Court Martial presided by myself as military judge pursuant to a charge sheet dated 29 June 2016, alleging three infractions under the *National Defence Act* (*NDA*). The place of trial provided for in the Convening Order is Building F-1, the purpose-built courtroom on Canadian Forces Base (CFB) Gagetown which has for years accommodated courts martial held on this base.

The application

[2] By notice of application received on 27 January 2017, counsel for the prosecution requests that the location of trial be changed to a theatre in Building J-7 on CFB Gagetown that has more spectator capacity than this courtroom.

[3] The application states the request is made on the basis of information received from the formation commander of the Combat Training Centre, direct superior officer of the commanding officer of the accused, the Commandant of the Royal Canadian Armoured Corps School, to the effect that he estimates that for each day of the trial there will be a minimum of 100 military members in attendance to observe the proceedings. The Commandant of the Royal Canadian Armoured Corps School estimates that 50 of those persons will be members of his unit. The theatre in Building J-7 can sit up to 200 persons when set up as a courtroom as opposed to the capacity of approximately 45 persons that can be seated in this courtroom.

The evidence

[4] This information appears in an Agreed Statement of Facts produced with the consent of the defence that also includes compelling reasons why it is desirable for military personnel to attend the proceedings. In short, these proceedings are important and military personnel should have access to the military judge's decision and reasoning for education purposes. Consequently, attendance will be mandated for military personnel, within the bounds of other commitments.

[5] In the course of oral arguments, the prosecutor confirmed in answer to questions from the Court that the information just mentioned on the preoccupations of the commander and commandant were communicated, through e-mails on behalf of both, to the CMA. Yet, the CMA evidently decided not to change the location of the trial as the Convening Order has not been amended to specify another location.

[6] The prosecution also offered as exhibit a document containing a table listing on one axis four possible alternative locations on CFB Gagetown for a court martial to be held, including the theatre in Building J-7, as well as comments as to how these locations meet 14 requirements listed on the other axis. That list of requirements were taken from a document made and published by the CMA. In addition, a number of photographs of the theatre in Building J-7 set up as a courtroom were produced as well as pictures of adjoining rooms that could be used by the Court and counsel at that location.

Position of parties

[7] During oral arguments, it was made clear by both parties that there is nothing wrong with the facilities in which the court is currently sitting as ordered in the Convening Order. Essentially, the prosecution asks me to order that the trial be moved

to Building J-7 because it is better, solely in relation to the number of spectators which can be admitted.

[8] The respondent consents to the application, thereby not opposing the wishes of his commanding officer and of the superior of his commanding officer, commander of the Formation where he is currently employed.

The law

[9] Section 165.19(2) of the *NDA* and Governor in Council regulations found at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 111.02(2)(*b*) grant to the CMA the power to issue a Convening Order that includes the place of trial. That authority was recognized by courts martial in the cases of *R. v. Wilcox,* 2009 CM 2024 and *R. v. Semrau,* 2010 CM 1003. QR&O 111.13 suggests that the place of trial is an administrative requirement that shall be determined in consultation with unit authorities. QR&O 111.12 makes the commanding officer of the unit where the court martial is held responsible for providing the required support to ensure that the court martial is conducted in a dignified and military manner.

[10] The role granted to military judges on the matters conferred by regulation to the CMA for the convening of a court martial at QR&O 111.02(2) is limited strictly to one aspect: the date and time of assembly of the members of a General Court Martial, as stated in subparagraph (*d*) of article 111.02(2). There is no specific authority in the *NDA* or its regulations for military judges to play a role in the decision of the CMA pertaining to the selection of the place of trial.

Analysis

[11] I conclude, in applying the facts before me to the regulatory framework, that the CMA, in maintaining its Convening Order for a trial in the current location at Building F-1, has made a decision regarding selection of the place of trial that does not concern the military judge. The CMA is an office set up by law and decisions from the CMA can be challenged on judicial review as recently found in *Canadian Broadcasting Corporation (Radio-Canada) v. Canada (Attorney General)*, 2016 FC 933. There is no authority given to a military judge in the law to judicially review a decision of the CMA.

[12] That being said, even if I, as a military judge, do not have a formal role to play in selecting the place of trial that ultimately appears in the Convening Order issued by the CMA, I agree with the parties that once proceedings have commenced in court as they have this morning, I do have the authority to grant an application to change the location of the trial under paragraph 179(1)(d) of the *NDA*. Yet, the power granted under section 179 is broad but it is not unlimited. I can change the location of a trial if a party raises an issue that concerns the due exercise of my jurisdiction, namely to ensure the proper administration of justice in these proceedings. Issues falling in that category as it pertains to the location of the trial would include matters that could impede the

conduct of the prosecution, the defence or the Court to an extent that cast doubts as to whether justice can be properly administered.

[13] In the evidence and representations made to me, I have heard nothing about the location where this trial has been ordered to be conducted which could cause me concern in relation to the conduct of the defence or the prosecution or the issue of the conduct of the court martial in a dignified and military manner. To the contrary, the room where the Court is currently sitting has been purpose-built as a military courtroom at great cost to the public. It compares very favourably with the other few purpose-built facilities on Canadian Armed Forces (CAF) installations and with courtrooms in civilian locations across the country. The support I have had the privilege of benefitting from as the military judge who has sat the most often in this location in the last few years, especially from personnel at the Combat Training Centre, has been nothing short of outstanding. There is nothing wrong with this courtroom or with the staff who is called upon to support courts martial here, as both parties would no doubt agree.

[14] I acknowledge that the prosecutor is arguing that he is not asking me to review the decision of the CMA. In effect, however, this is what he is asking me to do.

[15] All of the issues that were raised in support of the application are administrative, as opposed to judicial, in nature. The concerns that were raised come from military authorities. They were provided to the CMA who could have decided to change the Convening Order to have this trial held at Building J-7.

[16] The CMA, by regulations, is specifically granted the authority to select the place of trial. As military judge, I am not.

[17] The CMA, by regulations, is specifically granted the authority to consult with the chain of command in dealing with administrative requirements, including the place of trial. I am not.

[18] The CMA is aware of a number of administrative factors such as the costs and rationale of expenses incurred in the past for building dedicated facilities which may have an impact on a decision to use these facilities or not to support courts martial. I am not.

[19] As mentioned, even if I, as a military judge, do not have a role to play in selecting the place of trial that ultimately appears in the Convening Order, I do have the authority to grant an application to change the location of the trial. Yet, having a power does not mean an obligation to use it. It is clear to me that the most competent authority to decide the issues raised in this application is the CMA. Consequently, in the absence of issues relevant to the exercise of my jurisdiction for the administration of justice in these proceedings, I decline to intervene.

[20] I recognize that open courtrooms epitomize the cornerstone of a free and democratic society. Maximum attendance at courts martial, including by senior

officers, family members and journalists, helps maintain public confidence in the integrity of the military justice system and may improve the public's understanding of what occurs at courts martial.

[21] There have been many trials in this country where would-be spectators were unable to find place within courtrooms. The *NDA* at section 180 foresees limitations in accommodations that may impede the admission of members of the public to the proceedings. Limits on capacity of a room do not make trials less open to the public. High levels of public interest in given matters has not justified moving trials away from courtrooms. The reason for this, as explained by the BC Supreme Court in *R. v. Pilarinos and Clark,* 2001 BCSC 1332, is that the courtroom is a place of solemn inquiry, not a place of entertainment. This solemn inquiry can be more easily achieved in a courtroom such as this one, than in a theatre.

[22] I do acknowledge that courts martial are well attended here in Gagetown. This is no doubt a result of strong support from the leadership at many levels. It may well be that any extra space that could be added through renovations of this room would be well-used. In the interim, I believe that given that the vast majority of personnel attending proceedings are doing so on duty and are therefore under the authority of military authorities, it seems to me that the objectives of improvement of understanding and confidence in military justice can still be met within the current capacity in this room. A rotation of interested personnel may be made to provide some exposure to the greatest number of people. Internal communications may be used to provide access to decisions made in this court for the education of personnel, as required. At all times, I wish to state that the presence of the press in this room should be ensured, given their role in making proceedings available to the public. Also, persons who have a specific interest in the case such as friends or families of the accused or any victims should be granted priority of seating.

FOR THESE REASONS, THE COURT:

[23] **DISMISSES** the application.

Counsel:

The Director of Military Prosecutions as represented by Major D. Martin and Captain G. Moorehead

Mr. D. Hodson and Captain P. Cloutier, Defence Counsel Services, Counsel for Master Corporal K.P. Morton