HEARING BY A MILITARY JUDGE

Citation: *R. v. MacLeod*, 2018 CM 3015

Date: 20181019
Docket: 201817

Preliminary Proceeding

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Corporal G.D.W.M. MacLeod, Applicant

- and -

Her Majesty the Queen, Respondent

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

REASONS FOR A DECISION TO DISMISS THE CHARGE LAID UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT* AND TO TERMINATE THE PROCEEDINGS FOR A LACK OF JURISDICTION RESPECTING A PRELIMINARY APPLICATION PURSUANT TO SECTION 187 OF THE *NATIONAL DEFENCE ACT* AND ARTICLE 112.03 OF THE *QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES*

(Orally)

[1] On 27 September 2018, the applicant, Corporal MacLeod, through his counsel, filed an application pursuant to section 187 of the *National Defence Act* (*NDA*) and article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). Corporal MacLeod would like the judge presiding at this hearing to dismiss the charge preferred by the prosecution, he would like the court to terminate the overall proceedings and also he would like the court to declare that the charge sheet does not disclose a service offence.

[2] As a matter of evidence, the court considered:

(a) the application for the hearing as a preliminary proceeding;

(b) the charge sheet concerning Corporal MacLeod and dated 14 February 2018 signed by Major D.G.J. Martin, a representative of the Director of Military Prosecutions (DMP); and

(c) also, what I identified as the Supreme Court of Canada (SCC) listing of procedure about the appeal in the matter of *Corporal R.P. Beaudry*.

[3] According to the information provided to the court, Corporal MacLeod was charged with sexual assault contrary to section 271 of the *Criminal Code*. The charge was preferred by the DMP or one of his representatives on 15 February 2018.

[4] In the Court Martial Appeal Court (CMAC) decision of *Beaudry v. R.*, 2018 CMAC 4, in relation to the constitutional validity of paragraph 130(1)(*a*) of the *NDA*, the majority of judges concluded on 19 September 2018 at paragraph 72:

> Paragraph 130(1)(*a*) of the NDA is declared of no force or effect in its application to any civil offence for which the maximum sentence is five years or more, in accordance with subsection 52(1) of the *Constitution Act*, 1982.

[5] On 21 September 2018, on behalf of the Minister, the DMP filed a notice of a motion at the Supreme Court of Canada to suspend the effect of the decision made in the matter of *Beaudry*. As I mentioned, on 27 September 2018, Corporal MacLeod filed his application before me and I proceeded with the hearing on 17 October 2018. As a matter of fact, the court martial of Corporal MacLeod has not been convened yet, so there is no date set for the trial.

[6] Accordingly, that is why, pursuant to section 187 of the *NDA*, Corporal MacLeod would like a question of law to be determined by a military judge, not the one assigned to preside at the court martial because there is no court martial convened yet, but just by a military judge.

[7] Section 271 of the *Criminal Code* is very specific about the maximum sentence, which is 10 years' imprisonment, and it would clarify as such for the purpose of the *Beaudry* decision when I look at the first and only charge preferred on the charge sheet which refers to paragraph 130(1)(a) of the *NDA*, and, accordingly, in theory, it is alleged that the offence has no force and effect in its application.

[8] The position of the applicant is that the charge does not disclose a service offence and also that the charge on the charge sheet is not of the jurisdiction of the court martial. As a matter of context, defence counsel explained that he must present an application because he has to take positive actions on behalf of Corporal MacLeod. Pursuant to the decision in *R. v. Jordan*, 2016 SCC 27, related to the right of an accused to be tried within a reasonable time, according to counsel of the applicant, he cannot just sit and wait to see how the military justice system will react to the CMAC decision

in *Beaudry*. The clock basically is ticking for the accused and he has to be proactive, which is the reason why he is presenting this application.

[9] Also, he argued before me that a preliminary proceeding is the only means to address the issue as soon as possible because the court is not convened yet for the applicant which would have been the most efficient mean in the circumstances.

[10] The position of the respondent goes as follows: it is premature at this stage to decide on the nature of the charge or on the jurisdiction of the court to deal with this matter. The prosecution raised the fact that the motion to suspend the effect of the decision in *Beaudry* was filed only two days after the decision was made by the CMAC and now everybody, including the prosecution, is awaiting the result of that motion. Consequently, the prosecution is of the opinion that the hearing of the application or at least the decision on the application should be postponed up to the time or just after the SCC would have delivered a decision on the motion. Alternatively, I would say, the prosecution has brought before me the suggestion that this matter must go through a plea in bar of trial process during the trial itself when properly convened. Then, the court martial being convened, it would be in a position to consider dismissing or not the application.

[11] From my perspective, and counsel heard me raising this issue among other issues, and there are many. First, can a military judge presiding at a hearing, pursuant to section 187 of the *NDA*, other than the judge assigned to preside at the court martial, may decide an application that challenges the validity of the charge and the jurisdiction of the court to deal with such charge? I think, amongst other things, that is the first one the court must address.

[12] Second, if the court answers "yes", then should I exercise jurisdiction or defer the matter to the trial judge. If I proceed on the merits, meaning that I decide to exercise jurisdiction and deal with the matter, is the charge still a service offence in light of the *Beaudry* decision? Can the preferred charge be dismissed? If not, should the charge be dealt with by a court martial? These are all the questions I should ask myself in order to make a determination on the issues.

[13] First, I put to the attention of counsel the decision of *R. v. Tomczyk*, 2011 CM 1004, where Dutil C.M.J. delivered a decision in the context of a preliminary proceeding under section 187 of the *NDA*. One of the things he decided, despite the fact that the question and issue before him was different than the one before me today, because at the time it was dealing with a constitutional issue concerning section 165.191 of the *NDA*, he was not the proper forum to deal with the matter. I am of the opinion that I shall do the same thing in this application. I shall examine if the actual context makes me the proper forum to deal with this matter.

[14] I would agree with the CMJ in his decision that usually situations that would allow "a judge, other [than] the trial judge, [to] hear preliminary applications on specific matters … are expressly provided in legislation or valid statutory instruments." What I

mean by this, in other jurisdictions, very often you will find that specific preliminary matters are identified and listed making clear what can be considered by the trial judge and what can be considered by a judge that is not the trial judge, on some specific matters.

[15] In the context of a court martial, the fact that an accused may present a plea in bar of trial in order to raise that a court has no jurisdiction or that the charge does not disclose a service offence is specifically addressed at subparagraphs 112.05(5)(*b*), 112.24(1)(*a*) and (*e*) of the QR&O. In accordance with this regulation, these questions must be addressed once the trial has commenced. It then indicates that they must be dealt with by the court itself, meaning by the judge presiding at the court martial and not by me. In addition, paragraph 112.24(6) indicates that it is the court martial that must terminate the proceedings if a plea in bar of trial regarding its jurisdiction or the fact that the charge does not disclose a service offence is granted.

[16] Also the decision made by a court martial on such preliminary matters can be subject to a review by the CMAC, which is not the case if a military judge, other than the one presiding at a court martial, renders a decision on the same questions.

[17] The issues raised by the applicant must not be, in my humble opinion, immunized from review by the CMAC considering that it may put a final end to the judicial process. Then, it is my conclusion that, in accordance with the existing regulation, the issues raised by the applicant must be dealt with by the judge presiding at the court martial of Corporal MacLeod and not by me as a military judge in the course of this hearing.

[18] However, it does not preclude the military judge assigned to preside at the court martial to hear the matter as a preliminary question, prior to the date set for the trial. It would be up to him or her to make that decision.

FOR THESE REASONS, THE COURT:

[19] **CONCLUDES** that as the military judge presiding at a hearing pursuant to section 187 of the *NDA*, other than the judge being assigned to preside at the court martial, I do not have jurisdiction to decide this application that challenges the validity of the charge and the jurisdiction of the court to deal with such charge. Considering my answer to this question, it is not necessary for me to answer to the other questions.

[20] **DISMISSES** the application. The applicant may bring this matter to the military judge assigned to preside at the court martial once the trial is convened, if he wishes to do so.

Counsel:

The Director of Military Prosecutions as represented by Major A.J. van der Linde

Lieutenant-Commander J.E. Léveillé, Defence Counsel Services, Counsel for Corporal G.D.W.M. MacLeod