COURT MARTIAL

Citation: *R. v. Renaud*, 2019 CM 4022

Date: 20190730
Docket: 201882

Standing Court Martial

Canadian Forces Base Bagotville
Saguenay, Quebec, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Captain J. Renaud, Respondent

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

Order restricting publication: By order of this Court under section 179 of the *National Defence Act*, no person shall publish or broadcast in any manner any information that would establish the identity of any person described in these court martial proceedings as a victim, specifically and without restricting the generality of the foregoing, the persons identified in the charge sheet by the initials "E.T.", "A.L." and "A.N.".

[OFFICIAL ENGLISH TRANSLATION]

DECISION ON THE PROSECUTION'S APPLICATION FOR AN AMENDMENT TO THE CHARGE SHEET

(Orally)

Introduction

[1] Captain Renaud faces five counts in this trial by standing court martial. The first and second counts, under paragraph 130(1)(b) of the *National Defence Act* (*NDA*), allege, first, that he obstructed justice contrary to subsection 139(2) of the *Criminal Code* and, second, that he committed a breach of trust contrary to section 122 of the

Criminal Code. The impugned conduct attributed to Captain Renaud is the same on both counts, namely, having asked Captain Morin-Nappert to delete from her smartphone photographs and text messages of a sexual nature that he had transmitted to her. The other three counts are brought under section 129 of the *NDA* and are not relevant to this decision.

[2] Before closing its case after hearing nine witnesses, the prosecution applied for an amendment to the charge sheet to amend the details of the first two counts on two separate fronts. First, instead of reading [TRANSLATION] "between September 30 and October 6, 2017" the date of the offence would be amended to read [TRANSLATION] "on or about September 29, 2017 and on or about October 6, 2017". Second, the description of the act would be amended to add the words [TRANSLATION] "by asking V.M. to delete photographs from her smartphone" to read [TRANSLATION] "by asking V.M. to delete or confirm the deletion of photographs from her smartphone" [Emphasis added].

[3] This application to amend the charge sheet was made immediately following a decision of the Court on the admissibility of similar fact evidence, after hearing what was announced as the prosecution's last witness in its evidence. During the parties' submissions on the issue of the admission of similar facts, defence counsel raised deficiencies in the evidence relating to the particulars of the charge sheet and expressed a desire to bring a motion to dismiss or not to proceed on a prima facie basis as provided for in paragraph 112.05(13) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). Specifically, he drew the Court's attention to the fact that the request to delete the photographs attributed to the accused by Captain Morin-Nappert would have been made on September 29, 2017, that is, before the period set out in the details of the offence. He also pointed out that at a subsequent meeting between the two on October 5, 2017, the only request made would have been to confirm the deletion and not to delete. As conceded by the prosecutor, these remarks by the defence led the prosecution to realize that the evidence it presented did not conform to the particulars of counts 1 and 2 with respect to the timing of the offences and the manner in which the offence would have been committed.

[4] Before declaring its evidence closed, the prosecution therefore made this application for an amendment to the charge sheet to conform to the evidence heard.

[5] The defence objects to this application, arguing that amending the charges at this late stage of the trial is tantamount to changing the rules in the middle of the game and compromises the defence of the accused, specifying, among other things, that the cross-examination of the prosecution witnesses would have been different if they had established facts consistent with the particulars of the current charge sheet.

Analysis

Introduction

[6] In determining whether to order an amendment to the charge sheet, the Court must identify the applicable law and apply it to the circumstances of the case. As mentioned at the hearing, it is disappointing to have to interrupt the smooth conduct of the trial to consider this entirely avoidable issue. Unfortunately, this kind of inconvenience seems to be becoming more and more frequent. That being said, the court's analysis and decision on the amendment application is not an attempt to teach a lesson to nonchalant prosecutors in the hope that they will take the necessary care in the future. This decision is based only on the applicable law and facts.

Applicable law

National Defence Act

[7] Section 188 of the *NDA* deals specifically with the issue of amending charges and reads as follows:

Amendment of Charges	**Modification des accusations**
Amendment if defence not prejudiced	**Modification ne lésant pas la défense**
188 (1) Where it appears to a court martial that there is a technical defect in a charge that does not affect the substance of the charge, the court martial, if of the opinion that the conduct of the accused person's defence will not be prejudiced by an amendment of the charge, shall make the order for the amendment of the charge that it considers necessary to meet the circumstances of the case	**188 (1)** Lorsqu'elle constate l'existence d'un vice de forme qui ne touche pas au fond de l'accusation, la cour martiale doit, si elle juge que la défense de l'accusé ne sera pas compromise par cette décision, ordonner que soit modifiée l'accusation et rendre l'ordonnance qu'elle estime nécessaire en l'occurrence.
Adjournment on amendment of charge	**Procédure**
(2) Where a charge is amended by a court martial, the court martial shall, if the accused person so requests, adjourn its proceedings for any period that it considers necessary to enable the accused person to meet the charge so amended.	**(2)** En cas de modification de l'accusation, la cour martiale doit, si l'accusé en fait la demande, ajourner les procédures le temps qu'elle juge nécessaire pour permettre à celui-ci de répondre à l'accusation dans sa nouvelle forme.

Opportunity to borrow from the *Criminal Code*

[8] The prosecution argues that this provision should be supplemented by section 601 of the *Criminal Code* for two reasons. First, *R. v. Winters*, 2011 CMAC 1, where Létourneau J., at paragraph 32, refers to subsection 601(6) of the *Criminal Code* in analyzing the issue of the amendment to a detail of the charge. Second, the prosecution argues that the application of the provisions in section 601 of the *Criminal Code* is

necessary to dispose of the issue of amending the charge sheet, referring to section 179 of the *NDA*.

[9] With respect to paragraph 32 of *Winters*, I cannot accept the submission of the prosecution that this excerpt establishes that the issue of amendment of a charge sheet by a court martial must be dealt with by reference to the *Criminal Code*. Indeed, the analytical exercise undertaken by Justice Létourneau must be interpreted in the context of all the relevant paragraphs of *Winters*. The conclusion is stated at the outset in paragraph 30: the judge should have granted the prosecution's application to amend because substituting the word "regulation" with "instruction" was merely a detail that did not alter the essence of the offence and did not cause any prejudice to the respondent. The absence of prejudice is demonstrated by citing the summary of circumstances at paragraph 31. After referring to the state of the criminal law on this issue, Létourneau J. concluded that the situation is no different in military criminal law, citing section 188 of the *NDA* and reiterating his conclusion that the amendment in no way affected the substance of the charge and in no way compromised the defence of the respondent, who moreover [TRANSLATION] "wanted to plead guilty". He concludes paragraph 33 by referring once again to section 188 of the *NDA*, which, in his view, creates an obligation to amend the charge where the few conditions for its application are met.

[10] I therefore conclude that, although Létourneau J. referred to the solution proposed by the *Criminal Code* on the issue of amending a charge sheet, this exercise was strictly for information purposes. He arrived at the solution to the issue that was his to determine strictly by applying section 188 of the *NDA*.

[11] The prosecution also submits that the application of the provisions of section 601 of the *Criminal Code* is necessary in order for this court martial to assume the powers and functions of a superior court of criminal jurisdiction in relation to the issue of ordering an amendment to the charge sheet, referring to section 179 of the *NDA*. This section deals with the powers of a court martial, providing that a court martial has the same powers as a superior court of criminal jurisdiction in respect of a number of specifically mentioned functions relating to the admission of evidence, the enforcement of its orders and any other matter within its jurisdiction.

[12] With respect, I do not see how section 179 can be interpreted to support the prosecution's application to apply the provisions of the *Criminal Code* to the issue of amending the charge sheet. Section 188 of the *NDA* gives the court martial the power to amend charges. It is therefore able to exercise its jurisdiction to deal with charges before it. In the absence of incapacity or disability in the exercise of its jurisdiction, a court martial does not need to resort to a power conferred on a superior court in this area. The amendment is by no means a situation that is not provided for in QR&O and would therefore allow a court martial to follow the method most likely to achieve justice as set out in QR&O 101.04.

[13] I am aware that my colleague Sukstorf M.J. at paragraph 36 of her decision on a preliminary motion by the defence for particulars in *R. v. Banting*, 2019 CM 2008 refers to submissions by prosecutors to the effect that sections 188 and 179 of the *NDA* may give military judges some flexibility in amending a charge sheet. This statement was *obiter* considering that her Court was then seized with an application under subparagraph 112.05(5)(*c*) of the QR&O, a provision that expressly confers the power to order that further particulars be provided. Despite counsel's agreement on the ancillary issue of section 179 of the *NDA*, the reference to the power conferred by that section was entirely superfluous in the context.

[14] I am also aware that Ewaschuk J. for the Court Martial Appeal Court (CMAC) in *R. v. Bernier*, 2003 CMAC 3 noted that a military judge was not required to make a special finding under section 138 of the *NDA* and that subsection 601(4.1) of the *Criminal Code* applied. Again, this was *obiter* considering that the issue was whether the military judge had erred in making a special finding with respect to the time of the offence. In no case was there any question of determining whether section 601 of the *Criminal Code* applied. Ewaschuk J.'s blunt words on this ground of appeal, among several others, are not authoritative on the issue of whether section 601 of the *Criminal Code* should be used to determine whether an amendment to a charge sheet should be granted.

[15] The arguments submitted by the prosecution in this case, as well as in *Banting*, reveal the attraction of borrowing provisions of the *Criminal Code* to determine peripheral issues at courts martial, particularly because of the greater jurisprudential and doctrinal resources available in comparison to military law. While such borrowing may be practical, it does not make the criminal law provisions legally enforceable. I am therefore reluctant to follow this line of reasoning given that a court martial is a court martial that operates on an *ad hoc* basis to consider the charges contained in the charge sheet (see *R. v. MacLellan*, 2011 CMAC 5). The court martial has no inherent powers; it must be able to find its authority in the *NDA* and its regulations. It is only where these tools are deficient that a court martial may use the powers necessary for the exercise of its jurisdiction that a superior court of criminal jurisdiction possesses or rely on the *Criminal Code* to determine and follow the method most likely to achieve justice, as set out in QR&O 101.04.

[16] The issue of an application to amend charges is not one for which the tools provided by the *NDA* and its regulations are deficient: the authority of a court martial on this issue is expressly provided for in section 188 of the *NDA* and QR&O 112.59.

[17] Without detracting from what I have just mentioned, it is also necessary to recognize the special status of the charge sheet in the military criminal law process. The charge sheet not only focuses the court martial debate once proceedings commence. It also establishes the jurisdiction of the court martial by the laying of a charge, that is, the signing of a charge sheet by a person authorized to lay charges (see QR&O 110.06), and its subsequent transmission to the Court Martial Administrator. This action requires that authority to issue a convening order for a court martial to try the accused (see QR&O

110.07 and 111.01). It goes without saying, therefore, that the amendment of a charge sheet, a document that is so important in establishing the jurisdiction of the court, cannot be done lightly, without recourse to a clear enabling provision. A court martial has no inherent power to amend the charge sheet. This power must be provided to the court martial by the *NDA* or its regulations. The *Criminal Code* cannot provide this authority as a court martial is not a court within the meaning of the *Criminal Code*.

Conclusion on applicable law

[18] I therefore conclude that the question of whether the charge sheet should be amended as requested by the prosecution should be determined by reference to section 188 of the *NDA*.

Requirements for an amendment to the charge sheet

[19] As mentioned by Létourneau J. at paragraph 33 of *Winters*, section 188 of the *NDA* creates an obligation to amend the charge sheet where the few conditions for its application are met. In reviewing this provision, there are two preceding conditions:

(a) First, the existence of a defect in form that does not affect the substance of the charge. In English "there is a technical defect in a charge that does not affect the substance of the charge";

(b) Secondly, the court's judgement that the accused's defence will not be prejudiced by this decision. In English "of the opinion that the conduct of the accused person's defence will not be prejudiced by an amendment of the charge".

[20] The second test on the issue of impact on the accused's defence is one that is left to the Court's discretion and requires no comment at this time. This is not the case with the notion of technicality, which merits further analysis.

[21] The existence of a technical defect that does not affect the substance of the charge has been decided by courts martial in the past on the basis of the purely technical or substantive nature of the amendments requested. For example, in *R. v. Wilks*, 2013 CM 3032 there was an error in the initials of two complainants referred to in two charges. Similarly, in *R. v. Larouche*, 2012 CM 3008, an error in the service number of two complainants. In both cases, the defence confirmed that it knew who was the target of the alleged acts and consented to the amendment. There is no doubt that the amendment requested in *Winters* was of the same nature, i.e. to substitute "instruction" for "regulation".

[22] In this case, the prosecution's request is more substantial in nature than these examples. On the other hand, it would be erroneous to believe that the defect must be strictly limited to a purely technical or clerical defect, despite the use of the term "technical defect" in the English part of section 188 of the *NDA* and also despite section

112.59 of the QR&O which, after citing section 188 of the *NDA* at paragraph 1, mentions at paragraph 2 that the court may amend the convening order and the charge sheet if it finds, among other things, an error or omission of a clerical nature (an "*omission d'écriture*" in French).

[23] With respect to the second paragraph of QR&O 112.59, it appears that the reference in the regulations to specific amendments that may be made does not in any way compromise the generality of the statutory provision that applies to the issue of amending charges. With respect to the actual words of section 188 of the *NDA*, the technical defect cannot be defined without considering the following words, "that does not affect the substance of the charge". In so doing, it must be defined in terms of its opposite, the substantive defect that touches on the substance of the charge.

[24] As the Supreme Court of Canada (SCC) recently reminded us in *R. v. Stillman*, 2019 SCC 40 at paragraphs 32 et seq., the interpretation of a bilingual enactment begins with a search for the shared meaning between the two versions. What is shared between the English and French versions of section 188 of the *NDA* is the expression "*qui ne touche pas au fond de l'accusation*", "that does not affect the substance of the charge". What differs are the words "technical defect" and "*vice de forme*". Although the analysis would have been simpler if all the words used had been more accurately translated, for example, "technical defect" in French or "defect of form" in English, the use of accurately translated words with respect to the notion of "defect that does not affect the substance of the charge" leads, in my view, to only one logical conclusion, namely, that section 188 of the *NDA* allows the charge sheet to be amended if the proposed amendment does not affect the substance of the charge.

[25] This conclusion implies that the defect may be more than technical. Amending the charge sheet may result in a significant change provided it does not affect the substance of the charge. After all, a court martial may make a special finding as provided for in section 138 of the *NDA* (see QR&O 112.42). In order for such a finding to be made, the facts must have differed substantially from the facts alleged in the particulars of the charge, but must be sufficient to establish the commission of the alleged offence, and the difference must not have been prejudicial to the accused in his or her defence. The latter notion is consistent with the wording of section 188 of the *NDA*, which states that the accused's defence must not have been prejudiced by a variation of the charges.

[26] It would, in my view, be incongruous for the prosecution to be able to ask for a special finding at the final argument stage if it had not been able to ask for an amendment to the particulars of the charge beforehand during the trial. Indeed, the request for amendment during the trial is more likely to ensure that the accused's right to make full answer and defence is respected by allowing him or her to minimally adjust his or her defence to a new reality. In my opinion, there must be some consistency in determining what can be subject to a technical amendment that does not affect the substance of the charge. If something can be subject to a special finding, the same thing should be subject to amendment.

[27] I conclude, therefore, that the first requirement for an amendment to the charge sheet, with respect to the existence of a technical defect that does not affect the substance of the charge, must be broadly defined, i.e., it may include any amendment that cannot be considered a substantive defect, which affects the substance of the charge. The amendment of the charge sheet may result in a significant change.

[28] That being said, the fact remains that, in order to analyze and determine whether the prosecution's application should be allowed, I must determine whether each of the requested amendments constitutes a technical defect that does not affect the substance of the charge, as this concept has been interpreted from time to time in Canadian law. The answers to these questions are necessarily contextual in that they relate to the facts and evidence heard thus far in this trial. The Canadian law applicable to this issue will necessarily be inspired by the *Criminal Code*, in accordance with the submissions of counsel who have brought to the Court's attention a number of jurisprudential decisions from the civil courts. I wish to make it clear that this exercise of interpreting the words of section 188 of the *NDA* using criminal law sources is different from applying the provisions of the *Criminal Code* directly to a matter to be determined under military law.

Application to requests for amendments made by the prosecution

[29] I will deal with applications to amend made by the prosecution on the basis of the conditions for the application of section 188 of the *NDA*, analysing first whether the applications relate to a technical defect that does not affect the substance of the charge. If so, I will then address the issue of whether the accused's defence would be prejudiced if the Court decided to authorize the proposed amendment.

[30] With respect to the application to amend the timing of the offence, i.e., the application to extend the period of time for the commission of the acts described in counts one and two to include September 29, 2017, I find that this is a technicality that does not touch on the substance of the charge.

[31] In the recent decision of *Stevens c. R.*, 2019 QCCA 785, the Quebec Court of Appeal addressed this issue, confirming that particulars are said to be superfluous if they do not relate to the essential or constitutive elements of the offence and if they are not crucial to the defence (see paragraph 98). Referring to the Supreme Court of Canada decision in *R. v. G.(B.)*, [1999] 2 S.C.R. 475, the Court concluded that the timing of the offence is generally not an essential element of the offence, even less so in sexual crimes. The remainder of the analysis deals with the particular circumstances that may result in the timing of the offence not being changed if the defence is based on the timing of the offence. Under the first test in section 188 of the *NDA*, the Court is satisfied that the time of the offence can be considered, in the circumstances of the case, as a technicality that does not affect the substance of the charge.

[32] With respect to the amendments requested to add the words [TRANSLATION] "or confirm the deletion" in the description of the acts of which the accused is charged in the particulars of the offences covered by the first and second counts, the substance is to add a mode of commission of those offences. In the prosecution's view, a similar amendment was described as permissible by the Supreme Court of Canada in *Morozuk v. The Queen*, [1986] 1 S.C.R. 31. A similar amendment was granted by the Quebec Court of Appeal in *Zhou c. R.*, 2009 QCCA 366. It appears from these decisions that what was at issue was a substitution of one mode of committing the offence for another. The request of the prosecution in this case is to add a mode of commission of the offences. I have to determine whether the proposed amendment is a technicality that does not affect the substance of the charge. In this case, the charges do not change. I therefore believe that an addition as proposed does not touch the substance of the charge. However, I have serious doubts as to whether it is a technicality, considering that it adds to the conduct of the accused. He is charged with additional conduct, although I have difficulty seeing at this stage how a request to confirm the deletion of e-mails could constitute the *actus reus* of the offences alleged in counts one and two. This would, in my view, be evidence from which it could be inferred that a request for deletion had been made beforehand. That being said, I must conclude that the prosecution has not satisfied me that this was a technicality. I therefore conclude that I do not have the authority to amend the charge sheet to this effect under section 188 of the *NDA*.

[33] I must now determine whether I find that the defence would be prejudiced by any decision to amend the charge sheet.

[34] With respect to the proposed amendment as to the time of the alleged offences in counts one and two, defence counsel argue that the dates are important in this case. I agree with this assertion, but in a qualified manner. It is not so much the timing as the sequence of events that could be important in judging offences. The evidence is not affected by the motion to amend with respect to the sequence of events. The defence seems to have to either deny that the words attributed to the accused were uttered regardless of their position in time or deny the meaning of those words with respect to the *mens rea* on the first and second counts. Here again, it is the sequence of events that matters. There does not appear to be any issue of alibi that may be at stake with respect to the conversations in which the accused is alleged to have participated. In the circumstances, I do not see how the timing of the offences can be a crucial issue for the defence. Changing the date of a conversation to 24 hours before the time specified in the particulars of counts one and two cannot mislead the accused where the name of the person speaking is specified and the subject matter of the conversation in relation to the making of a request to delete photographs and text messages. I am therefore of the opinion that the prosecution's request with respect to the dates of the first and second count offences should be granted.

[35] It is not for me to decide whether the defence would be prejudiced by the prosecution's requested amendment with respect to the additional mode of commission of the alleged offence, having found that I was not satisfied that this was a technicality.

If I was wrong on this issue, I want to make it clear that I believe the defence of the accused would be compromised by an amendment to that effect in the circumstances of this case. Indeed, the words that would have been exchanged are of great importance. The addition of conduct of which the accused is charged, arising out of a conversation other than that which the accused was prepared to defend and defended during cross-examination of the prosecution's main witness, would, in my opinion, be prejudicial to his defence.

Conclusion and disposition

[36] The Court concluded that the prosecution's application to amend the particulars of the first two counts on the charge sheet with respect to the timing of the offences should be allowed. The date of the offence on these two counts will be amended to read [TRANSLATION] "on or about September 29, 2017 and on or about October 6, 2017".

[37] The second paragraph of section 188 of the *NDA* provides that where the charge is amended, the Court Martial shall adjourn the proceedings for such time as it considers necessary to allow the accused to answer to the charge in its new form. I will make enquiries of the accused on this matter when the proceedings are resumed. I will also offer to the accused that the prosecution witnesses who brought relevant evidence as to the time of the first and second counts may be recalled so as to ensure that any decision that may have been taken to limit their cross-examination in relation to what may have appeared to be a defect in the charge sheet can be reconsidered in light of the amended charge sheet.

[38] The particulars of the first and second counts in the charge sheet now read as follows:

> [TRANSLATION]
> "*Particulars*: In that, between on or about 29 September 2017 and on or about 6 October 2017, in or near Constanta, Romania, he wilfully attempted to obstruct, divert or thwart the course of justice by asking V.M. to delete from her smartphone photographs and text messages of a sexual nature that he had transmitted to her."
>
> [TRANSLATION]
> "*Particulars*: In that, between on or about 29 September 2017 and on or about 6 October 2017, in or near Constanta, Romania, being a military police officer, he committed a breach of trust in relation to the duties of his office by asking V.M. to delete from her smartphone photographs and text messages of a sexual nature that he had transmitted to her."

[39] The amendment is recorded on the charge sheet in accordance with subsection 188(3) of the *NDA*.

Counsel:

Me Charles Cantin and Me Sylvain Morissette, Cantin Boulianne Avocats, 2456 Saint-Dominique Street, Jonquière, Quebec, Counsel for the accused, Captain J. Renaud

The Director of Military Prosecutions, as represented by Lieutenant-Colonel D. Martin and Major É. Baby-Cormier