COURT MARTIAL

Citation: *R. v. Iredale*, 2020 CM 4008

Date: 20200715
Docket: 201970

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Captain M.J. Iredale, Applicant

- and -

Her Majesty the Queen, Respondent

Motion heard and decision rendered in Victoria,
British Columbia, on 23 June 2020
Reasons delivered in Gatineau, Quebec, on 15 July 2020

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by General Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "D.R.", shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR A DECISION PERTAINING TO A PLEA IN BAR APPLICATION

[1] Six charges have been preferred against Captain Iredale on 17 December 2019, alleging offences of sexual assault on three occasions and conduct to the prejudice of good order and discipline on three other occasions. As prescribed at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 110.06, the charge

sheet contains, at its commencement, the component to which the service member being charged belongs, thus revealing that Captain Iredale is a member of the reserve force.

[2] On 22 January 2020, Lieutenant-Colonel Berntsen, counsel for the accused, filed a Notice of Intent to Plead in Bar of Trial, which was subsequently amended and filed on 4 May 2020 (Exhibit M1-3).

[3] The notice has eight short paragraphs. It mentions that the only evidence to be submitted during the hearing of the application is the charge sheet and other matters for which judicial notice can be taken under the *Military Rules of Evidence* (*MRE*). The only substantial ground mentioned in support of the application is to the effect that "the charge sheet does not establish that any of the factors enumerated in section 60 (1) (c) (i) to (x) of the *National Defence Act* (*NDA*) existed at the time of the alleged offences." Paragraph 60(1)(b) of the *NDA* lists the circumstances in which a member of the reserve force, such as Captain Iredale, is subject to the Code of Service Discipline.

[4] As soon as this military judge was designated to hear the preliminary applications filed by the defence, concerns emerged as to how the plea in bar should be dealt with, especially since this trial is to take place before the panel of a General Court Martial. As I was also the military judge assigned to preside the trial, I was preoccupied with whether there had been a potential oversight by prosecutors on the issue of jurisdiction on a member of the reserve force when they decided to prefer this matter for trial by court martial. I was also preoccupied with the question of whether there was any evidential burden on the applicant pleading in bar, the ultimate burden on the prosecution and the timing of a potential hearing and determination on this issue, especially if the panel could be hearing evidence pertaining to offences on which it may ultimately have no jurisdiction. These concerns were shared with counsel in the course of two case management teleconferences held in March and April 2020.

[5] It is presumed that as a result of the concerns expressed both in the Notice of Intent to Plead in Bar of Trial and in the course of teleconferences as to whether the issue of jurisdiction was considered, the prosecution produced a response to the Notice of Intent on 25 May 2020 (Exhibit M1-4). In this response, the prosecution details, in 72 paragraphs, which factors listed at subparagraphs 60 (c) (i) to (x) of the *NDA* existed at the time of each of the six alleged offences and indicates the evidence it is able to produce to support its position as to each of the grounds of jurisdiction alleged.

[6] The plea in bar was again discussed at the next case management teleconference on 4 June 2020. I mentioned that the concerns previously raised seem to have been addressed and that there appears to be, at least prima facie, jurisdiction to go ahead with a trial. Defence counsel did not agree. I acceded to his recommendation that a discussion be held on the record as to the legal issues identified previously, which I considered to be extremely important for the efficient conduct of the trial. I ensured that counsel were provided on 12 June 2020 with a list of questions to be touched on during the discussion. Previously, in response to specific questions raised in an e-mail by Lieutenant-Colonel Berntsen, it was confirmed on 8 June 2020 by e-mail that although I

had not seen the discussion on the plea in bar as a summary dismissal issue, I was agreeable to proceed on that basis. This ensured that defence counsel was notified of the worst possible outcome of the discussion while maintaining the focus on a discussion meant to be broader than simply whether the plea should be summarily dismissed. The e-mails relating to this file were produced as exhibit M1-12.

[7] The discussion requested by defence counsel at the 4 June 2020 teleconference took place on 23 June 2020, after the Court had begun its proceedings at Canadian Forces Base Esquimalt the previous day by hearing and deciding to dismiss a recusal application presented by Lieutenant-Colonel Berntsen. Following short deliberations, I announced that I was exercising my discretion not to hold a hearing on the plea in bar as currently formulated. I mentioned that the application was therefore summarily dismissed, with reasons to follow in writing so that I could commence hearing another application. What follows are these reasons.

Issue

[8] The broad issue to be determined at this stage is whether, in the exercise of my duty to manage these proceedings, I should proceed with hearing a plea in bar of trial on the basis of the Amended Notice of Intent to Plead in Bar of Trial produced by the defence. If so, I will instruct counsel as to how I expect that hearing to unfold. If not, I will instruct counsel as to how I expect any challenge pertaining to jurisdiction be advanced, if required.

Position of the parties

[9] The prosecution submits there is what was described as a "price of admission" to be paid to be able to challenge the jurisdiction of the Court by means of a plea in bar, especially after it has offered proof of evidence that can be presented to establish jurisdiction. The prosecution submits that even if it did not seek summary dismissal of the plea in bar application, the Court is justified in requiring that an applicant point to specific evidence indicating an absence of jurisdiction before embarking on a hearing on such an application. As the applicant has failed to do so in this case, its plea in bar must be summarily dismissed.

[10] In contrast, defence counsel submits that there is no price of admission to be entitled to a hearing on a plea in bar application. His only obligation in the matter is to signify its intention to challenge the court's jurisdiction. Furthermore, Lieutenant-Colonel Berntsen stresses that he is not even required to make an allegation of fact to the effect that the accused was not subject to the Code of Service Discipline at the time of the alleged offences. He maintains, in line with the notice he filed with the court, that he does not intend to call any evidence in support of his plea in bar, given that the responsibility to prove jurisdiction rests wholly with the prosecution, beyond reasonable doubt. Should the prosecution elect to call no evidence, he maintains that it would have failed in its burden to prove jurisdiction. Should the prosecution call evidence in

response, his intent is to cross-examine prosecution witnesses to raise a reasonable doubt as to whether jurisdiction has been proven.

Analysis

The power of the military judge to manage proceedings

[11] Paragraph 179(1)(d) of the *NDA* provides a court martial the same powers, rights and privileges as are vested in superior courts of criminal jurisdiction with respect to matters necessary for the due exercise of its jurisdiction. As the military judge presiding at this General Court Martial, I have jurisdiction to hear and determine the plea in bar application. I consequently have jurisdiction to assess whether the plea in bar application should be summarily dismissed.

[12] In submitting that the Court should summarily dismiss the plea in bar, the prosecution argued that the applicant had no reasonable prospect of success, relying on paragraph 38 of *R. v. Cody*, 2017 SCC 31, where the Supreme Court of Canada (SCC) stated:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel—Crown and defence—should take appropriate opportunities to ask trial judges to exercise such discretion.

[13] What has become known as the *Cody* test – "reasonable prospect of success" and "no basis upon which the application could succeed" – emerges from earlier case law and it has now been applied in some subsequent cases. It cannot reasonably be denied that military judges have, today, the authority and even the duty to "weed out" applications that have no reasonable prospect of success.

[14] In the circumstances of this discussion on the plea in bar of trial, neither the grounds relied upon by the applicant in his notice or in verbal submissions made before me reflect a specific basis for suspecting the prosecution's choice of conduct in asserting military jurisdiction on Captain Iredale. In making that statement, I am cognisant that I must take into consideration the applicant's "best case", which in this case does not involve any evidence indicating an absence of jurisdiction on the accused. Indeed, Lieutenant-Colonel Berntsen stated in oral submissions that there is no need for him to summarize what he intends to present as evidence as, in his view, no such evidence is necessary. Should I find that any evidence is required by the applicant in a plea in bar, I am invited by counsel for the applicant to dismiss his application summarily.

The burden on an applicant in a plea in bar of trial under QR&O 112.24

[15] The *NDA* is silent as to plea in bar for lack of jurisdiction. The only plea in bar provision is found at section 66 of the *NDA* and deals with *autrefois* plea. One must therefore refer to QR&O article 112.24 on pleas in bar of trial to find the full scope of the submissions which may support a plea in bar of trial. In addition to an *autrefois* plea resulting from conviction, acquittal or a dismissal, they include the following: "the court has no jurisdiction; the accused is unfit to stand trial on account of mental disorder; or the charge does not disclose a service offence."

[16] In support of its "price of admission" submission to the effect that the applicant is bound to present some evidence going to lack of jurisdiction in order to properly submit a plea in bar, the prosecution points to the next paragraph in QR&O 112.24 which prescribes the procedure to be followed to deal with a plea in bar, which it is submitted supports an inference that the applicant has a burden to meet. These paragraphs from QR&O 112.24 read as follows:

> (2) The accused person may make any statement that is pertinent to the plea in bar of trial and witnesses may be called . . .
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> *(a)* by the accused person, to support the plea;
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> *(b)* by the prosecutor, in rebuttal of the plea; and
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> *(c)* by the court, if it desires to hear any further evidence.
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> (3) After witnesses, if any, have been heard, addresses may be made to the court first by the accused person and then by the prosecutor, and the accused person has the right to make an address in reply to any address made by the prosecutor.
>
> (4) Upon conclusion of the addresses, the court shall close to deal with the plea in bar of trial.

[17] Despite that procedure, the Court notes that in *R. v. Ryan* (1987), 4 C.M.A.R. 563 the Court Martial Appeal Court (CMAC) allowed the appeal of a decision of a presiding Judge Advocate to dismiss a plea in bar application in circumstances where there was no evidence before the Court proving or disproving the existence of a military nexus, a requirement at the time for the establishment of military jurisdiction for *Criminal Code* offences prosecuted under the Code of Service Discipline. Pratte J.A. found that the dismissal of the challenge to jurisdiction was in error because the status of a court martial as an inferior court precluded it to presume that any matter is within its jurisdiction. As he stated:

> Once the appellant had challenged the jurisdiction of the Court Martial, therefore, the Judge Advocate could not assume, in the absence of proof to the contrary, that the Court had jurisdiction. As the offence, in itself, had no connection with the military, it was necessary, in order for the Court to have jurisdiction, that the required nexus be found in the circumstances in which the offence had been committed. As long as these circumstances were unknown, the jurisdiction of the Court could not be presumed.

[18] Acknowledging that *Ryan* dealt with a military nexus issue which is not of concern anymore in Canadian military law, the applicant appears to draw a parallel between the situation where the court martial had to find a military nexus before proceeding and the situation of Captain Iredale where, because he is identified as a reservist on the charge sheet, the court has to be convinced that one of the factors enumerated in subparagraphs 60 (1) (c) (i) to (x) of the *NDA* existed at the time of the alleged offences. As these circumstances do not appear on the face of the charge sheet, it is implied that the applicant is in the same position as a 1980's accused facing a charge which on its face does not reveal a military nexus.

[19] The prosecution submits that the statement of law found in *Ryan* has been overruled in the subsequent decision of the CMAC in *R. v. Reddick* (1996) CMAC 393; 112 C.C.C. (3d) 491 where Strayer C.J., after quoting the paragraph which included the above extract, stated at page 12, "With respect I believe this decision cannot be taken to mean that in every case the Crown is obliged to present evidence of jurisdiction if an objection is raised by the accused" adding:

> A mere assertion by the accused that such is the case can surely not put on the Crown the burden of bringing "proof to the contrary" as suggested in the above quoted statement from *Ryan*. I am unable to accept that because a court martial is an inferior court in the legal sense of that term there must be brought "proof" of its jurisdiction before it can commence a hearing. As I understand it, there is a presumption of jurisdiction in a superior court, but none in an inferior court. An inferior court established by statute is considered to have only the powers conferred on it expressly or by necessary implication. But when challenged it is surely open to such a court martial to look at its statute and to the circumstances of the offence as alleged. If it determines that those circumstances, if ultimately proved, would bring the matter within its jurisdiction then it may proceed.
> [Footnote omitted.]

[20] As found in *R. v. Beres*, 2019 CM 4024 at paragraph 11, *Reddick* did not, strictly speaking, overrule *Ryan* on the burden to establish jurisdiction challenged on another basis than military nexus. Yet, the applicant in the plea in bar in *Beres* had introduced ample evidence, including by oral testimony, to establish that mistakes had been made in the prescribed procedure for the convening of the court, which cast a doubt on the court's jurisdiction. In these circumstances, it was found that the burden had shifted to the prosecution to alleviate any jurisdictional concern that had been raised at the satisfaction of the presiding military judge. The prosecution failed to do so and the plea in bar was consequently granted. Hence, *Beres* dealt with an entirely different situation than what we have here, where the applicant maintains that he does not have to present any evidence nor provide any indication as to what may justify a finding that the Court has no jurisdiction. Even if *Beres* was a successful plea in bar, it is not helpful for the applicant as it stands for the proposition that there is a burden an applicant needs to meet before a shift in the burden of persuasion on the issue of jurisdiction can occur.

[21] The interaction between the CMAC decisions in *Ryan* and *Reddick* was discussed in *R v Balint*, 2012 CM 2010, where the presiding military judge granted a

plea in bar having received in evidence nothing else than the charge sheet and the Notice of Plea in Bar. In that case, the accused, a member of the reserve force, was charged under subsection 125(a) of the *NDA* with having made a false statement in a memorandum to the effect that she had achieved a physical fitness requirement knowing that it was false. Even if there was no evidence introduced as part of the hearing of the plea in bar, counsel for the applicant specified that it was a lack of personal jurisdiction over the accused that gives rise to the plea. The military judge quoted the extracts from *Ryan* and *Reddick* above before mentioning, at paragraph 8:

> I conclude therefore, that once the issue of personal jurisdiction over the accused is properly raised, the burden rests upon the prosecution to establish that the accused was subject to the Code of Service Discipline at the time of the event forming the subject matter of the charge.

[22] The prosecution is inviting me to distinguish *Balint* on the basis that in that case, the applicant had adequately specified the complaint it had regarding the jurisdiction and therefore the issue was properly raised. I do not believe the published decision in *Balint* is sufficient to support that characterization. However, I do note that the context most likely played a role in the conclusion of the military judge, especially the charge and statement of particulars in issue in *Balint*, namely making a statement in a memorandum. Given that the accused was a member of the reserve force, the obvious issue is whether the accused was subject to the Code of Service Discipline at the precise moment that statement or memorandum was made. Jurisdiction under the Code of Service Discipline is always based on time sensitive factors, especially for reservists who are subject to the Code when two time-dependent situations correlate: they are member of the reserve force and they are in at least one of the situations described in paragraphs 60 (1) (c) (i) to (x) of the *NDA*. From that perspective, the charge chosen in *Balint* would immediately appear to be challenging to any informed observer given the inherent difficulty to prove which of the situation applied at the very moment an accused, member of the reserve force, drafted or signed a memorandum, unless that was done before a witness. This is in contrast with a charge targeting the moment a memorandum was handed out. It is also revealing that in *Balint*, once the prosecution was challenged during submissions on the plea in bar, the prosecutor declined to specify one or more of the enumerated bases in subsection 60(1) that would affect military jurisdiction. The situation is different in this case, where the prosecution voluntarily outlined which factors listed at subparagraph 60 (c) (i) to (x) of the *NDA* existed at the time of each of the six alleged offences as well as the evidence it is able to produce to support its position as to existence of these factors.

[23] I do believe that the applicant in a plea in bar has an obligation to demonstrate a jurisdictional concern sufficient to warrant consideration by the court. This means an applicant must be in a position to present an argument based on evidence adduced for that purpose, on material already in evidence or on matters taken under judicial notice. This is not a burden of proof itself but rather an evidential burden, akin to the burden on an applicant to point to evidence that is apt to convey an air of reality to a defence, justification or excuse.

[24] In *Balint*, the wording of the charge itself, combined with the refusal of the prosecution to provide further information was, in the mind of the presiding military judge, sufficient to grant the plea in bar in these circumstances. This outcome was within the scope of the exercise of discretion of that military judge in the circumstances of that case.

[25] The circumstances in this case are in my view different in several areas:

(a) First, the applicant makes no specific challenge as to jurisdiction in this case, insisting that he does not even make an allegation of fact that he was not subject to the Code of Service Discipline at the time of the offences;

(b) Second, there is currently no lingering issue of law such as military nexus requiring military judges to be cautious about jurisdiction. The provisions of the *NDA* conferring jurisdiction are presumed to be constitutional and the exercise of military jurisdiction has been recognized as entirely legitimate by the Supreme Court of Canada less than a year ago in *R. v. Stillman,* 2019 SCC 40, in stark contrast with decisions of the CMAC in cases such as *R. v. Trépanier,* 2008 CMAC 3 which highlighted the derogatory nature of the military justice system and may have invited caution at the time *Balint* was decided. Moreover, the exercise of prosecutorial discretion by military prosecutors and the facts that they benefit from a presumption that they exercise this discretion appropriately has been recognized by the Supreme Court of Canada in *R. v. Cawthorne*, 2016 SCC 32 at paragraph 32.

(c) Third, the charges in this case do not reveal a potential issue pertaining to jurisdiction, as they allege interactions between persons who can be presumed to have been interacting in the course of their military duty to justify the involvement of military authorities. Despite that common sense interpretation of the situation depicted in the charges, the questions raised by the Court as to a potential oversight as to the issue of jurisdiction were answered by the voluntary production by prosecutors of a document describing in detail each of the grounds of jurisdiction alleged. In doing so, the prosecution also answered the preoccupation enunciated by the applicant in its notice of plea in bar, to the effect that the basis for jurisdiction had not been specified.

[26] In conclusion, I found that there is indeed a burden on the applicant in a plea in bar to point to evidence or provide sufficiently precise detail of the nature of the application to properly raise the issue of jurisdiction over the accused. In this case, the applicant has indicated no such evidence or details, stating they are not needed. The position advanced by the applicant means that even a totally bare allegation regarding jurisdiction would require the court to receive proof of its jurisdiction before it can proceed, proof that is most likely to have to be provided by the prosecution with a right

to cross-examination by defence before the panel of the General Court Martial may assemble.

[27] Not only is this position inefficient, it is also contrary to the clear finding made by the CMAC in *Reddick* to the effect that a court martial does not need to formally receive proof of its jurisdiction before it can commence a hearing. Having looked at the jurisdictional provisions in the *NDA* and having obtained sufficient details as to the circumstances of the offences alleged, I conclude that those circumstances, if ultimately proved, would bring the matter within the Court's jurisdiction. I can then summarily dismiss the application and proceed with the trial.

[28] That being said, I wish to provide further guidance to counsel in the circumstances of this case, specifically as it pertains to whether and how the defence could submit that the prosecution has failed to prove jurisdiction at the required standard of proof beyond reasonable doubt.

The possibility of a further challenge to jurisdiction once the prosecution has closed its case.

[29] Indeed, I do believe that it is legitimate for the defence at a court martial to challenge whether the prosecution had proven jurisdiction beyond a reasonable doubt. The question is how this can be done most efficiently and fairly for all parties.

[30] The decision of this court to dismiss the plea in bar application as currently laid out in my view conforms to the conclusion of the CMAC in *R. v. Marsaw* (1997), CMAC-395, a decision which also provides useful direction as to how jurisdictional allegations should be dealt with. In *Marsaw*, the issue was whether the first two charges laid in the alternative, including the disgraceful conduct charge under section 93 of the *NDA* on which the panel returned a finding of guilty, were alleging in substance a sexual assault, an offence which at the time was beyond the jurisdiction of courts martial. A plea in bar to this effect was dismissed at the outset of the trial. On appeal, Strayer C.J., quoting from his reasons for the CMAC in *Reddick*, explained the appropriate way to handle the jurisdiction issue at pages 19 and 20:

> The appellant says that the Judge Advocate should either not have proceeded without being satisfied by prosecution evidence that the General Court Martial had jurisdiction or, after hearing the evidence, he should have determined that the offence as depicted in the evidence amounted to sexual assault and should have dismissed the first two charges on that basis.
>
> I am unable to accept the appellant's contentions. First, this Court stated in *R. v. Reddick*
>
> > …when challenged it is surely open to such a court martial to look at its statute and to the circumstances of the offence as alleged. If it determines that those circumstances, if ultimately proved, would bring the matter within its jurisdiction then it may proceed. It is of course open to the accused to raise a constitutional argument that the grant of jurisdiction to a military tribunal in his

> case would be beyond the jurisdiction of Parliament and he might find it useful to call evidence to that end. [Footnote omitted.]
>
> Unless this is done, the service tribunal is free to proceed although of course it is always open to the defence to argue later in the proceedings, and the court martial to find, that on the facts as proven some constitutional norm would be violated if a conviction were entered. Therefore the Judge Advocate correctly held that he could assume, on the basis of the charges as stated and particularized, that the tribunal had jurisdiction under the *National Defence Act*.

[31] These reasons demonstrate that the issue of jurisdiction or lack thereof, can be raised at other moments and in other ways than through a plea in bar under QR&O article 112.24 in the order of procedure provided for at QR&O article 112.05.

[32] In the case of *R. v. Scott*, 2018 CM 2025, the defence argued on a non prima facie application under QR&O article 112.05 (13), at the close of the prosecution's case that the prosecution had failed to prove that the court had jurisdiction over the accused as it pertained to one of the charges. The military judge found that once a court martial formally begins and a plea is entered, there is a presumption that the court has the necessary jurisdiction to hear the charges. As such, the prosecution is only required to prove the elements of the offences before the court and is not required to prove jurisdiction for every charge, absent evidence to the contrary. However, the military judge acknowledged that there could be evidence that comes to light during the prosecution's case which raises doubt on the presumption of jurisdiction and that it was open to the defence to point to that evidence to suggest that the court does not have the necessary jurisdiction.

[33] The *Scott* case reveals that the prosecution must be under notice that the jurisdiction is challenged so that it can prove, as part of its evidence at trial, the jurisdiction beyond reasonable doubt. *Scott* also shows that a non prima facie application is not likely an appropriate vehicle to challenge whether the prosecution has met its burden to prove jurisdiction given that in the context of a non prima facie application at the close of the prosecution's case, the issue is whether there exists an evidential foundation on the issue of guilt. As mentioned in Note B to QR&O paragraph 112.05, neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a prima facie case has been established and the doctrine of reasonable doubt does not apply.

[34] In the circumstances of this case, where the defence is unable or unwilling to point to any evidence indicating an absence of jurisdiction over the person of the accused, it could be said that the prosecution is not appropriately challenged regarding jurisdiction. However, addressing the issue of jurisdiction for the first time through an application at the end of the prosecution's case or later in the trial would create significant inefficiencies, including having to recall prosecution witnesses in reply on the application to testify on issues exclusive to jurisdiction at the expense of time and inconvenience, not only for these witnesses but also for the members of the panel.

[35] In the exercise of my authority to manage these proceedings, I would rather find at the outset of the trial that the prosecution is on notice that jurisdiction is being challenged by the defence, unless a formal admission is made to the contrary. Given this underlying challenge and the circumstances of this case, including the proposed evidence described in the voluntary reply submitted by the prosecution, I am of the view that evidence of jurisdiction can quite easily be embedded in the evidence for the prosecution on the alleged infractions. I do not think it would be awkward for members of the panel to hear that evidence as it would, in part, provide useful context which would have been offered in any event. The defence will be able to cross-examine prosecution witnesses on the issue of jurisdiction.

[36] Following the presentation of the prosecution's case, the defence will be able to apply under QR&O subparagraph 112.05 (e) should it wish to argue that jurisdiction has not been proven to the required standard.

[37] The application will be heard and determined at the close of the prosecution's case by the military judge in the absence of the panel.

[38] I disagree with the proposal of the prosecution to leave the issue of jurisdiction to be determined by the panel. Indeed, jurisdiction over the person is an issue of mixed law and facts which must be determined by the military judge presiding at the General Court Martial under section 191 and paragraph 192(1) of the *NDA*. This law conforms to the decision of Fauteux J. of the Supreme Court of Canada sitting in chambers on a leave application in the case of *Balcombe v. The Queen,* 1954 CanLII 75 (SCC). Leave to appeal was refused following a murder conviction where the applicant argued that the question of whether the offence alleged was committed within the province of Ontario was one for the jury to decide. Fauteux J. wrote:

> The question of jurisdiction is question of law—consequently for the presiding Judge—even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the jurisdiction of the Court try, at the place where it is held, the accused for the crime charged.

[39] On such an application, the applicant/defence will be called upon to present any evidence. Should the accused wish to testify on this issue, he will be able to do so in the absence of the panel. This should alleviate self-incrimination concerns such as those expressed in the concurring reasons of Marceau J,A. in *Ryan*. The prosecution will then be able to present evidence in reply and the Court may require that evidence be called prior to hearing the arguments of the parties on the issue. The decision will be rendered in the absence of the panel.

[40] Of course, proceeding this way leaves open the possibility that the Court decides it has no jurisdiction on some of the charges before it. This is not ideal as the panel would have heard evidence from prosecution witnesses of alleged wrongdoing on which the Court ultimately has no jurisdiction. This is a risk I am willing to take, after

having received the assurance that the prosecution has evidence which prosecutors believe can prove the jurisdiction. Should the prosecution fail to prove jurisdiction at the appropriate standard, I am confident that the panel can understand explanations that may have to be given to them as to why some incidents they heard about should be ignored and disregarded as no longer relevant to charges before them.

Conclusion

[41] In the exercise of my duty to manage these proceedings, I have decided not to proceed with hearing a plea in bar of trial on the basis of the Amended Notice of Intent to Plea in Bar of Trial produced by the defence. Indeed, the only substantial ground mentioned in that notice, to the effect that the charges do not establish which factors pertaining to jurisdiction over members of the reserve force, has been addressed in the reply by the prosecution. I found that there is a burden on the applicant in a plea in bar to point to evidence or provide sufficiently precise detail of the nature of the application to properly raise the issue of jurisdiction over the accused. As the applicant has chosen not to present any evidence nor provide any indication as to what may justify a finding that the Court has no jurisdiction, his plea in bar must be summarily dismissed.

[42] That being decided, I do consider that unless the Court is advised to the contrary, the prosecution is on notice of a challenge to the jurisdiction of the Court and is entitled to introduce evidence on the issue of jurisdiction as part of its case. Once the prosecution's case is closed, the defence will have the opportunity to present an application under QR&O subparagraph 112.05(5)(e) to challenge the jurisdiction, application which will be heard in the absence of the panel.

FOR THESE REASONS, THE COURT:

[43] **DISMISSES** the plea in bar application.

Dated this 15th day of July 2020, at the Asticou Centre, Gatineau, Quebec

("J.B.M. Pelletier, Commander")
Presiding Military Judge

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Captain M.J. Iredale, Counsel for the Applicant

The Director of Military Prosecutions as represented by Major C. Walsh and Major M.-A. Ferron, Counsel for the Respondent