



HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. Euler*, 2021 CM 5003

Date: 20210212

Docket: 202001

Preliminary Proceeding

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Corporal P.J.M. Euler, Respondent

Before: Commander C.J. Deschênes, M.J.

Restriction on publication: Pursuant to section 179 of the National Defence Act, the Court directs that any information obtained in relation to the proceedings of this Standing 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in these proceedings as a victim or complainant, including the person referred to in the Charge Sheet as M.L., shall not be published in any document or broadcast or transmitted in any way.

This order does not apply to disclosure of such information in the course of the administration of justice, when it is not the purpose of the said disclosure to make the information known in the community.

**DECISION RESPECTING AN 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
REQUESTING A CHANGE OF VENUE, AN APPEARANCE OF A WITNESS
BY VIDEO LINK, OR A CHANGE OF DATE**

(Orally)

Introduction

[1] Corporal Euler is charged with two service offences: one count of disgraceful conduct, contrary to section 93 of the *National Defence Act (NDA)*; and one count of abuse of a subordinate, contrary to section 95 of the *NDA*. The court martial was convened on 13 August 2020 to be held in Halifax on 15 February 2021. The prosecution now seeks, through an application served on 5 February 2021, to either change the location of the court martial to 2nd Canadian Division Support Base (2 CDSB) Valcartier for the duration of the complainant's testimony and return to Halifax to resume the proceedings, or to allow the complainant to testify via video link. As a further alternative, the prosecution asks to postpone the trial to a later date. He also suggests that the undersigned may consider ordering the taking of a view of a person, the complainant, who resides in the City of Québec area. This would allow her to testify at 2 CDSB Valcartier. The respondent opposes the application, suggesting that the circumstances do not call for a change of venue. He also contends that there is no authority to allow the testimony via video link since he does not agree to this means of collecting this evidence. As for the request to change the date of the trial, the accused advises that he has already waited 15 months to be tried as a result of the delays caused by the pandemic, and does not wish to incur further delays.

The facts

[2] The particulars of the charges indicate that both offences were allegedly committed toward the complainant, referred to as M.L., between 1 April 2019 and 1 August 2019, at or near Halifax. These charges were preferred on 9 January 2020 by an officer authorized to do so. The trial was originally scheduled to be held in May 2020, however, in light of the pandemic, the convening order was cancelled and the trial was to be rescheduled for a later date. On 13 August 2020, a new convening order was signed by the Court Martial Administrator (CMA) providing that Corporal Euler is to appear before a Standing Court Martial on 15 February 2021 at Canadian Forces Base Halifax.

[3] On 5 February 2021, the prosecution served a notice of application asking, amongst other things, to change the venue of the proceedings from Halifax to 2 CDSB Valcartier. He alleges that the complainant, who is one of the two witnesses for the prosecution, is unable to travel to the location of the proceedings. In her affidavit, the complainant states that she currently resides in the City of Québec area, which is a region she describes as one of the Level 4 alert zones in Quebec, the highest level of alert in Quebec and where medical resources are already stretched. She is a Canadian Armed Forces (CAF) member on parental leave and is the mother of three children aged five years old, three years old and four months old. In her affidavit, she claims that she is unable to travel because if she contracted COVID-19 she could no longer breastfeed her infant child. Also, her oldest child has asthma and is therefore at high risk of complications should he contract COVID-19.

[4] Halifax is where Corporal Euler currently resides. He suffers from a medical condition causing ailments to his lungs and heart, a condition referred to as lung and heart sarcoidosis. He also has type 2 diabetes; he was medically released from the CAF as a result of this latter diagnosis for which he requires insulin treatment. His medical condition is also cause for concerns in the context of the pandemic; the Government of Canada identifies older adults and people with chronic medical conditions such as lung disease, heart disease and diabetes as being at risk of more severe disease or outcomes from a COVID-19 infection. The accused has civilian employment as a commissionaire. He is not entitled to paid leave.

[5] As of 8 February 2020, the Government of Nova Scotia reported nine active cases and one new case of COVID-19. The Gouvernement du Québec reported 11,007 active cases and 826 new cases of COVID-19 as of 9 February 2020.

The issue

[6] I must now determine if I have authority to order a change of venue from Halifax to 2 CDSB Valcartier to allow the complainant to testify in person in court, and to resume the proceedings in Halifax after the testimony of the complainant. If such authority exists, I must decide whether the prosecution has demonstrated that this case justifies the change of venue. If he has not met his burden, I must then determine if I have authority to order the evidence of the complainant to be taken from 2 CDSB Valcartier via video link while the proceedings are taking place in Halifax, and if so, whether this is a case where the Court may make such order. Finally, if the answer is no to these questions, I must decide if postponing the trial would be an appropriate measure in the circumstances.

The evidence adduced at trial (the record)

[7] Exhibits have been filed before me by consent of the parties for completeness of the record and they consist of the notice of application, the affidavit of the complainant signed on 5 February 2021, and an agreed statement of facts. I took judicial notice, pursuant to section 15 of the *Military Rules of Evidence*, of the situation related to the COVID-19 pandemic, specifically the mode of transmission and the measures and restrictions currently in place to prevent contracting the virus, such as the wearing of masks, the requirement to self-isolate when crossing borders and the provincial recommendations related to avoidance of travel for non-essential purposes.

Analysis

Change of venue

[8] Pursuant to section 165.19 to 165.193 of the *NDA*, the CMA's statutory duties include the convening of General or Standing Courts Martial as the case may be. The *Queen's Regulations and Orders for the Canadian Forces* (QR&O), at paragraph 111.02(2), specifies the matters that the CMA is to include in a convening order, such as

“the type of court martial convened, the date and time proceedings commence, the place where it will be held and the language of proceedings chosen by the accused”.

[Emphasis added.] In *R. v. Wilcox*, 2009 CM 2024 and in *R. v. Semrau*, 2010 CM 1003, courts martial have recognized that the location of the trial is a decision to be made by the CMA, although, of course, there is nothing to prevent the CMA to take into consideration the wishes of the parties in making that decision, just as she does with respect to the scheduling of the trial. That said, there is no evidence before me regarding whether the applicant made any representations to the CMA regarding the location of the trial at the time the convening order was signed in August 2020. This application for a change of venue was raised only for the first time late last week. In support of his request, the prosecution does not allege that there was a change of circumstances related to the prosecution of this case.

[9] As recognized in *R. v. Morton*, 2017 CM 4008, although there is no specific statutory authority for military judges to judicially review the decision of the CMA regarding the choice of location, pursuant to section 179 of the *NDA*, courts martial, or a military judge performing a judicial duty such as in the case at bar, have the authority to grant an application to change the venue of the trial if a party demonstrates that, on a balance of probabilities, an issue that could impede the conduct of the prosecution, the defence or the conduct of the trial, in a way that cast doubts as to whether justice can be properly administered may arise. Such issue would indeed fall in the due exercise of the Court’s jurisdiction, namely to ensure the proper administration of justice, thus, a military judge presiding an application for a change of venue may consider a change of location of the trial, or part of it, once this threshold has been met.

[10] The criteria to be considered regarding the choice of location of the trial do not seem to have been clearly established by courts martial. In these circumstances, it has been widely recognized that criminal court cases could provide guidance in shaping a viable course of action in the context of military justice. In *Semrau*, Dutil C.M.J. stated that the factors applicable to a change of venue in ordinary criminal courts could be considered when the parties seek to change the location of the trial or portions of a trial by court martial. Although I agree with this premise, an application pursuant to section 599 of the *Criminal Code* is usually submitted in the cases of notoriety generating public acrimony toward an accused, which could present challenges with empaneling an unbiased jury. It also has a critical limitation not suffered by courts martial: the order is limited to intra-provincial changes of venue.

[11] As provided for in sections 67 and 68 of the *NDA*, courts martial are designed to encounter little to no geographical limitation imposed by territorial jurisdictional issues. They are portable courts that can operate within fairly rudimentary settings anywhere in the world, including in a theatre of hostility. Being mindful that the Code of Service Discipline does provide more flexibility, it does not imply that a request for a change of venue should be granted once the threshold established in *Morton* is met. Important considerations should be taken into account. These include, but are not limited to: the location or residence of the complainant; his or her personal challenges in travelling to testify at the location of the trial; the location of the commission of the offence, of the

accused's residence, of his or her home unit and of other witnesses; the nature and gravity of the offences; the practicality of changing the location; and the reasonableness of the additional costs associated with a change of venue, should it be granted. At the end, the exercise involving the determination of whether a change of venue should be granted, is a balancing act. If a change of venue is considered because the applicant demonstrates that an issue arose that would indeed fall in the due exercise of the Court's jurisdiction, the Court must then proceed to conduct a contextual analysis in order to determine if a change of venue should be ordered. The onus is on the applicant to prove that a change of venue is in the interest of justice; ultimately, the choice of location of the proceedings must not interfere with the accused's right to make full answer and defence, and with the ability of the courts to proceed in a dignified and military manner in accordance with article 111.12 of the QR&O.

[12] In this instance, what the applicant is seeking is, in fact, a change of venue for part of the trial, since the purpose is not to conduct the proceedings in a different location for the entire duration of the trial. Rather, it seeks to move the court proceedings temporarily to a third location, being the City of Québec area, for the sole purpose of collecting the testimony of the complainant. Regardless, I am satisfied that the prosecution demonstrated that the testimony of the witness located in the City of Québec area, being the complainant, is critical to the prosecution's case, therefore, the failure to obtain her evidence during the court martial proceedings would impede the conduct of the prosecution. As a result, I do have authority to consider a change of venue in the circumstances.

[13] I must now determine if the contextual analysis supports granting an order to change the venue of the trial. The prosecution suggests that the personal circumstances of the complainant render her unable to travel. Therefore, he suggests commencing the trial in Halifax, continuing it at 2 CDSB Valcartier to receive the evidence of the complainant, then resume the proceedings in Halifax. The prosecution also suggests that if the accused cannot or is unwilling to travel to 2 CDSB Valcartier for this part of the trial, he could attend the testimony of the complainant remotely.

[14] In the present case, in light of the evidence adduced at the hearing, I conclude that the prosecution failed to demonstrate that the complainant is unable to travel. While it is true that her personal circumstances present compelling reasons to be concerned with, should she become infected with COVID-19, it does not mean that she is unable to travel. Travelling in the current pandemic situation does not guarantee becoming infected or exposed to the virus, particularly when travelling in a province with very low count of active cases, and complying with mandatory provincial restrictions. Restrictions aiming at limiting contamination are imposed by provincial authorities. Failure to comply with these restrictions may result in sanctions. Travellers may be precluded for example, when travelling by air, from boarding their plane. Therefore, proper precautions are required to be taken to eliminate, or at least mitigate the risk of contamination and exposure and must be followed. Otherwise not only the risk of contamination increases, but sanctions could be imposed.

[15] Additionally, if this request was to be granted, it would have for practical effect of having some of the court participants travelling from the Ottawa region to Halifax, then from Halifax to 2 CDSB Valcartier, then back to Halifax to terminate the proceedings, to finally return to the Ottawa region. Not only is this request impractical and not fiscally responsible; it would unnecessarily expose the participants, including the accused whose medical condition is particularly troublesome, and the general population of the two provinces involved with the back and forth interprovincial travels, to additional unnecessary risks associated with exposure, even when following COVID protocols.

[16] Furthermore, the prosecution's suggestion that the accused attend remotely the testimony of the complainant negates the accused's expressed wish to exercise his right to attend his trial in person. Additionally, appearing remotely would impede his capacity to freely communicate with his counsel during a testimony vital to the prosecution's case. His virtual attendance, as suggested by the prosecution may, as a result, interfere with his right to make full answer and defence. Consequently, in addition to the absence of convincing evidence that the complainant is unable to travel, and because the request of a change of venue, as proposed by the prosecution, solely takes one factor into consideration, being the circumstances of the complainant, ignores the accused's own medical condition that puts him at risk, disregards public health recommendations to limit travel and would not be fiscally responsible nor practical, this application must fail. More importantly, a change of venue may be detrimental to the accused's right to make full answer and defence. Therefore, the request for a change of venue is denied.

Testimony of the complainant via telecommunications means

[17] Regarding the second request, the QR&O at paragraph 112.65(1) provides for the appearance of witnesses by video link as follows:

Where the prosecutor and the accused person agree and the judge so orders, the evidence of a witness may be taken at any time during court martial proceedings by any means that allow the witness to testify in a location other than the courtroom and to engage in simultaneous visual and oral communication with the court, the prosecutor and the accused person.

[18] Unfortunately, there is no provision that provides for the situation when one of the parties opposes this means of presenting the evidence in court. Section 714.1 of the *Criminal Code*, along with the jurisprudence pertinent to its application submitted by the applicant, has limited value in the case at bar since the application of this provision is not conditional to the agreement of both parties. One could argue, however, that in presence of special circumstances, QR&O article 112.65 does not necessarily displace the broader authority of courts martial, and military judges acting in their judicial capacity, provided for at section 179 of the *NDA*.

[19] In this instance, although the applicant established that the well-being of the complainant's family could be affected should she contract COVID-19, he failed to

prove that the complainant, a CAF member on maternity leave, was in fact unable to travel. Not only is she able to travel, given proper measures and the imposition of adequate restrictions, she can safely do so without exposing her family to risks of exposure. She is eligible to receive adequate financial, administrative, medical and logistical support from the CAF to ensure her safety during and after travel, to and from the current location of the trial. Absent persuasive arguments and evidence demonstrating that this case meets special circumstances requirements, such as proof of an actual physical incapacity to travel, QR&O article 112.65 applies. Therefore, since the defence does not agree to the testimony of the complainant being provided via video link, the Court does not have the authority to order this means of testifying. This second request is denied.

View order

[20] The prosecution suggested that I may choose to consider ordering the taking of a view so the Court could change location of the trial to allow the testimony of the complainant in person. Section 190 of the *NDA* provides that: “A court martial may view any place, thing or person.”

[21] Absent a regulatory regime, except for article 112.63 of the QR&O that provides for these proceedings to be public, and absent comprehensive court martial decisions that would guide me when considering issuing such order, I have informed myself of the *Criminal Code* equivalent, which reads as follows:

652 (1) The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.

[22] This provision also applies to cases tried by judges sitting without a jury (see section 572 of the *Criminal Code*, and *Regina v. Prentice*, [1965] 4 CCC 118). It provides the discretionary power of the presiding judge to direct to have a view “where it appears to be in the interests of justice”. As a result, as stated in *Wilcox*, I accept that the decision to order a view is a matter for the discretion of the Court and that an order should be made under section 190 of the *NDA* where such an order appears to be in the interest of justice. The burden of persuasion on this issue rests with the applicant.

[23] The purpose of an order for viewing is limited however. It is not designed to circumvent normal rules of collecting evidence, such as in the case of presentation of viva voce evidence. Rather, the purpose of a view order is to offer an opportunity for the trier of facts to better understand the evidence (see *Chambers v. Murphy*, [1953] 2 DLR 705), not to fill a statutory gap or to accommodate the personal circumstances of a witness. In other words, a view should never be ordered as a primary means of obtaining evidence. Consequently, I have not considered issuing a view order.

Postponing the proceedings of the court martial

[24] With respect to the request for postponing the trial, as mentioned before, the prosecution does not allege a change in the situation of the complainant. The situation raised in support of the application was foreseeable at least at the time that this court martial was reconvened in August 2020, when it was publicly known that the situation related to the pandemic would continue to affect our society well past the year 2020. The Court can only draw the conclusion that, when came time to make travel arrangements for the complainant a few days or weeks ago, she raised her concerns and reluctance to travel in light of her family circumstances. It is likely that the prosecution was unable to find accommodation and travel options suitable for the complainant in time for the start of the proceedings. It is unfortunate that this foreseeable issue was not addressed sooner. Nevertheless, I accepted that, because the complainant is a key witness to the prosecution's case, without her testimony it is likely that the prosecution's case would collapse. I also accept that the evidence adduced during the hearing of this application demonstrated that her personal circumstances present some challenges for herself and her family. Therefore, it is in the interest of justice to postpone the date of this trial by court martial. It would allow additional time for the complainant to see her family situation improve, and allow the finding of adequate travel and accommodation options that might limit her risks.

[25] There is an array of viable options available to the complainant that would serve to eliminate, or at least greatly mitigate, the risk of her or her family being exposed to the virus. For instance, the complainant may seek her chain of command's logistical and administrative support for travelling and safe return. She may try to see if she could be vaccinated sooner, explore the possibility of a stay at a third location at the Crown's expense to isolate herself upon return if there is a concern. Testing upon return can also be arranged with military health care providers. Steps with provincial authorities can be taken to see if the most vulnerable member of her family can be vaccinated during this time, or to allow her family care plan to be effected or changed to adapt to the evolving situation. She can find a person she trusts to accompany her during her travel so the impact on her family obligations are minimized. Although no evidence was adduced in this regard, there are certainly programs that exist for CAF members to obtain financial assistance in addressing these concerns, particularly for a complainant of sexual misconduct who is required to travel in order to provide testimony in court. The prosecution can provide assistance in this regard, as it is his duty to ensure his witnesses' attendance at the proceedings at the required time.

Conclusion

[26] The prosecution failed to demonstrate that its key witness is unable to travel. Therefore, the request for a change of venue, and the request to allow the complainant to testify via video link, are denied. The complainant is a compellable witness. However, the complainant's family situation does present particular challenges for her to travel in the next few days, in time for the trial. Since it is society's interest to encourage the reporting of service offences and the participation of victims and witnesses in the military justice process, I am satisfied that the evidence supports a

change of date of the trial to allow the complainant's situation to improve and to find suitable travel and accommodation options in order to allow her to provide her testimony at the trial by court martial to be held in Halifax.

FOR THESE REASONS, I

[27] **GRANT** in part the application of the prosecution.

[28] **DENY** the request to change the venue for part of the Standing Court Martial of Corporal Euler.

[29] **DENY** the request to allow the complainant to testify via video link from 2 CDSB Valcartier.

[30] **DIRECT** that the Standing Court Martial of Corporal Euler be postponed to commence at a later date. Counsel are to provide their availability as soon as practical.

Counsel:

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain and Major M. Reede, Counsel for the Applicant

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Corporal P.J.M. Euler, the Respondent