**COURT MARTIAL**

**Citation:** *R. v. Waugh*, 2021 CM 5022

**Date:** 20211210
**Docket:** 202056

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private G.A.R. Waugh, NCRMD accused**

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

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**Restriction on publication: Pursuant to section 179 of the *National Defence Act* and sections 486.4 and 486.5 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by 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in the charge sheet as "M.S.", as well as anyone described in these proceedings as the accused's former partner, shall not be published in any document or broadcast or transmitted in any way.**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 said disclosure to make the information known to the community.**

## DECISION REGARDING A DISPOSITION HEARING AND AUTHORITY TO IMPOSE CONDITIONS

(Orally)

### *Introduction*

[1] Private Waugh was charged with one offence of sexual assault, contrary to section 271 of the *Criminal Code*, an offence punishable under section 130 of the *National Defence Act* (*NDA*). On 9 December 2021, after a three-day trial where unchallenged expert evidence was produced, the Court found that Private Waugh committed the act that formed the basis of the charge, but was at the time of the offence suffering from a mental disorder so as to be exempt from responsibility. Consequently, the Court pronounced a verdict of not criminally responsible on account of mental disorder (NCRMD). After the Court rendered its finding, the prosecution asked this Court to decline holding a disposition hearing, but suggested that two conditions be nevertheless imposed on Private Waugh.

### *Position of the parties*

[2] The prosecution contended that this Court has the statutory discretion to decide not to hold a disposition hearing in light of its non-mandatory nature as provided for in subsection 202.15(1) of the *NDA*, and by analogy, by subsection 672.45(1) of the *Criminal Code*. He contended that the two criteria imposed by subsection 202.15(1) of the *NDA* to hold a disposition hearing are not met. In fact, the court martial does not have the evidence nor the expertise to be satisfied that it can readily make a disposition

in respect of Private Waugh. While the expert report and testimony of Dr Pressman formed part of the evidence adduced at trial, there has been no formal forensic risk assessment conducted to determine his risk level and what his treatment, if any is required, should be. The prosecution further contended that the Review Board, which has a strong medical component to its make-up, would be better equipped to make the appropriate disposition in this case. Further, the circumstances of the case at bar do not dictate that disposition should be made without delay. Absent compelling circumstances that could dictate otherwise, the prosecution invited the Court to decline to hold such hearing as neither of the criteria are met. The prosecution also informed the Court when queried that the victim did not want to provide a victim impact statement in the context of a disposition hearing.

[3] The prosecution invited the Court to impose on Private Waugh the following two conditions: that he not keep any ammunition in his home, and that he sleeps alone, unless he discloses his condition to a prospective bed partner. The prosecution contended that the conditions sought are limited in scope, and are tailored to infringe on Private Waugh's freedom to the absolute minimum extent possible in the circumstances while still providing some measure of protection to the public. The prosecution contended that this Court may impose conditions outside of a disposition order, through a court order pursuant to subsection 202.21(2) of the *NDA*.

[4] The defence is also not seeking to have a disposition hearing in this case. However it is not opposed to one being held as long as it is a streamlined process; in fact, the defence is concerned with additional delays that would be caused in obtaining medical evidence and expertise that would assist the Court in arriving at an appropriate disposition. The defence is prepared to agree that *NDA* subsection 202.21(2) could constitute an appropriate vehicle to impose the conditions the prosecution is seeking, but recognized that the statutory authority is limited. Counsel for the defence specified that the two conditions were agreed upon with the prosecution as they were deemed reasonable. However, their imposition is not necessary since Private Waugh has demonstrated that he is responsible and takes his sleep disorder seriously. He has, and will, take it upon himself to prevent a similar situation from reoccurring.

## ***Analysis***

### *Criteria for a disposition hearing*

[5] Subsection 202.15(1) of the *NDA* provides that:

> Where a court martial makes a finding of not responsible on account of mental disorder in respect of an accused person, the court martial shall hold a hearing and make a disposition under section 202.16, where the court martial is satisfied that it can readily make a disposition in respect of the accused person and that a disposition should be made without delay.

This subsection provides a mechanism to courts martial, similarly found at PART XX.1 of the *Criminal Code* for courts of criminal jurisdiction, which aims at protecting the public from dangerous persons, while ensuring that the NCRMD accused is treated fairly, in consideration of the need for their reintegration into society as well as their other needs. The law makes it clear that before a court martial embarks upon a disposition hearing, the following two criteria found at subsection 202.15(1) of the *NDA* shall be met: first, that the Court is satisfied that it can readily make a disposition and, second, that a disposition should be made without delay.

[6] Unlike its *Criminal Code* equivalent found at subsection 672.45(1), however, the *NDA* does not provide for the NCRMD accused, or the prosecution, to apply for a disposition hearing. In addition, subsection 672.45(1) of the *Criminal Code* provides that if one of the parties does apply for a hearing, the Court shall hold the hearing. In accordance with subsection 202.15(1) of the *NDA*, holding a disposition hearing in the military justice system is discretionary.

## ***Historical background of the regime***

[7] The current *NDA* regime followed the legislative evolution of the *Criminal Code* regarding the mental disorder regime. Prior to 1991, then-section 542(2) of the *Criminal Code* provided for the automatic detention of an "insanity acquittee" at the pleasure of the lieutenant governor. Its *NDA* counterpart, section 200 of the *National Defence Act* R.S., c. N-4, s. 1 (1985), provided that, where "evidence is given at a court martial that a person charged with a service offence was insane at the time of the commission of that offence, the court martial, if it finds the person not guilty of the offence, shall make a special finding as to whether the person was insane at the time of the commission of the offence and whether the person was found not guilty by reason of insanity." Generally replicating the *Criminal Code* model, the court martial had to impose a mandatory order for the accused person to be kept in custody "until the pleasure of the lieutenant governor of the province is known and the lieutenant governor may make an order for the safe custody of that person, as if the same finding had been made in respect of that person by a civil court in the province in which that court martial was held".

[8] In 1991, the Supreme Court of Canada (SCC) rendered a decision that would precipitate well-needed changes to the non-*Charter* compliant *Criminal Code* regime. In *R. v. Swain*, [1991] 1 S.C.R. 933, the SCC declared inoperative subsection 542(2) of the *Criminal Code* (section 614 at the time the decision was rendered), because it violated sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*. The SCC found the violation was not justified by section 1 of the *Charter*. With the amendments to the *Criminal Code* that followed this SCC decision, the *NDA* was amended to ensure that a similar regime was in place in respect of trials by court martial (see *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and Young Offenders Act in consequence thereof,* SC 1991, c 43).

[9] In the years that followed, further legislative changes were made to the *NDA* to modernize it. In particular, provisions in relation to the procedure at disposition hearing, similar to sections 672.5 and 672.541 of the *Criminal Code*, were enacted. Victim impact statements were introduced in this procedure to afford a voice to victims in the disposition of an accused person found NCRMD (see Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts* (*Strengthening Military Justice in the Defence of Canada Act*) which received Royal Assent on 19 June 2013). These amendments generally reflect the current *NDA* regime, which has further been slightly amended over the years in an attempt to follow changes to the criminal justice system.

***Disposition by a Review Board***

[10] Within the current regime, when a court martial does not make a disposition with respect to the accused after the NCRMD verdict, the *NDA* implies that the matter be referred to a Review Board for a disposition (subsections 202.21 (1), (2), (3); 202.22 (3.1); 202.25 of the *NDA*). Section 197 of the *NDA* defines a Review Board by referencing to the definition found at subsection 672.38(1) of the *Criminal Code*. The Review Board is chaired by a judge of the Federal Court, a judge of a superior, district or county court of a province, or a person who is qualified for appointment to, or has retired from, such a judicial office. At least one member must be a psychiatrist, and where only one member is a psychiatrist, at least one other member must have training and experience in the field of mental health and be entitled to practice medicine or psychology (sections 672.38, 672.4 and 672.41 of the *Criminal Code*).

[11] The Review Board is specialized in matters dealing with NCRMD accused persons and has recourse to a broad range of evidence and expertise as it seeks to make the appropriate determination in consideration of the NCRMD accused's medical condition, the support services existing for the NCRMD accused in the community, and the assessments that will be provided by experts. Indeed, the disposition hearing allows for the input of medical professionals who will have had a chance to assess the person found NCRMD and to develop opinions based on an up-to-date assessment of that person's condition. It is a non-adversarial process that provides for a full and wide-ranging inquiry into all factors relevant to the appropriate disposition.

[12] In addition, the *Criminal Code* regime provides for a short time frame for the Review Board to hold a disposition hearing, since it must hold a hearing and make a disposition as soon as practicable, but not later than forty-five days after the verdict is rendered. However, this deadline can be extended to ninety days in exceptional circumstances subsections 672.47(1) and 672.47(2) of the *Criminal Code*).

[13] In a nutshell, the *Criminal Code* regime seems to provide more power and more options to courts of criminal jurisdiction and to review boards (see in particular section 202.25 of the *NDA* - powers of Review Boards under the *Criminal Code*).

[14] Having reviewed the applicable provisions found both in the *NDA* and the *Criminal Code*, the Court finds that, on the totality of the evidence heard, it is not satisfied that all relevant information is before it to hold a hearing and to make a disposition in Private Waugh's case. Although convincing, Dr Pressman's evidence at trial was incomplete in the context of a disposition hearing, as it did not address the likelihood for recurrence as well as the risk of harm to others that a recurrence, if any, could pose. It also did not expand on possible treatments available to Private Waugh, or if any treatments are even required.

[15] Obtaining the information necessary to hold a disposition hearing, such as clinical assessments, would cause additional delays to these proceedings. This is particularly problematic for Private Waugh, who had to travel from another province to answer to the charge against him in the context of these court martial proceedings. Thus the Court is not satisfied that it can readily make a disposition in the case of Private Waugh.

[16] Furthermore, although the two conditions to be met in accordance with subsection 202.15(1) of the *NDA* are cumulative, I find that there is no evidence that a disposition should be made without delay. In particular, there is no evidence that Private Waugh presents an imminent danger to society or to himself. He is also currently not the subject of a detention, which would have required this Court to examine without delay any existing order depriving him of his liberty, and the prosecution is not recommending that Private Waugh be detained. Lastly, counsel for the prosecution and for the defense asked this Court to decline holding a disposition hearing. Consequently, the Court will not hold a disposition hearing in the circumstances.

[17] I leave for another day the discussion regarding whether section 202.16 of the *NDA* provides courts martial with the authority to impose an absolute discharge similar to section 672.54 of the *Criminal Code*, since it is silent on such disposition (pursuant to subsection 202.16 (1) of the *NDA*, a court martial making a disposition can impose only one of the listed dispositions).

[18] Therefore, as I declined to hold a disposition hearing, the matter will be referred to the appropriate provincial Review Board as defined at section 197 of the *NDA* and subsection 672.38(1) of the *Criminal Code*, for a disposition of Private Waugh's case.

***Authority to impose conditions***

[19] Having decided that a disposition hearing will not be held, I must determine if the Court can impose conditions outside of a disposition order, as contended by the parties.

[20] The right of an individual to be protected against arbitrary detention is guaranteed in the *Charter*. Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", while section 9 also provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." The imposition of conditions by a Court constitutes a form of deprivation of liberty, albeit a less serious one than detention. Thus, a statutory authority must exist allowing the imposition of conditions depriving the accused's person liberty so as to not infringe their *Charter* rights.

***DIVISION 3***

[21] To highlight this principle, drawing a parallel with the provisions found at DIVISION 3 of the Code of Service Discipline dealing with arrest and pre-trial custody, the Court Martial Appeal Court (CMAC) has qualified the imposition of conditions upon release from custody, including that the person have no contact with the alleged victim, to be restrictions imposed upon the person's freedom (see *R. v. Champion*, 2021 CMAC 4, paragraph 18). The CMAC also recognized in the same decision, at paragraph 32, that "the imposition of conditions on an individual is necessarily subject to the principles of fundamental justice where such conditions will restrict that individual's life, liberty or security of person."

[22] Because counsel suggested that this Court can impose conditions outside of a disposition order, the Court has examined other *NDA* provisions where authority for courts martial or military judges to impose restrictions on an individual's liberty can be found. In doing so, it further considered DIVISION 3 of the Code of Service Discipline. In particular, subsection 159 (1) provides that when a person is arrested, and the Custody Review Officer (CRO) does not direct the release of the person from custody, the CRO shall, as soon as practicable, cause the person to be taken before a military judge for the purpose of a hearing to determine whether the person is to be retained in custody. The military judge then decides, pursuant to the applicable provisions, whether to release the detainee with or without conditions, or retain the person in custody.

[23] As recognized in the *Champion* decision at paragraph 36, DIVISION 3 of the *NDA* provides the authority for the military judge to impose conditions to be placed on the release of an individual before a charge has been laid (see, for example, subsection 159.4 (1) of the *NDA*). The precursor to impose a condition in this context is the detention of the individual, followed by a decision to release the individual from custody. Said somewhat differently, without a decision made by the CRO to retain the individual in custody in accordance with the mechanism provided for at DIVISION 3, military judges have no statutory authority to impose conditions out of thin air.

***DIVISION 7***

[24] Similar to the regime found at DIVISION 3, the authority provided by the applicable provisions to impose conditions as found at DIVISION 7 of the Code of Service Discipline (with Chapter 119 of the *Queen's Regulations and Orders for the Canadian Forces)* is based on the precondition that the NCRMD accused is already deprived of their liberty, or that detention is necessary. In other words, the Court can only impose conditions if it directs that the accused person be released from custody or if it directs that the accused person be detained in custody in a hospital or other appropriate place (see subsection 202.16 of the *NDA*).

[25] In reviewing the regime set out at DIVISION 7, it is apparent that it is only through a disposition order as provided for at subsection 202.16 (1) that the conditions the prosecution is seeking can be imposed. Outside of this regime, there is no statutory authority allowing the imposition of such conditions. Ultimately, what the prosecution is asking this Court is to impose conditions normally found in a disposition order without ordering a disposition.

[26] I do not accept the prosecution's contention that section 202.21 of the *NDA* provides the authority to do what he seeks. Titled "Status quo pending Review Board's hearing", this section provides that any order or direction for the custody or release from custody of the accused person that is in force at the time the finding is made continues to be in force until a disposition is made by the Review Board. It also provides, under the title "Variation of order", that a court martial may, on cause being shown, cancel any order or direction and make any other order or direction for the custody or release from custody of the accused person that the court martial considers to be appropriate in the circumstances, pending a disposition in respect of the accused person made by the Review Board.

[27] Once again, an order or direction for the custody or release from custody must be in force at the time the finding is made for this provision to apply. Private Waugh was not, and is not, the subject of a detention order or direction for release. In addition, an order must exist to be subsequently varied. Without an existing order, the Court cannot make an order or direction under this provision. The French version is unequivocal, confirming the necessity to have an existing order as a condition of application, to provide the Court the authority to impose another order:

> 202.21(2) [L]a cour martiale peut […] annuler l'ordonnance ou la décision […] et prendre en remplacement une ordonnance ou une décision de mise en liberté provisoire ou de détention.

As the accessory follows the principal, I cannot impose conditions without releasing Private Waugh, and I cannot release him if he is not detained. I also cannot vary an order that does not exist. The Court finds therefore that, in reviewing the applicable provisions, it has no authority to impose conditions outside of a disposition order.

***Restraint in imposing conditions in the context of a disposition***

[28] Even in the context of a disposition hearing, section 202.16, like its *Criminal Code* equivalent (section 672.54), requires that the disposition must be the least onerous and least restrictive to the accused person. In this regard, the SCC in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, where a constitutional challenge of PART XX.1 of the *Criminal Code* was before Court, stated at page 645 that:

> Parliament intended to set up an assessment-treatment system that would identify those NCR accused who pose a significant threat to public safety, and treat those accused appropriately while impinging on their liberty rights as minimally as possible, having regard to the particular circumstances of each case.

[29] The SCC later stated at page 660 that:

> Paragraph (*a*) [of section 672.54 of the *Criminal Code*] must be read with the preceding instruction that the court or Review Board must make the order that is the least onerous and least restrictive to the accused. It must also be read against the constitutional backdrop that public safety is the only basis for the exercise of the criminal law power, absent a conviction. Read in this way, it becomes clear that absent a positive finding on the evidence that the NCR accused poses a significant threat to the safety of the public, the court or Review Board must order an absolute discharge.

[30] In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498, the SCC confirmed the principles it established in *Winko* and added at page 509 that "[t]he 'least restrictive regime', in ordinary language, would include not only the place or mode of detention but the conditions governing it." See also *R. v. Luedecke*, 2008 ONCA 716 at paragraph 101 where the Ontario Court of Appeal stated that when a disposition hearing is held, "the disposition order must be tailored to the specific circumstances of the individual and must, to the extent possible, minimize the interference with that individual's liberty."

[31] There must therefore be evidence of a significant risk to the public, before the Court or Review Board can restrict the NCRMD accused's liberty. Absent evidence demonstrating that the NCRMD accused is a significant threat to public safety, there is no constitutional basis for the criminal law to restrict his or her liberty. In the case at bar, if the prosecution was of the view that conditions were necessary for Private Waugh, it should have recommended to this Court to hold a disposition hearing. Ultimately, by taking the position that the Court should decline holding a disposition hearing because the two criteria of section 202.15 of the *NDA* were not met, the prosecution implied that it viewed that Private Waugh was not posing a significant threat to the safety of the public.

[32] In summary, the regime found at DIVISION 7 provides the possibility of imposing conditions within a disposition order. The disposition order must be the least onerous and least restrictive to the NCRMD accused. Absent a finding on the evidence

that the NCRMD accused poses a significant threat to the safety of the public, an absolute discharge must be ordered. Outside of that regime set out in DIVISION 7, there seems to be no authority for a Court to impose conditions. In addition, the imposition of conditions is generally ancillary to an order releasing the person (implying current detention) or an order providing for the detention of the person. Therefore, conditions cannot be imposed without an order imposing, or that has imposed, a deprivation of liberty of the person. Private Waugh is not in a situation where the Court has authority to impose conditions.

[33] Having considered these principles, the Court is not convinced that the conditions the prosecution seeks to have imposed outside of a disposition would in any event, be necessary or even legitimate. In essence, the prosecution is asking the Court to forbid Private Waugh from sleeping with someone. This very broad condition is unnecessary and dramatically impedes Private Waugh from making fundamental personal choices (see for example, *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paragraph 77, where the SCC concluded that section 7 of the *Charter* applies not just to physical restraint, but to the "fundamental personal choices" available to an accused).

[34] As for a condition imposing that he discloses his condition and that he be forbidden from having ammunition, although reasonable, the Court finds that, in reviewing the evidence, imposing these conditions is also unnecessary. While it is true that Private Waugh suffered parasomnia since age 4, and at 27 years of age he has engaged in similar activity at least a dozen times throughout his adulthood, he has not been a law enforcement concern until now. Furthermore, an onset of parasomnia requires a narrow set of circumstances to be triggered, which was described by the expert, as the three "Ps", being genetic predisposition, which refers to the family history of sleep disorder in the subject's family; priming factors, which include the subject being sleep deprived, sometimes accompanied by the presence of stressors; and a provoking or trigger factor. These three criteria must be concomitantly present to possibly trigger a parasomnia onset. Private Waugh is now aware of the potential for harming a non-consensual partner if he shares his bed with another person and can presumably mitigate or control some risk factor. His post-offence conduct demonstrates that he had serious concerns for the victim once he realized what he had done during a parasomnia episode. He immediately stopped the sexual act upon realizing what was happening, apologized and extracted himself from the situation. The evidence before the Court shows that his involuntary conduct, and his realization of the harm caused to the victim as a result, brought upon him some physical ailments, with indications that he may now, as a result of the act forming the basis of the charge, suffer from mental health issues.

[35] Private Waugh's character, as shown through his actions and behaviour following the event and his awareness of the criminal consequences that may follow should he face similar allegations, convinces the Court that imposing the conditions is unnecessary. In that sense, the Court accepts the prosecution's argument that these proceedings would most likely encourage Private Waugh in taking appropriate measures to prevent the situation from reoccurring. Additionally, it has been over two years since the act was committed and there is no indication that there was a recurrence. It is a matter of a relatively short period of time before the Review Board examines this case and makes an appropriate disposition, benefiting from the additional assessment that would be presented to it in due course.

[36] Consequently, even if there was authority outside of a disposition order for this Court to impose the conditions recommended by the prosecution, the Court finds that, in considering the evidence adduced at trial, the conditions sought are not necessary.

***Conclusion***

[37] The Court finds that the criteria set out at section 202.15 of the *NDA* are not met. Therefore, a disposition hearing will not be held. The disposition hearing process provides for a timely disposition hearing before the Review Board. Although it is the Review Board from Quebec in accordance with section 197 of the *NDA* that is currently

the appropriate board to dispose of his case because these proceedings took place in Gatineau, Quebec, nothing precludes Private Waugh from exploring the possibility of transferring his case to the Review Board of his province of residence as suggested by his counsel, where he presumably has all the necessary support he requires.

[38] The Court finds that it has no authority to impose conditions on Private Waugh without a disposition order. Even if authority existed, the conditions sought are not necessary in the circumstances. Nevertheless, this Court's decision for not imposing conditions does not bind the Review Board.

[39] Lastly, in accordance with subsection 202.22(3.1) of the *NDA*, a transcript of the proceedings will be sent to the appropriate Review Board with all exhibits as soon as practicable. I will ask the court reporter to prioritize the preparation of the transcript so it can be provided to the Review Board as expeditiously as possible so as to enable its work without delay.

**FOR THESE REASONS, THE COURT**

[40] **DECLINES** to hold a disposition hearing.

[41] **DENIES** the imposition of conditions.

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**Counsel:**

The Director of Military Prosecutions as represented by Major M. Reede

Major F. Ferguson, Defence Counsel Services, Counsel for Private G.A.R. Waugh