HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. Waugh*, 2022 CM 5019

Date: 20221104

Hearing before a military judge

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Private G.A.R. Waugh, Applicant

- and -

His Majesty the King, Respondent

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and sections 486.4 and 486.5 of the *Criminal Code*, I direct that any information obtained in relation to these proceedings 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person referred to in the charge sheet as "M.S.", as well as anyone described as the accused's former partner, shall not be published in any document or broadcast or transmitted in any way.

DECISION ON AN APPLICATION TO TRANSFER TO THE PRINCE EDWARD ISLAND PROVINCIAL REVIEW BOARD FOR DISPOSITION

(Orally)

I. Introduction

[1] The applicant, Private (Pte) Waugh, a reserve force member, was charged with one offence of sexual assault. On 9 December 2021, in Gatineau, Quebec, the Court found that Private Waugh did not act voluntarily when he engaged in a sexual activity with M.S. without her consent. A verdict of not criminally responsible on account of mental disorder (NCR-MD) was pronounced. Following the NCR-MD verdict, the Court declined to hold a disposition hearing and made no order regarding the transfer of the file. However, it indicated in its decision that a provincial board should dispose of

this case and a transcript of the proceedings was to be sent to the appropriate Review Board. The transcript of the proceedings was therefore sent to, “la Commission d’examen des Troubles Mentaux du Québec” (CETM). A few months later, following a request from the applicant to obtain an interprovincial transfer of his file for disposition, the CETM responded that the board had no authority to make the order sought and declined to hold a disposition hearing. The applicant now seeks an order from this Court for the interprovincial transfer of his file from Quebec to his province of residence, Prince Edward Island (P.E.I.), for disposition by a Review Board under the regime set out at XX.1 of the *Criminal Code.*

[2] Although the request from the applicant seems relatively simple at first glance, there are several issues to address in order to decide if the application should be granted. The first issue is to determine whether this Court has authority to make an order to send the file for disposition to a provincial board following its decision declining to dispose of this case. If the authority exists, this Court must determine whether the applicant has demonstrated that a transfer of his case to P.E.I. is warranted.

Background

[3] The charge arose from a night on or about 23 July 2019 where Pte Waugh and M.S., a close friend, were spending time together in his room. M.S. had informed Pte Waugh that she did not wish to engage in a sexual activity with him. A few hours after they had both fallen asleep together in his bed, the accused penetrated M.S.’ vagina with his penis. Once he awoke, he saw the victim was distressed, got out of bed and left the room, leaving an apology note. At the trial, expert evidence was introduced on consent. The prosecution agreed with the defence’s position that Pte Waugh did not act voluntarily when he engaged in a sexual activity with M.S. without her consent. A verdict of NCR-MD was pronounced because the evidence, including the expert’s opinion that was accepted by the Court as conclusive, demonstrated that Pte Waugh suffered from a sleep disorder and that at the time of the incident, he was experiencing an episode of a sexualized form of parasomnia amounting to a state of automatism (*R. v. Waugh*, 2021 CM 5021).

[4] Following the verdict, both parties contended that the Court should decline to hold a disposition hearing. Based on the facts of this case, the Court declined to hold a disposition hearing because the criteria set out in the *National Defence Act* (*NDA*) (subsection 202.15(1)) were not met (*R. v. Waugh*, 2021 CM 5022). The Court made no order regarding the transfer of the file, but indicated in its decision that a provincial board should dispose of this case and a transcript of the proceedings was to be sent to the appropriate Review Board with all exhibits as soon as practicable. Since the *NDA* provides that the “appropriate province” for jurisdictional purpose is the province in which the court martial is held, and the trial of the applicant having been held in Gatineau, Quebec, the transcript of the proceedings was sent to the CETM.

[5] In March 2022, the applicant sent a letter to the CETM seeking a transfer of his file to his home province of P.E.I. Subsequently, the respondent sought written

representations from the CETM in order to better understand the enforcement concerns they raised. On 23 June 2022 a letter was received by the respondent from the legal representatives of the CETM. In the letter, the legal advisor for the CETM opined that the board had no authority to order an interprovincial transfer because this specific power is removed from the Board's power through an exception built into section 202.25 of the *NDA*. In the same letter, the legal advisor informed counsel for the respondent that the CETM declined holding a hearing because of concerns with the enforcements of its disposition outside of Quebec. The applicant now turns to this Court as his last and only avenue.

II. Does this Court martial have authority to make an order transferring the file for disposition to a provincial board following its decision declining to dispose of this case?

Position of the parties

[6] The applicant contended that this Court should not consider itself *functus officio* because the application does not pertain to the reconsideration of the verdict or the outcome of the trial itself. Indeed, a military court retains jurisdiction over Pte Waugh's case under paragraphs 179(1)(c) and (d) of the *NDA* because paragraph (c) allows this Court to address the enforcement of its orders, which would include the order referring Pte Waugh's case to the CETM. Moreover, paragraph (d) may serve to permit a military court to address issues that flow from the *NDA*'s provisions regarding mental health review boards since the file remains alive throughout that process. Additionally, the *NDA* provision removing the power of interprovincial transfer from the Review Board's *Criminal Code* powers pertains to a procedural matter. In accordance with subsection 202.22(1) of the *NDA*, it could be construed as a procedural irregularity that does not affect the validity of the proceedings. Thus, the intervention of this Court is permitted by the *NDA* to address this issue, so long as the offender does not suffer significant prejudice. Lastly, the removal of the power of interprovincial transfer from the Review Board's *Criminal Code* powers does not equally restrict the power of a military court to order a transfer as long as the Directorate of Military Prosecutions is involved in the process and is allowed to provide submissions. Judicial intervention in this matter would be in the interests of both the offender and the administration of justice.

[7] The respondent is generally in agreement with the applicant, adding that the application does not go to the merits of the decision; there is no Court decision that could be corrected on appeal to move the disposition hearing to P.E.I. Additionally, the CETM has been in possession of all the required material for months but to date, has not held a hearing for the applicant and there are no enforcement mechanisms available to the Court to force it to do so. The CETM's inaction represents a material change in what was reasonably anticipated following the NCR-MD finding, because both parties understood at the time of the verdict that the applicant's file could be transferred by the CETM with relative ease to his home province. The Board's decision not to transfer the file, and to not dispose of the case, resulted in the applicant being unable to move forward with his life. This fact clearly engages the Court's authority to continue to deal

with matters concerning enforcement of its orders. An assessment of whether a judge has become *functus* should not be done in the absence of considerations on the administration of justice or impact on the accused. It would bring the administration of justice into disrepute if no disposition hearing is held, therefore the Court has authority to rule on this matter.

The legal principles

[8] Considering the peculiarity of the timing of this application, I will first address the *functus officio* rule. The term *functus officio* has, "traditionally been understood to mean that once a judge decided a matter, they had discharged their office and did not have the ability to return to and correct their decision", *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, at paragraph 32. The goal of the *functus officio* rule is to ensure finality in judicial decisions, as a practical necessity for both the parties involved and for the system of justice as a whole. The rule serves to prevent courts from continually hearing applications to change their decisions (*R. v. Banting* 2020 CMAC 2, at paragraph 8) otherwise effective appellate reviews would be detrimentally impacted.

[9] This principle has more significance in the military justice system because courts martial do not exist as a permanent court. They function on an *ad hoc* basis. Indeed, as provided for at section 165 of the *NDA*, a person may be tried by court martial only if a charge against the person is preferred by the Director of Military Prosecutions (DMP). Every time charges are preferred by the DMP, a court martial has to be convened, and the presiding military judge addresses these specific charges, *R v. MacLellan*, 2011 CMAC 5 at paragraph 42; *Canada (Director of Military Prosecution) v Canada (Court Martial Administrator)*, 2007 FCA 390 at paragraph 5. In conjunction with articles of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O*)* that provide that once the court martial has rendered its final judgment, it terminates its procedures (see paragraph 112.05(20) when the accused has been found not guilty; paragraph (22) and article 112.06 when imposing a sentence of incarceration and/or certain ancillary orders), article 112.655 makes it clear that "[a] court martial shall be deemed to be dissolved when it has terminated its proceedings in respect of all accused persons". Thus, it is dissolved since there is no more need for that service tribunal (*R v. Wilks,* 2013 CM 4017 at paragraph 11).

[10] That said, the common law rule of *functus officio* has recently been the subject of a ruling by the Supreme Court of Canada (SCC) in *Canadian Broadcasting Corp. v. Manitoba*. In that case, an affidavit filed in a criminal matter before the Court of Appeal had been subject to a publication ban pending a decision as to the admissibility of the affidavit as new evidence. Allowing the appeal on the merits, the Court of Appeal dismissed the motion for new evidence but ordered that the publication ban remain in effect indefinitely. The Canadian Broadcasting Corporation brought a motion before the Court of Appeal to have the publication ban set aside, arguing that having access to the affidavit would shed light on the criminal matter before the Court of Appeal and the Court's conclusion on the merits that a miscarriage of justice had occurred at trial.

Deciding that the Court of Appeal retained the authority to supervise access to the record of its own proceeding, the SCC clarified, at paragraph 33, that:

> In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. [Indeed, a] court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered. After this point, the court is understood only to have the power to amend the judgment in very limited circumstances[.]
> [My emphasis. Citations omitted.]

[11] The limited circumstances for a court to amend its judgment as referred to by the SCC can be summarized as follows: where there is a statutory basis to do so; where necessary to correct an error in expressing its manifest intention; or where the matter has not been heard on its merits. The SCC further explained at paragraph 39 that:

> Recognizing that this jurisdiction [over court openness] survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments associated with the doctrine of *functus officio*. Relief granted pursuant to this power leaves the substance of the underlying proceeding and the reasons that support it undisturbed. While some interlocutory motions, such as motions relating to the admissibility of evidence, may have an impact on the final decision on the merits, deciding public access to the court record has no bearing on the underlying proceeding or its appeal. The doctrine of *functus officio* reflects the transfer of the decision-making authority in respect of final judgments from the court of first instance to the appellate court. It was never intended to restrict the ability of those lower courts to control their own files in respect of these decisions.
> [Citations omitted.]

Analysis

[12] Considering the recently adopted principles by the SCC regarding the *functus officio* rule in *Canadian Broadcasting Corp. v. Manitoba*, I am satisfied that the rule does not prevent this Court from exercising its jurisdiction over Pte Waugh's application because the applicant is not seeking to rehear the matter; he is not asking this Court to change the verdict, or to hold a disposition hearing following the Court's decision declining to dispose of his case. He is seeking an order ancillary to the two prior court martial decisions rendered in his case, for an appropriate provincial board to finally dispose of the matter in accordance with the *Criminal Code* NCR-MD regime. His application seeking a transfer has not been heard on its merits prior to the application being served; in sum, it has not yet been the subject of a judicial decision.

[13] Additionally, considering the applicable statutory provisions, I am of the view that there is a statutory basis to be seized with this application. In fact, the NCR-MD regime found in the *NDA* does not specify that the proceedings are terminated when the court martial declines to hold a disposition hearing; section 202.15 does not go beyond the authority of the trial judge to decide to hold a disposition hearing. That said, it can be implied from section 202.161 (High-Risk Accused) that it is within the Court's discretion to then terminate the proceedings when the Court declines holding a disposition hearing:

> (1) If a court martial makes a finding under subsection 202.14(1) that an accused person is not responsible on account of mental disorder and it has not terminated its proceedings in respect of the accused person, the Director of Military Prosecutions may make an application to the court martial for a finding that the accused person is a high-risk accused.
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> (2) If the court martial has terminated its proceedings in respect of the accused person, the Director of Military Prosecutions may make the application to the Chief Military Judge. On receipt of the application, the Chief Military Judge shall cause the Court Martial Administrator to convene a Standing Court Martial.
> [My emphasis.]

[14] In other terms, the Court has discretion to terminate its proceedings, and may do so once it has declined to hold a disposition hearing. It may also terminate its proceedings at a later time.

[15] Under the statutes, even when it has terminated its proceedings, a court martial retains some powers to continue dealing with an NCR-MD accused person, as provided, for example, by section 202.161. This section allows the DMP to make an application to the Chief Military Judge (CMJ) who shall cause the Court Martial Administrator to convene a Standing Court Martial to deal with an application pertaining to an NCR-MD accused persons *after* the court martial has terminated its proceedings. This provision shows Parliament's intent to confer authority to a court martial subsequent to the termination of its proceedings to deal with residual or ancillary matters in respect of NCR-MD accused person. This legislative intent is found in several other provisions of the NCR-MD regime which provide for the authority to apply for variance of an order, or to apply for an order even after the court would normally have terminated its proceedings. Specifically, subsection 202.201(1) states that a, "hearing by a court martial to make or review a disposition in respect of an accused person shall be held in accordance with this section and the regulations" while subsection 202.21(2) provides that, pending a disposition in respect of the accused person made by the Review Board, a court martial may cancel any order or direction for the custody or release from custody of the accused person. It also provides authority to hold hearings on issues of Assessment Orders, Dispositions and Assessment Reports following a NCR-MD verdict.

[16] Thus, similar to Part XX.1 of the *Criminal Code*, the *NDA* regime is designed to provide courts martial with statutory authority that goes beyond the NCR-MD verdict and disposition, expanding on courts martial more traditional jurisdiction over typically military justice issues. In sum, the jurisdiction of court martial is allowed to continue after the NCR-MD verdict, and after a decision to dispose, or not to dispose of the case. Consequently, and regardless of whether the proceedings of this court martial were terminated last December, I find that I am not *functus officio*, both because I have not ruled previously or even heard the merit of the application seeking a transfer, and because the NCR-MD regime under the *NDA* allows courts martial to retain or continue its jurisdiction over the NCR-MD accused person past its traditional dissolution point.

[17] That said, the difficulty in the case at bar is that the *NDA* is silent on interprovincial transfer of files for disposition. The regime under the *NDA* explicitly excludes the power to transfer from the Review Board's *Criminal Code* powers, and it does not confer courts martial with a clear authority to order a transfer. This issue is a novel issue for courts martial where no specific provision exists to authorize or order a transfer of the file to another province for disposition. Strangely, I would have to infer that this void was meant to implicitly provide the exclusive power to transfer to courts martial. I also note that, unlike the *Criminal Code* (sections 672.86 to 672.89), there are no criteria or mechanism to guide this Court, should it decide that authority exists to consider issuing an order to transfer interprovincially. In sum, the law is silent on both the power to transfer the file to another province, and naturally, on the mechanism for the exercise of this power, if any.

[18] Having found that the *NDA* does not provide explicit authority to order a transfer of the file, I must turn to the interprovincial transfer mechanism found in the *Criminal Code* NCR-MD regime. Under the regime, it is the provincial Board who has the power to recommend the transfer once a disposition is made by a Court or by the Board itself. The regime also established the criteria for the transfer, which are that the transfer is "for the purpose of the reintegration of the accused into society or the recovery, treatment or custody of the accused" (paragraphs 672.86(1)(a) and (2.1)(a)). Thus, under the *Criminal Code* regime, a disposition hearing has been held, and the decision and order issued as a result would serve to provide the necessary information to the Board in order for it to make the appropriate determination following a request for an interprovincial transfer. The request for transfer may originate from the accused person, or from the Board seized with the matter. Once the transfer is recommended by the Board, the Attorney Generals of the provinces concerned must consent to the transfer. If they do so when the accused is detained, a warrant is signed. This constitutes the legal authority for the transfer. If the accused is not detained, the Board shall, by order, either direct that the accused be taken into custody and transferred, or direct that the accused attends a specified place. The Board's order constitutes the legal authority to transfer an accused who is not in custody. In a nutshell, the power to transfer rests solely with the provincial Boards, not the courts. This mechanism has been used by Boards for various reasons including for an accused person expressing the wish to return and live close to his family members (*W.G. and Person in Charge of Institute A*, 2021 CanLII 110237), to get better suited psychiatric or medical treatments, or to be treated in more appropriate facilities (*B.E. et Responsable de l'institut A*, 2021 CanLII 133001; *Lewis v. R.*, 1995 CanLII 3072). Courts of criminal jurisdiction have recognized that there is no appeal for an interprovincial transfer, or for a refusal of an interprovincial transfer, because it is not a disposition under the legislation (*Harvey v. British Columbia (Adult Forensic Psychiatric Services),* 2019 BCCA 250, *Krueger v. Ontario Criminal Code Review Board* (1994), 9194 CanLII 8737 (ON CA).

[19] In examining the *Criminal Code* provisions for the transfer of Pte Waugh's file, I find that they do not apply because the applicant was never the subject of a disposition order, and because the *Criminal Code* specifies that this power is exercised exclusively by provincial boards. Courts do not have authority to order a transfer. Therefore, the

regime under the *Criminal Code* does not provide this Court with authority to order a transfer. However, the criteria applicable to determine if a transfer is required can serve to guide this Court if it chooses that is does have the authority under the *NDA* to transfer the file for disposition.

[20] Thus, I must turn to the general authority and powers of courts martial to determine if they can serve to order a transfer for disposition by a provincial Board. In this context, it is well established that in accordance with section 179 of the *NDA*, courts martial have the power to control their own process and exercise other powers that are necessary to accomplish the role the law assigns them:

> 179(1) A court martial has the same powers, rights and privileges —including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to
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> (a) the attendance, swearing and examination of witnesses;
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> (b) the production and inspection of documents;
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> (c) the enforcement of its orders; and
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> (d) all other matters necessary or proper for the due exercise of its jurisdiction.
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> (2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.
> [My emphasis.]

[21] Because courts martial jurisdiction and powers must be grounded in legislation, section 179 was enacted to provide courts martial with power to control their procedure in respect of residual matters that are not dealt with in the *NDA* or its regulations, *R. v. Barrieault*, 2019 CM 2013 at paragraphs 17 to 24; *R. v. Leblanc*, 2011 CMAC 2; and *R. v. Master Corporal J.E.M. Lelièvre*, 2007 CM 1011 at paragraph 5. Interestingly, the SCC has interpreted legislative provisions of other acts that have similar wording of those found at section 179 of the *NDA*, but in a non-penal context. In *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724, at page 743, the SCC held in that:

> This Court has had occasion to consider the question of the proper way to approach the interpretation of the provisions which empower certain bodies to undertake certain kinds of activities. In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, this Court considered whether a statutory grant of authority in ss. 8(1), 8(2) and 8(3) of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), provided a power to punish for contempt ex facie curiae. Those sections were held to provide for such a power on the basis of the plain meaning of the words as well as the breadth of the provisions seen in light of one another and established principles of interpretation.

[22] In any event, the issue of court martial powers to make an order using the authority found at section 179 of the *NDA* after a court martial is deemed dissolved was previously the subject of a ruling by my brother judges in the context of an application

to vary an order. In *Wilks*, the trial judge found that, because a court martial has a common law jurisdiction to impose a publication ban, it retains its common law power to vary or revoke such order if the circumstances that were present at the time the order was made have materially changed. Considering the issue also pertained to the enforcement of a court's orders and was a matter within the exercise of its jurisdiction as provided for at paragraphs 179(1)(c) and (d), the military judge found that he had authority to vary the order. Further, in *Canadian Broadcasting Corp. v R*, 2014 CM 3014, the military judge, citing *Wilks* with concurrence, added, at paragraph 21, that:

> [A] military judge may, on application, reconsider and vary in some instances an order he made during the court martial he presided, if such topic is not specifically covered by any provision of the *National Defence Act*. He would then use the common law power of the court martial if the circumstances that were present at the time the order was made have materially changed.

[23] Consequently, although a court martial may have terminated its procedures, there have been cases where it has decided that its jurisdiction over the matter can continue as part of the powers conferred pursuant to section 179. Thus, I agree that section 179 in certain circumstances, provides proper authority to a court martial to continue to exercise its jurisdiction over the matter it presided, in order to supervise proceedings generally understood to be ancillary but independent matter, with the caveat that the exercise of the general power in the circumstances of the case does not contravene another *NDA* provision or article of the QR&O. In the case at bar, in addition to the law being silent on powers to transfer from one province to another, or to designate one provincial Board as an appropriate board, combined with the CETM's position that it is deprived of any authority to order a transfer and cannot dispose of the case, I find that I have authority to issue the order sought because the order would allow the enforcement of a court's orders and decisions, as they pertain to the NCR-MD verdict and decision not to hold a disposition hearing. The order sought would allow another provincial board to be properly seized with the matter so it can finally dispose of this case. Indeed, I was informed that, without an order from this Court, a provincial board would not be deemed to have been properly seized with the matter. Without this Court's intervention, the NCR-MD verdict, and the decision declining to hold a disposition hearing, would have no force and effects, and Pte Waugh's situation would remain unresolved. The transfer is a matter within the exercise of the Court's jurisdiction as provided for at paragraphs 179(1)(c) and (d), for the enforcement of its orders, and for all other matters necessary or proper for the due exercise of its jurisdiction.

Conclusion

[24] To conclude on this point, I find that this Court is not *functus officio* because the applicant is not asking this Court to rehear the matter pertaining to either his verdict or the Court's decision to decline holding a disposition hearing. He rather seeks an ancillary order that has not yet been the subject of a ruling by this Court. As for the statutory authority of courts martial to order the transfer of the file to another province, the *NDA* and the *QR&O* contain no provisions in this regard, and the *Criminal Code*

regime does not provide the required authority. I conclude that, in the circumstances, I have authority to issue the order sought because the order would allow the enforcement of a court's orders and decisions as provided for at section 179 of the *NDA*.

[25] Having determined that I have authority to deal with the application, I must now decide if Pte Waugh has demonstrated that a transfer of his file for disposition to the P.E.I. Board is warranted.

III. Has the applicant demonstrated that a transfer of his file for disposition to the P.E.I. Board is warranted?

Position of the parties

[26] In the application, counsel for the applicant admitted that she did not consider that paragraph 197(a) of the *NDA* deems the appropriate mental health Review Board to be the one in the province in which the trial itself took place when requesting the Asticou Centre as the appropriate trial location. She also explained that she was under the false impression that the provincial review board would be capable of conducting its own interprovincial transfer of the file, following its own guidelines. She contended that Pte Waugh would prefer for his mental health Review Board hearings to occur in his province of residence, P.E.I. As a resident of this province, a transfer of his file for disposition to P.E.I. would result in the absence of the requirement to travel, with the associated expenses that he would otherwise have to personally incur. He also has family, social and economic support in P.E.I. In addition, there are sleep specialists in neighbouring provinces that he can consult. Should the P.E.I. Board dispose of the case, it would ensure that any authorities monitoring Pte Waugh would be in the same provincial jurisdiction as his residence. Furthermore, his Review Board hearings would be conducted in his own language. While there is no doubt that the CETM would make every effort to conduct hearings in English, language barriers may still impact the proceedings despite the best efforts of all parties. The applicant was made aware that there could be enforcement issues if his file remained under Quebec jurisdiction, given that he resides in P.E.I.

[27] The respondent agreed with the applicant's position. He explained that the CETM had expressed concerns with the enforcement of any disposal order it would render with regard to the applicant. In particular, the CETM does not have the ability to designate a hospital or psychiatric follow up for the applicant outside of Quebec. Also, the CETM's objective of reintegration into society is frustrated by its lack of awareness of the programs available in P.E.I. Thus, it is in the interests of justice both to society at large and to the applicant, and in the interests of the administration of justice, that P.E.I. be identified as the appropriate province. Unfortunately, the respondent was unable to obtain a formal agreement from the P.E.I. Board to take the matter in order to dispose of the case, however the respondent confirmed that the Board was aware of the case.

Applicable law

[28] Subsection 202.22(3.1) of the *NDA* provides that if the court martial does not hold a disposition hearing, "it shall send without delay to the Review Board of the appropriate province, following a verdict of […] not responsible on account of mental disorder, in original or copied form, any transcript of the proceedings in respect of the accused, any document or information relating to the proceedings and all exhibits filed with it, if the transcript, document, information or exhibits are in its possession." Section 197 of the *NDA* defines "Review Board" as the Review Board established or designated for a province pursuant to subsection 672.38(1) of the *Criminal Code*. It also defines the "appropriate province", which means:

> (a) in respect of a court martial held in Canada, the province in which it is held, or
>
> (b) in respect of a court martial held outside Canada, the province with which the Minister makes arrangements for the benefit and welfare of the accused person; (*province concernée*)

Analysis

[29] The issue stems from the very narrow definition of "appropriate province" which determines the provincial jurisdiction of the Board when the court martial is held in Canada. It is surprising that the location of the court martial dictates the jurisdiction of the province in which the disposition should take place. Courts martial are portable courts and often their location has nothing to do with the residence of the NCR-MD accused person. The place in which the alleged infraction was committed is an important factor when deciding on the location of the trial, for general deterrence purpose, but also for practical reasons, for example, because this is where the majority of the witnesses may be located. This is the reality that affects accused Canadian Armed Forces (CAF) members who are not necessarily tried in their province of residence due to the very nature of their military service. This is particularly true for reserve force members who serve on consent, typically travelling out of their province of residence for the relatively short duration of their Class B or C service. This was the case of Pte Waugh at the time of the incident forming the basis of the charge against him because he travelled to Ottawa, Ontario from P.E.I. for part of his summer service.

[30] I deduce from the admission of counsel for the applicant (that she did not consider that paragraph 197(a) of the *NDA* deems the appropriate mental health Review Board to be the one in the province in which the trial itself took place), that the trial location of Gatineau, Quebec, was recommended by counsel prior to convening the court martial, for reasons of convenience for some of the court participants. Counsel's recommendation for the trial location being Gatineau made sense at the time, because the trial would have most likely taken place where the infraction was committed, in Ottawa. Considering the nature of military service, in particular as it pertains to the personal situation of the applicant, and the resulting effect of holding the trial in Gatineau in the context of the NCR-MD regime, it makes little to no sense that the "appropriate province" as defined by section 197 for a CAF member found NCR-MD is linked to the location of the trial.

[31] In this case, with the concurrence of both parties, the court martial of Pte Waugh was convened to take place in Asticou Quebec for both logical and practical reasons. Pte Waugh was at the time of the incidents, as well as at the time of his trial, residing in the province of P.E.I., and still is to this day, where he has a full network supporting him. When the decision was made for the trial to take place in Gatineau, counsel of record believed at the time of the trial that an interprovincial transfer could be administratively sought directly from the CETM.

[32] I note that the appropriate province as provided for at paragraph 197(b) in respect of a court martial held outside Canada, is the province "with which the Minister makes arrangements for the benefit and welfare of the accused person". Therefore, when the member is tried overseas, there is no geographical attachment to any province, such as the place the member is posted to or where he or she normally resides, for the determination of the appropriate province. Similar to the criteria found in the *Criminal Code* when considering a transfer, Parliament's intent clearly articulates the necessity to ensure the benefit and welfare of the accused person when making the determination as to the appropriate province to deal with the disposition. It is unfortunate that the path chosen for the determination of the appropriate province, was a different path when a trial takes place in Canada, particularly when courts martial are essentially, like the persons subject to its jurisdiction, mobile; they are, for the most part, taking place outside of the region where the Office of the CMJ is located. Nevertheless, reviewing both NCR-MD regimes, the legislative intent is that the interest of the accused person is a critical factor in determining the appropriate provincial board to dispose of the case of CAF members. I do not see, therefore, why the benefit and welfare of the accused person would be criteria that should be ignored when a CAF member is tried in Canada. In other words, the identification of the province to dispose of a case when the trial takes place in Canada cannot result in disregarding the benefit and welfare of the accused person. Relying on these criteria, I find that it would be for the benefit and welfare of Pte Waugh that his file be sent to the Board in P.E.I. for disposal. The applicant has demonstrated that he has his family and social network in P.E.I., and also that he has a civilian full-time employment there. There is no support in Quebec for him. More significant is that the CETM has refused to dispose of his case, for reasons of issues of enforcements of its order. This leaves the P.E.I. Board to be the only option.

Conclusion

[33] Consequently, I find that Pte Waugh's file should be transferred to P.E.I. so the Board of that province can properly be seized with the matter and dispose of this case.

IV. Conclusion

[34] In conclusion, this court martial has the authority to order that the file of Pte Waugh be sent to the province of P.E.I. for the Board of that province to dispose of his case because of its powers found at section 179 of the *NDA*. Further, the CETM's position of lack of authority to transfer, and its decision not to dispose of the case,

constitute a material change in circumstances. It is also a novel issue for courts martial where no specific provision exists. The applicant has demonstrated that the Board of his province of residence is the appropriate board in the circumstances.

[35] Until such time as Parliament fills the gap on the authority for transfer for disposition, should an accused be declared NCR-MD by a court martial, counsel must address the matter of the appropriate province in the event that the court martial decides not to hold a disposition hearing.

THEREFORE, I:

[36] **ORDER** that a transcript of the proceedings in respect of the accused, any document or information relating to the proceedings and all exhibits filed with it, be sent without delay to the Review Board of the province of P.E.I. in accordance with subsection 202.22 (3.1) of the *NDA*.

[37] **ORDER** that a copy of this decision be provided to both CETM and to the Office of the Judge Advocate General, Military Justice.

Counsel:

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

The Director of Military Prosecutions as represented by Major M. Reede, Counsel for the Respondent