



COURT MARTIAL

Citation: *R. v. Maslin*, 2025 CM 7001

Date: 20250207
Docket: 202410

Preliminary Proceedings

Asticou Centre
Gatineau, Quebec, Canada

Between:

Master Corporal T. Maslin, Applicant

- and -

His Majesty the King, Respondent

Before: Colonel S.S. Strickey, M.J.

REASONS ON AN APPLICATION TO HAVE THE ACCUSED APPEAR AT HIS COURT MARTIAL REMOTELY VIA VIDEOTELECONFERENCE (VTC)

Introduction and background

[1] Master Corporal (MCpl) Maslin, the applicant, is charged with one offence punishable pursuant to section 130 of the *National Defence Act* (*NDA*), that is to say, assault causing bodily harm, contrary to paragraph 267(b) of the *Criminal Code*. It is alleged that the offence was committed on or about 5 September 2023 at or near Goose Bay, Newfoundland and Labrador. On 2 October 2024, the Court Martial Administrator (CMA) signed a convening order whereby MCpl Maslin would attend before a Standing Court Martial at 0930 hours on 10 February 2025 at Goose Bay, Newfoundland and Labrador.

[2] During a pre-trial conference on 7 February 2025, the applicant's counsel advised that the applicant received a medical chit stating that he was unable to attend the court martial on 10 February 2025. More specifically, the medical chit precludes the applicant from flying; the

applicant is located in Edmonton, Alberta. Following the pre-trial conference and later that morning, the applicant filed an application requesting participation at his court martial remotely via VTC. Due to the late notice of the applicant's circumstances coupled with the upcoming court martial on 10 February 2025, and that many parties would presumably need to be travelling over the weekend of 8-9 February 2025, I agreed that the application would be heard via teleconference at noon on 7 February 2025.

[3] Following receipt of arguments from both parties, I denied the application with written reasons to follow and ordered that the court martial be postponed to a later date. The following are the reasons for my decision.

Issue

[4] In this application, I must determine if the accused can be permitted to attend his Standing Court Martial by means of VTC.

Position of the parties

The applicant

[5] The applicant put forth two primary arguments. I will summarize these arguments below.

[6] First, a plain reading view of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.64, "preliminary proceedings" suggests that the limitation for an accused to plead guilty is limited to just that – at "preliminary proceedings". In this case, the accused is seeking to participate in his court martial by VTC, not in any preliminary proceedings. In the case at bar, there is evidence that MCpl Maslin cannot travel from his current place of duty, Edmonton, to Goose Bay for the court martial. It would be in the best interests of the military justice system if the accused were allowed to appear remotely in Edmonton with the court martial being conducted in Goose Bay.

[7] In addition, the applicant argued that the nature of an assault causing bodily harm would militate towards utilizing provisions available in the civilian criminal justice system that would allow an accused to appear remotely. The applicant further stated that paragraph 267(b) of the *Criminal Code* can be proceeded with in the civilian criminal justice system by indictment or as a summary conviction offence. In the circumstances of this case, the applicant suggests, if the case proceeded in the civilian criminal justice system, it would be proceeded with as a summary conviction offence. The applicant then pointed to the provisions outlined at Part XXVII of the *Criminal Code* (Summary Convictions); in particular, subsection 800(2) that allows counsel to appear for an accused.

[8] At the conclusion of their argument, the applicant conceded that the precise answer as to whether an accused can appear by VTC is unclear. The applicant further stated that given MCpl Maslin's medical condition that he is unable to attend his court martial, if I determine that he cannot attend the court martial by VTC, that the court martial be postponed.

The respondent

[9] Taken globally, the respondent put forth the argument that the Court does not have authority to grant what is sought in the application. More specifically, the respondent made a global argument; namely, when the court martial scheme set forth in the *NDA* and *QR&O* is read as a whole, the “default” position is the physical presence of the accused at court martial. For example, the respondent pointed to provisions in the *QR&O* to support her argument such as *QR&O* paragraph 112.05(2)(d) (the accused shall be brought before the court martial) and *QR&O* article 111.06 (the Court Martial Administrator shall summon the accused to appear at the court martial)

Evidence

[10] The defence evidence presented in this application was composed of an affidavit in support of the notice of application for an order permitting the applicant to appear before this Court by video and Exhibit “A” to the affidavit consisting of DND form 1616 (10-91) entitled “PRESCRIPTION - ORDONNANCE” dated 6 February 2025, signed by “Susan Poon, Nurse Practitioner, CAFHS C (EDM)” and stating the following:

“Thomas Maslin, who is under my care, has a medical condition that currently prohibits them from flying. Due to the nature of their condition, it is medically necessary to refrain from air travel at this time.”

[11] The respondent did not introduce evidence in the application.

Analysis

[12] I agree with the general proposition of the respondent that the starting point in the military justice system is that court participants, such as the accused in this case, appear at a court martial in person. For an accused person, section 195 of the *NDA* appears clear on this point:

195 The finding and sentence of a court martial shall, at the conclusion of the trial of the offender so sentenced, be pronounced in open court to the offender, who shall be under the sentence as of the date of the pronouncement thereof.
[My emphasis.]

195 Le jugement de la cour martiale doit être prononcé en audience publique, en présence de l'accusé, à la clôture du procès; il prend immédiatement effet.
[Mon emphase.]

[13] In contrast to the civilian criminal justice system, the military justice system is a disciplinary system with the purpose to “maintain the discipline, efficiency and morale of the Canadian Forces” (*NDA* section 55). I concur with my colleague Pelletier M.J. where he aptly explained the in-person nature of the military justice system in *R. v. Lavoie*, 2023 CM 4007 at paragraph 36:

Indeed, the context of the *NDA* leans heavily in favour of in-person testimony, and this is normal, since the military justice system is not only a tool for the administration of justice but also, and primarily, because of its constitutional foundations, a tool for the administration of discipline within the armed forces.

[My translation.]

[14] Along with the guidance set forth at *NDA* section 195, there are several other provisions in the *NDA* to compel an accused to attend their court martial in person. For example, when the CMA convenes a court martial, they shall summon the accused person to attend the proceeding (*NDA* subsection 165.19(1.1)); and should an accused abscond during their court martial, the presiding military judge can continue the trial in their absence (*NDA* subsections 194.1(1) and paragraph 194.1(2)(a)). I further note some additional provisions in the *NDA* that support an accused's presence at a court martial, such as the concept of "portability" of the military justice system outlined at section 68 of the *NDA* where there is no territorial limitation in holding a court martial, "every person alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline, either in Canada or outside Canada" and *NDA* subsections 183(1) - (4) on the attendance and witnesses and costs of attendance at court (see *Lavoie*, paragraph 36).

[15] Similar to the military justice system, the civilian criminal justice system states that, with exceptions, an accused shall be present in court during the whole of their trial (see *Criminal Code* subsection 650(1) and section 715.21). However, the *Criminal Code* was amended in 2019 and 2022 respectively to allow remote attendance in criminal proceedings by an accused (see Part XXII.01). In particular, section 715.232 permits the Court to allow an accused person to appear by videoconference at a trial for a summary conviction offence. For indictable offences, section 715.233 states that the Court may, with the consent of the prosecutor and the accused, allow an accused to appear by videoconference at a trial for an indictable offence. In addition, the *Criminal Code* contemplates an accused or offender appearing by VTC or audioconference during various stages of criminal proceedings including at a preliminary inquiry (section 715.231), plea (section 715.234) and sentencing (section 715.235).

[16] Finally, the *Criminal Code* amendments provide specific guidance to judges when considering a determination to allow an accused or offender to appear by videoconference. This includes: the location and personal circumstances of the accused or offender; the costs that would be incurred if the accused or offender were to appear in person; the suitability of the location from where the accused or offender will appear; the accused or offender's right to a fair and public hearing; and, the nature and seriousness of the offence (see *Criminal Code* paragraphs 715.23 (a) to (e)).

[17] It is important to note that none of these amendments in the civilian criminal justice system were made to the *NDA*. Indeed, when Part XXII.01 (Remote Attendance by Certain Persons) was added to the *Criminal Code* in 2019 (S.C. 2019, c. 25), significant amendments to the *NDA* were brought forth with the coming into force of certain provisions of Bill C-77 (S.C. 2019, c.15); but no provisions expanding remote participation by an accused were made. In addition, further amendments allowing the accused or offender to appear in the civilian criminal system were made in 2022 (S.C. 2022, c.17) with no corresponding amendments to the military justice system. The apparent choice of the legislator not to incorporate provisions to permit an

accused to participate in a proceeding by videoconference in the military justice system serves to reinforce the words of my colleague Pelletier M.J. in *Lavoie*, at paragraph 36, of the unique aspects of the military justice system to hold in-person courts martial:

In this context, it is understandable that the legislator and regulatory authorities have chosen to favour the holding of in-person trials in a military setting, typically at the accused's unit where members of the unit can attend the trial.

[My translation.]

[18] Although the *NDA* is silent regarding the use of videoconference technology in the military justice system, the *QR&O* contains two articles specifically on point:

QR&O 112.64 – PRELIMINARY PROCEEDINGS – VIDEO LINK

(1) Where the prosecutor and the accused person agree, and the judge so orders, the accused, the prosecutor or the judge may appear at preliminary proceedings (see article 112.03 – *Preliminary Proceedings*) by any means that allow the judge, the prosecutor and the accused to engage in simultaneous visual and oral communication.

(2) Paragraph (1) does not apply in respect of an accused person's plea of guilty at preliminary proceedings.

QR&O 112.65 – APPEARANCE OF WITNESS – VIDEO LINK

(1) 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 in the courtroom and to engage in simultaneous visual and oral communication with the court, the prosecutor and the accused person.

(2) The taking of evidence may include the examination of documents and filing of exhibits if suitable arrangements have been made with the judge for the receipt and filing of original documents or exhibits.

[19] A plain reading view of the provisions of the *QR&O* suggest that remote participation for an accused is limited to preliminary proceedings; if they are not submitting an application to plead guilty as that would require the accused to appear in person (*QR&O* 112.64(1) and (2)). The other reference to video link is limited to witnesses at *QR&O* article 112.65; there is no specific mention of an accused in this article.

[20] In summary, gleaned the rationale from Pelletier M.J. at paragraph 30 in *Lavoie* (citing paragraph 26 of *Bell ExpressVu Limited Partnership v. Rex*, 2004 SCC 4), reading the words in the Act and the regulations in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament strongly militate towards the in-person participation of an accused at court martial.

[21] The applicant argued that in the circumstances of this case, if the offence proceeded in the civilian criminal justice system, it would be proceeded with as a summary conviction offence. Taking that logic forward, the applicant further stated that there are provisions in the *Criminal Code* that would allow a defendant to "appear personally by counsel or agent" (see

Criminal Code subsection 800(2)) for an offence proceeded with as a summary conviction offence.

[22] First, there was no evidence presented in this application to outline the circumstances or seriousness of the alleged offence. Second, as stated by the Court Martial Appeal Court of Canada in *R. v. Dixon*, 2005 CMAC 2 at paragraph 23, "...in the military context, [*Criminal Code* offences lose] its hybrid character and cannot be prosecuted according to the *Criminal Code* procedures applicable to summary conviction offences". Third, it appears that the applicant would be seeking to utilize the *Criminal Code* provisions outlined at Part XXII.01 (Remote Attendance by Certain Persons) in the context of the military justice system rather than subsection 800(2). For the reasons set forth above, while the *Criminal Code* was amended in 2019 and 2022 to permit an accused to participate remotely in the civilian criminal justice system, no such changes were made to the military justice system.

[23] While not put forward by counsel, one could suggest that section 179 of the *NDA* could be utilized to "import" the *Criminal Code* provisions to the military justice system. There were no arguments put forth on this point; therefore, I will not comment further only to note that I generally concur with the rationale of my colleagues Pelletier M.J. in *Lavoie* and Deschênes, M.J., as she then was, in *R. v. Martin*, 2022 CM 5023 and *R. v. Sutherland*, 2022 CM 5022 as it relates to the interpretation of *NDA* section 179.

[24] There have been previous applications before military judges considering either a complainant or witness testifying at a court martial via videoconference (see *Lavoie*, *Sutherland*, *Martin*, and *R. v. Machtmes*, 2021 CM 2002). All these decisions were made on the unique circumstances in those cases. Similarly, I want to stress that my decision is limited to the particular facts of this case and limited arguments presented by both parties. Taken as a whole, I must deny the application.

[25] I accept the evidence submitted by the applicant that MCpl Maslin is unable to travel to the court martial scheduled for 10 February 2025. The evidence is lacking regarding the duration of this medical limitation. During the application, the applicant conceded that if the Court does not grant MCpl Maslin's application to participate in the court martial by VTC, they are seeking a postponement of the court martial given his medical condition.

[26] As this situation is not accounted for in the QR&O, article 101.04 would apply:

QR&O 101.04 – CASES NOT COVERED BY THE QR&O

When, in proceedings under the Code of Service Discipline, a situation arises that is not contemplated by the QR&O or by the orders or directives issued to the Canadian Forces by the Chief of the Defence Staff, the method that seems most likely to do justice is followed.

[27] The application is denied. In this case, considering the novel circumstances in the application and limited time to render this decision, it is in the best interests of military justice to postpone the court martial to allow MCpl Maslin a reasonable period of convalescence that would permit him to travel to Goose Bay to attend his court martial in person.

FOR THESE REASONS, THE COURT:

[28] **DENIES** the application made by MCpl Maslin.

[29] **DIRECTS** that the Standing Court Martial of MCpl Maslin be postponed commencing at a later date. Counsel are to provide their availability as soon as possible.

Counsel:

Lieutenant(N) B. Wentzell, Defence Counsel Services, Counsel for Master Corporal T. Maslin, Applicant

The Director of Military Prosecutions as represented by Lieutenant-Commander J. Besner, Counsel for the Respondent