COURT MARTIAL

Citation: *R. v. Mahar*, 2014 CM 4007

Date: 20140812
Docket: 201394

Standing Court Martial

Her Majesty's Canadian Ship *Queen Charlotte*
Charlottetown, Prince Edward Island, Canada

Between:

Warrant Officer A.N. Mahar, Applicant

- and -

Her Majesty the Queen, Respondent

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

DECISION RESPECTING A PLEA IN BAR OF TRIAL BROUGHT UNDER QR&O 112.05(5)(b) AND 112.24(1)(a) THAT THE COURT HAS NO JURISDICTION TO TRY THE ACCUSED

(Orally)

INTRODUCTION

[1] Warrant Officer Mahar is charged with four offences under sections 90, 125 and 129 of the *National Defence Act* allegedly committed between 21 November 2012 and 22 January 2013 at Charlottetown, Prince Edward Island. Those charges were preferred by a representative of the Director of Military Prosecutions in November 2013 for trial before Standing Court Martial.

[2] At the opening of his trial, Warrant Officer Mahar brought this application for a plea in bar of trial under subparagraphs 112.05(5)(b) and 112.24(1)(a) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), on the grounds that the Court has no jurisdiction to try the accused. The applicant alleges that the charge initially laid at the unit level and subsequently referred to the Director of Military Prosecutions by

various military authorities was defective because it was not laid by a person authorized to do so by the commanding officer of the unit to which he was posted or present at the time. The applicant further alleges that this defect goes to the validity of the charge itself and therefore vitiates the referral process and the subsequent actions of the Director of Military Prosecutions who had in fact no charge on which to act. The applicant is asking the Court to terminate these proceedings.

EVIDENCE

[3] The evidence jointly submitted for the purpose of this application consists of the following:

(a) a statement of Agreed Facts (Exhibit M1-3);

(b) the original Record of Disciplinary Proceedings (Exhibit M1-4);

(c) a letter dated 8 August 2013 from the Commanding Officer of the Joint Personnel Support Unit to the Commander, Military Personnel Command applying for disposal of a charge (Exhibit M1-5);

(d) a letter dated 30 August 2013 from the Commander, Military Personnel Command to the Director of Military Prosecutions referring the matter with a recommendation for trial by court martial (Exhibit M1-6);

(e) a bundle of organizational documents pertaining to the respective chains of command of the PEI Regiment and the Joint Personnel Support Unit (Exhibit M1-7); and

(f) matters of which judicial notice may be taken under sections 15 and 16(1) of the Military Rules of Evidence.

FACTS

[4] The applicant is a member of the Regular Force who was posted to the PEI Regiment from August 2008 until 6 May 2013. The one charge appearing on the Record of Disciplinary Proceeding, Exhibit M1-4, and the four charges preferred for trial before this Court allege infractions committed during that period. On 21 May 2013, one charge against the applicant was put in writing on the RDP at Exhibit M1-4 and signed by Chief Warrant Officer Egan, a person authorized to lay charges by the Commanding Officer of the PEI Regiment. On that date however, the applicant was no longer posted to PEI Regiment. He had been posted effective 15 days earlier to the Joint Personnel Support Unit. Regardless, the charge and accompanying Record of Disciplinary Proceedings were referred to the Commanding Officer of the PEI Regiment, an election for trial by court

martial was received and the matter was subsequently referred to the Commander of the 36th Canadian Brigade Group, the next superior officer in matters of discipline in the PEI Regiment's chain of command. It is at this point that the officers involved realized that the wrong chain of command had been engaged. The charge and accompanying Record of Disciplinary Proceedings were obtained by the Commanding Officer of the PEI Regiment who transferred the matter laterally to the Commanding Officer of the Joint Personnel Support Unit. From that point, the file was sent to the Commander of Military Personnel Command, the Joint Personnel Support Unit's next superior officer in matters of discipline, who is also a referral authority. This officer referred the matter to Director of Military Prosecutions with a recommendation that a court martial be convened.

POSITION OF THE PARTIES

Applicant

[5] The applicant alleges that the general structure of the *National Defence Act* and its regulations require that only the commanding officer of the unit to which a person is posted or present, or personnel authorized by that commanding officer, be authorized to lay charges against that person. The charge initially laid in this case on 21 May 2013 was defective in that it was laid by Chief Warrant Officer Egan, a person authorized to lay charges in the applicant's former unit but not in the unit the applicant had joined 15 days earlier, which was not even in the same command. As no valid charge existed, the subsequent referral by the Commanding Officer of the Joint Personnel Support Unit was also defective and was not an unfettered exercise of discretion of this Commanding Officer, who would have been under compulsion to proceed with the charge initiated by the PEI Regiment. Finally, the applicant alleges that the defect relating to the existence of a charge is of such a fundamental nature that it cannot be cured by the subsequent actions of the Director of Military Prosecutions or his representative in preferring charges for trial by court martial.

Respondent

[6] In reply, the respondent argues that the charge initially laid met the requirements found in regulations, as the person laying the charge was authorized by a commanding officer to lay a charge. It is argued that a distinction must be made between the charge laying stage and the subsequent steps of dealing with a charge where then it is the Commanding Officer of the accused's unit or the unit where he is present who must deal with the charge. The respondent concedes that there were errors initially committed in the referral of the charge but states that those errors were adequately cured when the charge was laterally referred to the appropriate commanding officer, who was then in a position to exercise his prerogative to deal with the charge through his superior authority in matters of discipline, on its way to the Director of Military Prosecutions. Finally, the respondent argues that even if a deficiency going to jurisdiction existed, it was cured by

the actions of the Director of Military Prosecutions in preferring the charges, as the failure to follow the regulatory requirement was simply a matter of administrative control that can be corrected as ruled by the Court Martial Appeal Court decision in *R. v. Couture*, 2008 CMAC 6.

DECISION

[7] The Court is of the view that this plea in bar raises essentially three questions. First, can a person authorized to lay charges by the Commanding Officer of the PEI Regiment lay a valid charge against a person no longer belonging to that regiment? Second, is the way the referral was ultimately performed by the Commanding Officer of Joint Personnel Support Unit on receipt of the charge through the Commanding Officer of the PEI Regiment defective, so as to compromise the validity of the referral process? And finally, if necessary, can the actions of Director of Military Prosecutions in preferring the charges cure any defect in the charge referred to him?

[8] For the reasons that follow, the Court finds that the charge was validly laid by a person authorized to do so at the PEI Regiment and that the referral, although laborious, was ultimately performed in compliance with the intent of the regulations, using a course best calculated to do justice. Consequently, there is no need to answer the third question.

ANALYSIS

Was a valid charge laid on 21 May 2013?

[9] The applicant alleges that the general structure of the *National Defence Act* and its regulations require that only the current commanding officer of a person to be charged, or personnel authorized by that commanding officer, be authorized to lay charges. In support of this argument, the applicant first refers to sections 160 and 161 of the *National Defence Act* which read as follows:

> 160. In this Division, "commanding officer" in respect of an accused person, means the commanding officer of the accused person and includes an officer who is empowered by regulations made by the Governor in Council to act as the commanding officer of the accused person.
>
> 161. Proceedings against a person who is alleged to have committed a service offence are commenced by the laying of a charge in accordance with regulations made by the Governor in Council.

[10] Those regulations by Governor in Council are found in section 1 of Chapter 107 of the QR&O, specifically at articles 107.015 and 107.02.

> 107.015 – MEANING OF "CHARGE"

> (1) For the purposes of proceedings under the Code of Service Discipline, a "charge" is a formal accusation that a person subject to the Code has committed a service offence.
>
> (2) A charge is laid when it is reduced [in] writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings ... and signed by a person authorized to lay charges.
>
> 107.02 – AUTHORITY TO LAY CHARGES
>
> The following persons may lay charges under the Code of Service Discipline:
>
> (a) a commanding officer;
>
> (b) an officer or non-commissioned member authorized by a commanding officer to lay charges; and
>
> (c) an officer or non-commissioned member of the Military Police assigned to investigative duties with the Canadian Forces National Investigation Service.

[11] The applicant supports his argument to the effect that only the commanding officer of the unit to which a person to be accused is posted or present, or personnel authorized by that commanding officer, are authorized to lay charges by pointing to the definition of commanding officer at QR&O paragraph 101.01(1), which reads, in part, as follows:

> MEANING OF "COMMANDING OFFICER"
>
> (1) For the purposes of proceedings under the Code of Service Discipline, "commanding officer":
>
> (a) means, in addition to the officers mentioned in the definition of commanding officer in article 1.02 [and those are an officer in command of a base, unit or element, or any other officer designated as a commanding officer], a detachment commander; and
>
> (b) includes, in relation to an accused person,
>
> (i) the commanding officer of the base, unit or element to which the accused belongs or, except in the case of a detention barrack, the commanding officer of the base, unit or element in which the accused is present when proceedings are taken under the Code of Service Discipline in respect of the accused.

[12] With respect, this definition of the meaning of commanding officer is made "in relation to an accused person". The definition is not, in the Court's view, useful to determine the requirements to be met in order for a person to validly become "an accused person" through the proper laying of a charge. In that sense, the laying of a charge is a crystalizing moment, which marks a break between the more general authority of

authorized persons to deal with alleged breaches of the Code of Service Discipline in the Canadian Forces at large and the specific application of that Code to an accused person. For that moment to occur with a valid charge only three things are formally required and these appear at QR&O 107.015(2). First, the charge must be reduced to writing in Part 1 of a Record of Disciplinary Proceeding; secondly, it must be signed; and thirdly, by a person authorized to lay charges. Regarding the last requirement, three classes of persons listed at QR&O article 107.02 are authorized to lay charges, including "an officer or non-commissioned member authorized by a commanding officer to lay charges" [Emphasis added].

[13] On the facts of this case, Chief Warrant Officer Egan was a person authorized by a commanding officer to lay charges, having been so authorized by the Commanding Officer of his regiment, the PEI Regiment. The charge was reduced in writing and signed. Therefore, the three requirements for a valid charge were met.

[14] A plain reading of QR&O paragraph 107.02 (b) reveals that there is no requirement that the person laying the charge be authorized by the Commanding Officer of the person against whom a charge is to be laid. As long as a Commanding Officer has authorized that person to lay charges, he or she can do so. It is arguably rare to see a person authorized to lay charges in a given unit proceed to lay charges against a member of another unit who is not present in the unit of the charge layer. Yet in this case, the offence charged had allegedly been committed at or in relation to the unit of the charge layer and the person to be charged had just been posted out of that unit a few days earlier. No allegations were made to the effect that other requirements imposed on the person laying a charge such as having an actual and reasonable belief that the alleged offence was committed or the requirement to obtain advice from a legal officer were not met here. In the specific circumstances of this case, these requirements may have been met just as well at the PEI Regiment.

[15] The applicant argues that allowing commanding officers who have no command relationship with the accused to lay or authorize the laying of charges against persons not serving at their unit runs counter to the principle of command unity. That argument does not resist scrutiny. There are other circumstances in the Code of Service Discipline where commanding officers are granted authority to take action concerning persons not serving at their unit, for instance, by authorizing an arrest warrant under section 157 of the *NDA* or a search warrant under section 273.3. Also, in 1998 the chain of command lost monopoly over the charging function in the Code of Service Discipline when for the first time outsiders such as members of the Military Police were authorized to lay charges as provided at QR&O 107.02 (b). This was one of the major features of the Canadian military law reform instituted by Bill C-25 and accompanying regulations.

[16] Therefore, the Court concludes that a valid charge was laid on 21 May 2013.

Was the referral invalid?

[17] Although the laying of the charge was done in accordance with regulatory requirements, it has been conceded by the respondent that the referral of that charge by the person who laid it did not occur as required in QR&O paragraph 107.09(1), which reads as follows:

> REFERRAL AND PRE-TRIAL DISPOSAL OF CHARGE
>
> (1) An officer or non-commissioned member who lays a charge shall:
>
> (a) refer the charge to:
>
> (i) the commanding officer of the accused;
>
> (ii) the commanding officer of the base, unit or element in which the accused was present when the charge was laid; or
>
> (iii) an officer to whom the commanding officer referred to in subparagraph (i) or (ii) has delegated powers of trial and punishment pursuant to article 108.10 (*Delegation of a Commanding Officer's Powers*); and
>
> (b) cause a copy of the Record of Disciplinary Proceedings to be provided to the accused.

[18] The requirement imposed on a charge layer in this case to cause a copy of the Record of Disciplinary Proceedings to be provided to the accused was met. However, it would appear that in referring the charge, the charge layer acted as if the accused person was still a member of the PEI Regiment even if this was not the case. Indeed, it can be deduced from the annotations on the Record of Disciplinary Proceedings at Exhibit M1-4 and the Agreed Facts at Exhibit M1-3 that the charge was referred to the Acting Commanding Officer of the PEI Regiment, Major Wynne, who subsequently signed Part 4 of the Record of Disciplinary Proceedings to refer the matter to the Commander of the 36th Canadian Brigade Group, the PEI Regiment's next superior officer in matter of discipline.

[19] It is at this point that the fact that the applicant was no longer posted to PEI Regiment was discovered and the charge and accompanying Record of Disciplinary Proceedings were re-directed to the Commanding Officer of the accused at the Joint Personnel Support Unit who completed the referral to the Commander, Military Personal Command, his next superior officer in matter of discipline, who is also a referral authority. The question is whether this initial confusion on the part of the charge layer invalidates the referral of the charge. The Court does not believe so, in light of the fact that the corrections that were applied allowed the referral process to ultimately take place as foreseen in regulations.

[20] Indeed, errors do happen in the administration of formal procedures such as those that relate to proceedings under the Code of Service Discipline. Some are so major than only a complete do-over can be an appropriate cure. So was the situation in the court martial case of *R. v. Laity*, 2007 CM 3011 where my colleague, Military Judge d'Auteuil, granted a plea in bar of trial when the evidence revealed that the Record of Disciplinary Proceedings had not been signed and consequently no charge was validly laid. As outlined above, this is not the case here as all of the requirements for the laying of a valid charge were met. Other errors do not have the same effect. This is illustrated by the Court Martial Appeal Court decision in *R. v. Couture*, 2008 CMAC 6 where it was decided that the failure of the charge layer to read the legal advice which had been provided on the charge to be laid was of the nature of omitting an administrative control put in place in order to prevent unfounded charges. As such, a failure to comply with that requirement did not invalidate the charge. Simply stated, the factual situation and the kind of mistake revealed by the facts in this case is much closer to *Couture* than it is to *Laity*.

[21] The purpose of the regulation as it pertains to the referral of charges is to ensure that the commanding officer of the unit where the accused is posted or present makes the proper recommendations or decisions in respect of a charge laid against a member towards which they have specific responsibilities. This was allowed to happen here. The officers confronted with the initial error by the charge layer had no specific guidance as to what to do. I agree with the argument of the respondent that in the circumstances, the decision made to laterally transfer the file from the PEI Regiment to Joint Personnel Support Unit was the course that seemed best calculated to do justice, as foreseen in QR&O article 101.04. Given the conclusion of the Court Martial Appeal Court in *Couture*, it could also be concluded that in the circumstances of this case, the minor deviation from the referral procedure prescribed in QR&O should not invalidate the entire process, in the absence of injustice done to the accused person by the deviation.

[22] There are no facts presented in the course of the application that would allow this Court to conclude, as submitted by counsel for the applicant, that the Commanding Officer of the Joint Personnel Support Unit was under compulsion to proceed with the charge laid by the PEI Regiment and could not exercise his discretion not to proceed with the charges. To the contrary, the letter signed on 8 August 2013, produced as Exhibit M1-5, includes reasons of substance as to why, in the opinion of the Acting Commanding Officer of the Joint Personnel Support Unit, the matter should proceed by court martial. These reasons were accepted, as evidenced by the letter from the Commander of Military Personnel Command to the Director of Military Prosecutions produced as Exhibit M1-6. This is not a situation akin to the one in the 1972 Court Martial Appeal Court decision of *Nye v R*, 1972 CMAR 85, where testimony was heard to the effect that the Acting Commanding Officer of a unit may have felt compelled to sign a charge sheet to be submitted for trial by court martial by a senior officer from higher headquarter despite doubts about its legality. Here, it is hard to foresee the existence of the same type of

command influence considering that since the reform of 1998, only Director Military Prosecutions, an entity outside of the chain of command, can prefer charges on charge sheets for trial by court martial. Furthermore, there is no evidence in this case that any authority from the Joint Personnel Support Unit felt compelled to act in a certain way in relation to the charge initially laid at the PEI Regiment.

Was any defect cured by the actions of the DMP in preferring the charge?

[23] Although the question is extremely interesting, the Court does not need to address it at this point, having concluded that there were no defects to be cured by the actions of the Director of Military Prosecutions in this case.

FOR THESE REASONS, THE COURT:

[25] **DISMISSES** the application.

Counsel:

Lieutenant-Commander D. Liang, Directorate of Defence Counsel Service, Counsel for applicant, Warrant Officer A.N. Mahar

Lieutenant Commander D.T. Reeves and Major D. Martin, Director of Military Prosecution, Respondent for Her Majesty the Queen