COURT MARTIAL

Citation: *R v Moriarity*, 2012 CM 3017

Date: 20121018
Docket: 201229

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty, the Queen

- and –

Captain D.J. Moriarity, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

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REASONS ON APPLICATION MADE BY THE ACCUSED FOR AN ORDER DECLARING SUBPARAGRAPH 130(1)(A) OF THE *NATIONAL DEFENCE ACT* OF NO FORCE OR EFFECT PURSUANT TO SECTION 52 OF THE CONSTITUTION ACT, 1982.

(Orally)

CONTEXT

[1] Captain Moriarity is charged with four offences punishable under section 130 of the *National Defence Act* (*NDA*): the two first ones for sexual exploitation contrary to section 153 of the *Criminal Code*, the third one for sexual assault contrary to section 271 of the *Criminal Code*, and the fourth one for invitation to sexual touching contrary to section 152 of the *Criminal Code*. The sexual exploitation offences involving one complainant relate to incidents that allegedly occurred at Vernon Army Cadet Summer

Training Centre, British Columbia, in July and August 2010 and in March 2011. The two other offences, involving a second complainant, relate to incidents that allegedly occurred at Ashton Armoury, Victoria, British Columbia, between May 2009 and July 2011.

[2] By way of an application made to this Standing Court Martial pursuant to subparagraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces*, (QR&O), Captain Moriarity is seeking an order from the presiding military judge finding that subparagraph 130(1)(*a*) of the *NDA* to be contrary to section 7 of the *Canadian Charter of Rights and Freed*oms (hereafter the *Charter*), and if so, as a remedy, an order declaring this *NDA* provision to be of no force or effect under paragraph 52(1) of the *Constitution Act, 1982*.

[3] More specifically, the applicant is looking for a decision from this court that subparagraph 130(1)(*a*) of the *NDA* infringes section 7 of the *Charter* because it engages his liberty interests in a manner that is not in accordance with the principles of fundamental justice. He argued before this court that this *NDA* provision is broader than what is required to achieve the legitimate objective of the legislation. He is seeking an order declaring subparagraph 130(1)(*a*) of the *NDA* being of no force and effect to the extent of the inconsistency pursuant to paragraph 52(1) of the *Constitution Act, 1982*, because it is inconsistent with section 7 and cannot be saved by section 1 of the *Charter*.

[4] However, considering that a factual foundation is required for the court in order to be in a position to proceed with the application, counsel suggested, and the court accepted, to proceed first with the hearing of the evidence on the main trial, and once the case was closed for both parties, to open a *voir dire* in order to proceed with the hearing of the application.

EVIDENCE

[5] The evidence on the application consisted of:

(a) Exhibit VD1-1, the written notice of application dated 28 September 2012 and received at the Office of the Court Martial Administrator on 3 October 2012;

(b) Exhibit VD1-2, the written notice of constitutional question dated 1 October 2012, the affidavit of service, and the applicant's written argument; all those documents received at the Office of the Court Martial Administrator on 3 October 2012;

(c) Exhibit VD1-3, excerpts of 1950 House of Commons official report of debates concerning Bill 133 (an Act Respecting National Defence);

(d) Exhibit VD1-4, excerpts of minutes of proceedings from the House of Commons Special Committee on Bill 133 (an Act Respecting National Defence);

(e) Exhibit VD1-5, excerpts of 1985 House of Commons official report of debates concerning the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*;

(f) Exhibit VD1-6, the convening order dated 12 September 2012;

(g) Exhibit VD1-7, the charge sheet dated 25 April 2012;

(h) Exhibit VD1-8, Captain Moriarity's judicial confession;

(i) Exhibit VD1-9, respondent's written submissions; and

(j) the judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

FACTS

[6] Without going deeply through the circumstances of this case, the judicial confession made by Captain Moriarity revealed that at the time of the incidents on which the charges are based, which is between March 2007 and July 2011, he was subject to the Code of Service Discipline by performing military duties as a Cadet Instructor Cadre (CIC) officer on a defence establishment, and that he was in a position of trust and authority with respect to cadets.

[7] It is during the summer of 2011, after both complainants learned that Captain Moriarity had been returned to his unit because another cadet had come forward with an allegation that he had had inappropriate conversation with him online, that they decided on their own to disclose what happened between them and Captain Moriarity.

[8] Charges were laid against Captain Moriarity and they were preferred on 11 May 2012 by the Director of Military Prosecutions.

POSITION OF THE APPLICANT

[9] The applicant is taking the position that section 130 of the *NDA* is a service offence because the definition at section 2 of the *NDA* of a service offence and the application of subparagraph 130(1)(*a*) of the *NDA* make *Criminal Code* offences, such as the ones Captain Moriarity is charged with, a service offence.

[10] Then, using paragraph 130(2) of the *NDA*, the applicant suggested to the court that it may potentially see it impose on him the punishment prescribed for the related *Criminal Code* provisions, which would mean that if he is found guilty by the court of sexual exploitation or invitation to sexual touching, a minimum sentence of 45-days' imprisonment and a maximum of 10-years' imprisonment, and if found guilty of sexual assault, a maximum of 10-years' imprisonment.

[11] Being exposed to the threat of being imprisoned, defence counsel argued that the applicant's liberty enunciated at section 7 of the *Charter* is engaged by the availability of a penalty of imprisonment, as established by the Supreme Court of Canada in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, at paragraph 90.

[12] Then, the applicant submitted that the court shall consider if his liberty interests are deprived in accordance with the principles of fundamental justice and, specifically, with the one that legislation of a criminal nature just not be overbroad (see *R v Demers*, 2004 SCC 46, at paragraph 37).

[13] In order for the court to proceed with its analysis, he suggested that the purpose of section 130 is to articulate a standard of conduct that is required to achieve the Code of Service Discipline's purpose of enforcing internal discipline effectively and efficiently.

[14] He came to that suggestion by relying, first, on the legislative history as it appeared from some excerpts of 1950 House of Commons official report of debates concerning Bill 133 (an Act Respecting National Defence), some excerpts of minutes of proceedings from the House of Commons Special Committee on Bill 133 (an Act Respecting National Defence), and an excerpt of 1985 House of Commons official report of debates concerning the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*.

[15] Secondly, the applicant relies on the place of the considered provision in the Code of Service Discipline and its roots in the Constitution.

[16] Finally, he based his suggestion on case law decisions, such as *R v Généreux*, [1992] 1 SCR 259, at paragraphs 60 and 67, *R v Mackay*, [1980] 2 SCR 370, at paragraphs 32, 55, and 58, and R v *Reddick*, CMAJ 9, at paragraph 22.

[17] Essentially, he submitted to the court that the main purpose of the Code of Service Discipline, in which can be found subparagraph 130(1)(a) of the *NDA*, is to maintain discipline and integrity in the Canadian Forces. In that respect, he suggested to the court that this provision cannot be broader than the Code.

[18] The applicant conceded that his own factual situation does not support his argument that subparagraph 130(1)(*a*) is overbroad. However, he suggested that the court may proceed with the use of hypotheses in determining this question, as it was the case in *R v Heywood*, [1994] 3 SCR 761, at paragraph 62.

[19] Then, as a hypothesis to consider by the court, he suggested that a person subject to the Code of Service Discipline may be charged through subparagraph 130(1)(*a*) of the *NDA* for a conduct that is completely unrelated to the objective of the Code, which is to maintain discipline and integrity in the Canadian Forces, and it would result in a situation where subparagraph 130(1)(*a*) of the *NDA* would allow a service tribunal to deal with

unrelated matters to military discipline which is far beyond from what is the purpose of the Code.

[20] The applicant does not deny the fact that subparagraph 130(1)(*a*) of the *NDA* may serve a public function as well, by punishing specific conduct which threatens public order and welfare within the purpose of the Code. However, he is of the opinion that such function cannot justify a situation where a person subject to the Code of Service Discipline is charged for an unrelated matter to the application of that Code through subparagraph 130(1)(*a*) of the *NDA*.

[21] In addition to his argument, the applicant highlighted the fact that for similar criminal offences committed in similar circumstances, a person subject to the Code of Service Discipline may receive different treatment from the one he would have received if he had been prosecuted before a civilian court of criminal jurisdiction, which would include the possibility of a jury trial.

[22] Then, the applicant took the position that the violation cannot be justified under section 1 of the *Charter* and that the only remedy available to the court is to invalidate, pursuant to section 52 of the *Constitution Act, 1982*, subparagraph 130(1)(*a*) of the *NDA* for being inconsistent with section 7 of the *Charter*.

POSITION OF THE RESPONDENT

[23] The respondent submitted to the court that this application must be dismissed because:

(a) the evidentiary foundation is insufficient to entertain this *Charter* challenge;

(b) the over-breadth analysis under section 7 of the *Charter* does not apply; and

(c) if the over-breadth analysis applies, then it nevertheless fails.

[24] The respondent suggested, first, to the court that there is no factual foundation for supporting the constitutional challenge made by the applicant, and, as a result, this court would have to proceed with an analysis in the abstract, (see *Ellis v R*, 2010 CMAC 3, at paragraphs 27 to 31), which it must not do.

[25] To the suggestion made by the applicant that the court may use hypothetical situations to proceed with its analysis, the respondent reminded the court that they must be reasonable as indicated by the Supreme Court of Canada in *R v Heywood*, [1994] 3 SCR 761, at paragraph 62. He indicated to the court that the applicant failed to submit such reasonable hypotheses.

[26] Concerning the over-breadth analysis under section 7 of the *Charter*, the respondent submitted that subparagraph 130(1)(*a*) of the *NDA* does not create a service offence because it simply incorporates into the Code of Service Discipline all other *Federal Acts*, such as the *Criminal Code*. Then, it does not impose a risk to or engage the applicant's liberty and must not be subjected to any analysis under section 7 of the *Charter*.

[27] However, if the court embarks in the over-breadth analysis as to determine if the right to liberty of the applicant has been deprived in accordance or not with this principal of fundamental justice, it urged the court to properly and accurately identify the purposes of subparagraph 130(1)(*a*) of the *NDA*, which, to his opinion, the applicant failed to do. He submitted to the court that the purposes are the following ones:

> (a) the maintenance of public peace, order, and welfare;
>
> (b) recognition that offences triable under civil law may take on wholly unique significance or connotation when committed by a member of the Canadian Forces; and
>
> (c) the legitimate legislative intention of mandating respect for and obedience of federal laws by members of the Canadian Forces.

To make such assertions, he relies especially on the remarks of Justice Lamer in *Généreux* at paragraph 31 of that decision.

[28] When using these objectives, he suggested that the court should conclude that subparagraph 130(1)(*a*) of the *NDA* is not overbroad and clearly respects Parliament's objectives when it was issued because it is directly related and proportional to them.

[29] For the respondent, the applicant's liberty is deprived in accordance with the principle of fundamental justice that law must not be overbroad. Subparagraph 130(1)(*a*) of the *NDA* challenges applicant's right to liberty in a very less significant kind and degree than the *Heywood* or *Demers* Supreme Court cases.

[30] Finally, it is suggested by the respondent that if the court concludes that subparagraph 130(1)(*a*) of the *NDA* is invalid pursuant to section 52 of the *Constitution Act, 1982*, then it should not consider striking down that provision as a remedy in the circumstances.

ANALYSIS

[31] Section 7 of the *Charter* reads as follows:

> 7. Every one 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.

[32] The Chief Justice of the Supreme Court of Canada expressed, in a very clear manner, what is legally required by that section when she said, at paragraph 12 of the decision of *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350:

> Section 7 of the *Charter* guarantees 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. This requires a claimant to prove two matters: first, that there has been or could be a deprivation of the right to life, liberty and security of the person, and second, that the deprivation was not or would not be in accordance with the principles of fundamental justice. If the claimant succeeds, the government bears the burden of justifying the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[33] I agree with the applicant that the threshold to engage the right to liberty under section 7 of the *Charter* for an analysis of an offence provision is very low. As established in *PHS Community Services Society* and in *R v Malmo-Levine*, [2003] 3 S.C.R. 571, at paragraph 84, the availability of imprisonment or the risk of such thing is sufficient to trigger an analysis under section 7 of the *Charter*. So the applicant has established that, by the effect of subparagraph 130(1)(*a*) of the *NDA*, considering that there is a potential for a minimum sentence of 45 days of imprisonment and a maximum of 10-years' imprisonment, there could be a deprivation of his right to liberty.

[34] Then, the applicant is left with the burden to prove that the deprivation was not or would not be in accordance with the principles of fundamental justice, and more specifically that subparagraph 130(1)(*a*) of the *NDA* must not be overbroad.

[35] For the purpose of this application, I find necessary to reiterate some basic principles governing the existence of a military justice system in our country.

[36] In *Généreux*, the Supreme Court of Canada recognized the necessity for the armed forces to posses its own system of tribunals and its own code of discipline. Paragraph 60 of this decision clearly established that:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military....

[37] Then what is a Code of Service Discipline? In *Généreux*, the Supreme Court answered that question in those terms at paragraph 67:

> The Code of Service Discipline defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard....

[38] Interestingly enough, the Supreme Court of Canada had contemplated that same issue in *R v Mackay*, [1980] 2 SCR 370, and the Chief Justice, in his dissenting opinion, answered to that question at paragraph 5 and 6 as follows:

> The *National Defence Act* deals in a very wide way with what are called "service offences". The term is defined in s. 2 to mean "an offence under this Act, the *Criminal Code* or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Code of Service Discipline covers, of course, members of the regular forces and also, in prescribed circumstances, members of the re-serve forces. It deals, in the main, with disciplinary offences and misconduct connected with military activities but, as the definition above indicates, it also deals with offences punishable by ordinary law and subjects an accused member of the armed forces to trial before a service tribunal for all classes of "service offences". There is only the exception stated in s. 60 of the Act that "a service tribunal shall not try any person charged with an offence of murder, rape or manslaughter, committed in Canada."
>
> Although a scale of punishments is fixed for service offences in s. 126 of the Act, nonetheless where the offence is a contravention of the ordinary law, it is the punishment that is fixed by that law that applies. The governing provision is s. 120, headed *Offences Punishable by Ordinary law* …

[39] According to the Supreme Court of Canada, the Code of Service Discipline is a set of rules establishing the standard of conduct to be followed by the military members and some civilians with the Canadian Forces. This Code deals with specific military offences and offences punishable by ordinary law and provides for a set of military tribunals to deal with the breaches of those standards.

[40] Then, knowing what is the Code of Service Discipline, what is its purpose? The Supreme Court of Canada could not be clearer than it was in *Généreux*, when at paragraph 31, the court said:

> ... Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the *Narcotic Control Act*. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other

> person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*)....

[41] This relationship between the military laws and the civil law was discussed by the Supreme Court of Canada in *Mackay* by Justice McIntyre in those terms at paragraph 71:

> Since very early times it has been recognized in England and in Western European countries which have passed their legal traditions and principles to North America that the special situation created by the presence in society of an armed military force, taken with the special need for the maintenance of efficiency and discipline in that force, has made it necessary to develop a separate body of law which has become known as military law. The development of this body of law included, sometimes in varying degree but always clearly recognized, a judicial role for the officers of the military force concerned. It was inevitable that the question of the relationship of military law to the ordinary civil law would arise. It was also inevitable that the question of the relationship to the civil law of those also subject to the military law would have to be faced. Holdworth, in his *History of English Law*, 7th rev. ed., (1966), vol. 10, p. 382, says that Blackstone did not deal with these questions but "they were beginning to be raised at or shortly after the time when he wrote in". These questions have been in great part resolved. As a general proposition in England and in Canada, a member of the armed services becomes upon enlistment subject to military law but remains subject to the general civil law. His entry into service adds an obligation in the requirement of conformance with the military law but leaves him subject to the ... civil law....

[42] It is clear for the court that, as any other Canadian citizen, soldiers, airmen, and sailors remain subject to the civil law, including the *Criminal Code*, and also become subject to additional specific obligations when enlisting in the Canadian Forces.

[43] Subparagraph 130(1) of the *NDA* reads as follow:

> 130. (1) An act or omission
>
> > (a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or
> >
> > (…)
>
> is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

[44] In *Application under s. 83.28 of the Criminal Code (Re)* [2004] 2 SCR. 248, Iacobucci and Arbour JJ., for majority stated, at paragraph 34:

> The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament"... The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

[45] Adopting this approach, I come to the conclusion that the purpose of subparagraph 130(1) (*a*)of the *NDA*, further to its reading and as established by case law, is to have the persons subject to the Code of Service Discipline remain subject to the civil law, which would include criminal law, as any other citizen of Canada.

[46] The sole effect of this provision is to make any act punishable under Part VII of the *NDA*, the *Criminal Code* or any other Act of Parliament as an offence under the Code of Service Discipline, or what we are used to call a service offence as defined at section 2 of the *NDA*. At first sight, by enacting this provision, Parliament used the means necessary to achieve its objective, which was to have Canadian Forces members remain subject to the civil law.

[47] The applicant raised the fact that by making a criminal offence as a service offence in using subparagraph 130(1)(*a*) of the *NDA*, a person subject to the Code of Service Discipline will be tried by a service tribunal and then expose himself or herself to have a tribunal specifically set to deal with matters that pertain to military discipline dealing with offences of a criminal nature that have nothing to do with maintaining discipline and integrity of the Canadian Forces, and may also receive a different treatment from the one he would have received if he had been prosecuted before a civilian court of criminal jurisdiction.

[48] I am of the opinion that, for a person subject to the Code of Service discipline, being tried by a service tribunal for a criminal offence is a consequence or the result of the application of a different provision in the Code, which is the one granting jurisdiction to a service tribunal to deal with a service offence

[49] As I mentioned to the applicant's counsel during his address to the court, it is not the offence provision that confers to a military tribunal the necessary jurisdiction to deal with it, but the provision in the Code allowing the authority to a service tribunal to deal with a service offence. As an example, section 92 of the *NDA* does not specify in what context a military tribunal may dispose or not of a charge for disgraceful conduct, as it is also the case for a charge laid under section 130 of the *NDA*. As section 92 of the *NDA*, section 130 of the *NDA* does create a service offence, nothing more, nothing less.

[50] What it is really raised by the applicant is the effects on a person subject to the Code of Service Discipline of a criminal charge laid under subparagraph 130(1)(*a*), which results in being tried by a service tribunal. However, I am of the opinion that this provision has no such effect.

[51] In other words, the applicant would like this court to determine if a service tribunal is the proper forum to deal with a criminal offence that it is unrelated with military discipline? This question is more a matter involving an issue in relation to the competence of the court to hear the matter than anything else. The analysis does not raise such question and it won't be answered.

[52] As conceded by the applicant, the factual background submitted to the court does not allow it to make any decision concerning this matter. He suggested to the court that it could use hypotheses to achieve that, as it was the case in *Heywood*.

[53] The wide variety of offences involved by the use of the various provisions of *Criminal Code* as a service offence or any other Act of the Parliament in the circumstances where a person subject to the Code of Service Discipline may be charged are so different that it makes impossible for the court to consider any reasonable hypotheses that would help it to decide this matter.

[54] What the applicant is asking the court to do is to determine the scope of the jurisdiction of a service tribunal in order to determine if the impugned provision is overbroad and, as a result, violates his right to liberty.

[55] The actual factual foundation or the scheme for the legal analysis does not allow such thing. To the contrary, evidence adduced supports the fact that this court has jurisdiction to deal with this matter because it involves an officer on duty on a defence establishment and having a relation of authority with cadets.

[56] No deleterious effects have been demonstrated by the applicant, and in that regard he has failed to demonstrate to the court that he was deprived of his right to liberty not in accordance with the principle of fundamental justice.

[57] The approach taken by this court reflects exactly what was suggested by the Court Martial Appeal Court in *Reddick* at paragraph 28, where the question of the nexus to determine the jurisdiction of a court was discussed:

> I therefore conclude that the nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court. Indeed I think it can be put aside as distracting from the real issue which is one of the division of powers. In addressing that issue a court martial must start by considering whether the Code of Service Discipline gives it jurisdiction in the circumstances alleged in the charges. If so, it can presume that the Code, as part of the *National Defence Act*, is constitutionally valid unless the accused can demonstrate that in his particular circumstances the application of the Code to him would have an unconstitutional consequence.

[58] In the present case, the applicant failed to demonstrate that in his particular circumstances, the application of the Code to him would have an unconstitutional consequence.

[59] Reality is that such thing must always be done on case by case analysis and in the absence of any factual foundation to justify it, a court martial may decline or refrain to proceed with such analysis because, as stated in *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pages 361 and 362, and confirmed by the Court Martial Appeal Court in *Ellis*:

> *Charter* decisions should not and must not be made in a factual vacuum...

[60] Here, facts did not support the applicant's submission that subparagraph 130(1)(*a*) of the *NDA* to be contrary to section 7 of the *Charter*.

DISPOSITION

FOR THESE REASONS, THE COURT:

[61] **DISMISSED** the application.

Counsel:

Lieutenant-Colonel S. Richards, Canadian Military Prosecutions Service
Counsel for Her Majesty, the Queen

Major S. Collins, Captain Bruce, and Lieutenant-Commander M. Létourneau,
Directorate of Defence Counsel Services
Counsel for Captain D.J. Moriarity