

**Citation:** *R. v. Sergeant N.C. Couture*, 2007 CM 1014

**Docket:** 200720

**STANDING COURT MARTIAL  
CANADA  
QUEBEC  
AREA SUPPORT UNIT VALCARTIER**

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**Date:** July 18, 2007

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**PRESIDING: COLONEL M. DUTIL, CHIEF MILITARY JUDGE**

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**HER MAJESTY THE QUEEN  
(Prosecutor-respondent)**

**v.**

**SERGEANT N.C. COUTURE  
(Accused-applicant)**

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**DECISION RESPECTING A PLEA IN BAR OF TRIAL BROUGHT UNDER  
SUBPARAGRAPHS 112.05(5)(b) AND 112.24(1)(a) OF THE QUEEN'S  
REGULATIONS AND ORDERS FOR THE CANADIAN FORCES**

**(Rendered orally)**

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**INTRODUCTION**

[1] This is an application brought 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 ground that the Court has no jurisdiction to try the accused because the charges that are the subject matter of the proceedings in this Court Martial are void *ab initio* because Master Warrant Officer Brown, the person who laid the initial charges in this case, failed to comply with, *inter alia*, article 107.03 of the QR&O, and the applicant is asking the Court to terminate the proceedings.

**EVIDENCE**

[2] The evidence heard on the application consists of the following:

- 1) matters of which judicial notice may be taken under section 15 of the Military Rules of Evidence;
- 2) a joint summary of facts filed as Exhibit R1-2;
- 3) a copy of the Record of Disciplinary Proceedings against Sergeant Couture, the applicant, signed by Master Warrant Officer D. Brown on May 16, 2006, filed as Exhibit R1-3; and
- 4) the testimony of Master Warrant Officer Denis Brown.

**FACTS**

[3] The facts that are relevant for the purposes of this application begin shortly after the events that are the subject matter of the charges set out in the charge sheet before the Court, which allegedly took place on or about September 17, 2005, when Captain É. Tremblay, the adjutant of the accused's unit at the time, initiated an investigation into those events during the following month. He submitted his investigation report on March 16, 2006, based on two memoranda and the statements made by six individuals. Captain Boucher, the acting adjutant, then requested legal advice, under article 107.03 of the QR&O, in response to the report. There is no evidence as to whether Captain Boucher was, at the time, a person authorized to lay charges within the meaning of article 107.015 of the QR&O. In early May 2006, the legal adviser for the unit provided his legal advice, after requesting that Captain Boucher investigate further, which he did. The legal adviser also provided a draft Record of Disciplinary Proceedings at that time. On May 16, 2006, Master Warrant Officer Brown, a person who was authorized orally by the accused's commanding officer to lay charges and who had 38 years' experience in the Canadian Forces, laid the charges against Sergeant Couture that are set out in Exhibit R1-3, that is, as reduced to writing in Part 1 (Charge Report) and signed in his hand. Master Warrant Officer Brown testified that he had sufficient knowledge of the events that are the subject matter of the charges from discussing them with the unit adjutant, the alleged victim and Sergeant Couture. He testified that he had no doubt about laying the charges after reading the draft Record of Disciplinary Proceedings prepared for his signature after the discussions referred to above. He added that he had never read Captain Tremblay's investigation report or the legal advice provided by the unit's legal adviser regarding the events that are the subject matter of the charge, even though he was aware, from a conversation with the unit adjutant, that legal advice had been requested and obtained. At the end of cross-examination, when he testified regarding the events that are the subject matter of the charges he laid against Sergeant Couture, Master Warrant Officer Brown added that [TRANSLATION] "when a person has knowledge of events such as those that occurred in 2005, they remember most things", but, paradoxically, he acknowledged that he had no

memory either of the advice or of the substance of the discussions he had regarding those events.

**POSITIONS OF THE PARTIES**

***Applicant***

[4] The applicant submits that the charges laid on May 16, 2006, and reduced to the Record of Disciplinary Proceedings filed as Exhibit R1-3 are void *ab initio* because Master Warrant Officer Brown had a personal obligation having regard to articles 107.015 and 107.3 of the QR&O to request and read the legal advice before laying the charges against Sergeant Couture. The applicant also submits that Master Warrant Officer Brown did not have reasonable and sufficient knowledge for laying charges against him.

***Respondent***

[5] The respondent submits that the legal advice required by article 107.03 of the QR&O creates only a procedural obligation that in no way affects the legal basis of charges laid under article 107.015. She further submits that the obligation set out in article 107.03 in no way requires that it be performed by the same person who lays the charge or charges against an accused, but concedes that the legal advice must be read. The respondent submits, however, that failure to read the legal advice does not irreparably vitiate the entire accusatorial procedure initiated under Chapter 107.

**DECISION**

[6] The Court is of the opinion that the application raises the following issues:

- (a) What is the nature and effect of article 107.03 of the QR&O?
- (b) Does the combined effect of the provisions of Chapter 107 of the QR&O mean that the person who lays a charge under articles 107.015 and 107.04 is the only person who may make a request for legal advice under 107.03, and if not, may the person who lays the charge rely on legal advice obtained under that article?
- (c) Is the Record of Disciplinary Proceedings prepared in the prescribed form by a person who is authorized to lay a charge against the accused and who has a reasonable belief that the accused committed the alleged offence invalid if the person authorized to lay the charge fails to read

legal advice provided in response to a request made under article 107.03, and if so, what is the effect of the invalidity?

*Nature and effect of article 107.03 of the QR&O*

[7] Chapter 107 of the QR&O deals with the preparation, laying and referral of charges. It is made up exclusively of regulations made by the Governor in Council under section 161 of the *National Defence Act*. It is divided into four sections:

- (a) Section 1 - General;
- (b) Section 2 - Record of Disciplinary Proceedings;
- (c) Section 3 - Pre-Trial Procedures; and
- (d) Section 4 - Unit Registry of Disciplinary Proceedings.

The legal framework adopted for the preparation, laying and referral of charges in the military justice system clearly establishes the importance of this aspect for maintaining discipline and for the administration of military justice. Although the person who is authorized to lay charges under article 107.02 of the QR&O does not need to act judicially or quasi-judicially in deciding to do so under article 107.015, that person does have a statutory obligation to act according to the law, as Chief Justice Mahoney of the Court Martial Appeal Court (as he then was) wrote in *R. v. Lunn*, [1993], 5 C.M.A.C. 157, at page 165:

Persons making decisions relative to the laying and prosecution of charges must act according to the law but the law does not require their independence or impartiality. What is required of them is that they not act in a manner that may be seen, by a reasonable and informed person, as drawing the administration of justice into disrepute.

[8] Chapter 107 of the QR&O was adopted entirely in its present form on September 1, 1999. It must be noted that at that time the Governor in Council knowingly imposed a statutory obligation on persons authorized to lay charges and on delegated officers, commanding officers or superior commanders to whom a charge has been referred to obtain legal advice from the unit legal adviser in the cases expressly referred to in articles 107.03 and 107.11. The legal framework does not impose that obligation for all situations in which a charge could be laid or that could be referred to the competent authority. The Governor in Council chose to impose that additional requirement in order to protect the integrity of the charging process within the military justice system, and the individuals who might be charged, prosecuted and tried under the Code of Service Discipline, only in the following cases:

- (a) offences that are not authorized to be tried by summary trial under article 108.07;
- (b) offences alleged to have been committed by an officer or a non-commissioned member above the rank of sergeant; and
- (c) offences that, if a charge were laid, would give rise to elect to be tried by court martial.

In the context of the legislation and regulations in force, that statutory obligation is not strictly procedural in nature. Of course, it is an additional step in the process of laying and referring charges, but as I said, it is not strictly procedural in nature. It is apparent from reading Chapter 107 that the Governor in Council has imposed an additional burden in the public interest and for the protection of individuals subject to the Code of Service Discipline. Accordingly, the Court finds that the statutory obligation imposed on the person who has the authority to lay a charge under article 107.02 is not a mere formality and that compliance with the obligation is required before the offences referred to in article 107.03 may be set out on a Record of Disciplinary Proceedings under article 107.04.

*Whether the combined effect of the provisions of Chapter 107 of the QR&O means that the person who lays a charge under articles 107.015 and 107.04 is the only person who may make a request for legal advice under 107.03, and if not, whether the person who lays the charge may rely on legal advice obtained under that article*

[9] The second issue relates to the combined effect of the provisions of Chapter 107 of the QR&O in relation to the obligation imposed on a person who lays a charge under articles 107.015 and 107.04 to obtain legal advice under 107.03. It is plain from this article that it imposes a statutory obligation to obtain the legal advice of the unit legal adviser on an officer or non-commissioned member who has the authority to lay a charge. Any person authorized to lay a charge could necessarily, therefore, perform that obligation. However, the Court is of the opinion that articles 107.015, 107.02, 107.03 and 107.04 must be interpreted together. It must be noted that a contextual analysis of those provisions and the notes that accompany them show that the person referred to in subsection 107.03(1) is the person who will set out the charge on the Record of Disciplinary Proceedings as provided in article 107.04. The reason for this is very simple, and is expressly stated in subsection 107.03(2), which I quote:

**107.03(2)** The officer or non-commissioned member shall obtain legal advice concerning the sufficiency of the evidence, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge.

The Governor in Council chose to impose the statutory obligation on the person authorized to lay charges to consider specific information provided by a unit legal adviser in exercising his or her discretion as to whether to lay charges, in addition to mere reasonable belief that the person has committed an offence.

[10] Article 107.03, however, does not require that the person who lays the charges be the person who makes the request. That interpretation is not consistent with the ordinary meaning of the words used in the article. The officer or non-commissioned member must obtain legal advice. Whether that advice is obtained directly or indirectly does not matter. In the context of this case, the legal advice requested by Captain Boucher and provided by Captain Fortin, the legal adviser, could have been provided to Master Warrant Officer Brown before he laid the charges and this would have met Master Warrant Officer Brown's statutory obligation to obtain legal advice in order to exercise his discretion properly. However, it is clear from the evidence that he never read the legal advice. The Court does not share the prosecution's opinion that Master Warrant Officer Brown was not legally required to consult the advice before laying the charges. The Court understands that the prosecution is suggesting that mere knowledge of the existence of legal advice is sufficient. The Court rejects that interpretation, having regard to its contextual analysis of Chapter 107. The effect of the approach proposed by the prosecution would be to dilute, if not eliminate, the very basis for the statutory obligation imposed by the Governor in Council and make it a requirement of mere form. It would be acceptable for Master Warrant Officer Brown to draft the Record of Disciplinary Proceedings without reading the legal advice, but the next step, the laying of the charges, that is, when he signs, must meet the minimum requirement that he know what the advice was. Notwithstanding the fact that there was no direct evidence that Captain Boucher was authorized to lay a charge, the Court finds, from the joint summary of the facts, Exhibit R1-2, that he was duly authorized to do so, because the parties stated at paragraph 5 of the summary that Captain Boucher had requested legal advice under article 107.03, which imposes the statutory obligation only on officers and non-commissioned members who have authority to lay charges. The Court points this out because Captain Boucher could therefore easily have signed the Record of Disciplinary Proceedings against Sergeant Couture himself, without in any way excluding the regimental sergeant-major from the disciplinary process.

*Whether Master Warrant Officer Brown's failure to read legal advice provided under article 107.03 invalidates the Record of Disciplinary Proceedings against Sergeant Couture, and if so, what the effect of the invalidity is*

[11] The Court is of the opinion that, in the context of this case, the failure of Master Warrant Officer Brown to read legal advice provided in response to a request made under article 107.03 invalidates the Record of Disciplinary Proceedings against Sergeant Couture. First, Master Warrant Officer Brown testified that his knowledge of the case was limited to discussions with the adjutant, the victim and the accused. He

also referred to comments that had been brought to his attention by other people. Second, he admitted that he knew that a unit investigation report had been prepared by Captain Tremblay, but he also acknowledged that he had not read it. With respect to the legal advice, it must be recalled that he never saw it. The Court finds particularly troubling the portion of his testimony in which he was careful to mention both that when an event as significant as the event that is the subject of the charges against Sergeant Couture occurs, people remember most things, and also that he does not remember either the advice or the substance of the discussions he had regarding this case. The Court finds from his testimony that he was not in the position of an informed person in possession of information that met the minimum requirements imposed by the Governor in Council in article 107.03. The effect of this situation was that he was unable to lay charges of the nature of the charges referred to in article 107.03; the situation would have been different if the nature of the charges or other matters referred to in 107.03 had not been in issue. The Court therefore finds that the Record of Disciplinary Proceedings produced as Exhibit R1-3 is void *ab initio*. We must acknowledge that the signing of a document of this nature is not a mere formality; on the contrary, it carries significant legal consequences and it is the trigger for the disciplinary and penal process constituted by the military justice system in Canada, which operates as an exception to the civil criminal justice system in Canada.

[12] I agree with the comments of my colleague, Military Judge d'Auteuil, in *R. v. Laity*, dated April 17, 2007, in which he states, at paragraph 19, and I quote: “The step of laying charges in the Canadian Military Justice system is more than something of an administrative nature. It constitutes the formal and only legal way to commence disciplinary proceedings.” We must keep in mind that only the persons referred to in article 107.02 of the QR&O have the power to lay charges under the Code of Service Discipline: a commanding officer, a person authorized by a commanding officer and a police investigator with the Canadian Forces National Investigation Service. The Governor in Council knowingly kept the persons who are able to lay charges to a minimum and imposed specific obligations on them in exercising that exclusive discretion, one of which is that they obtain legal advice for certain specific cases as set out in article 107.03.

[13] The subsequent proceedings, initiated on the basis of the invalid document, are also null and void. The effect of section 165.12 of the *National Defence Act* is that the initial invalidity cannot be corrected, as the judge in *Laity* concluded. In short, no charge was referred to the Director of Military Prosecutions because a charge is laid solely when it has been laid in accordance with regulations made by the Governor in Council under section 161 of the Act. Accordingly, there is no charge before this Court. As Chief Justice Lamer of the Supreme Court of Canada (as he then was) said in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paragraph 34, and I quote:

I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is

enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be (*Maxwell on the Interpretation of Statutes, supra*, at p. 29). The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.

Chief Justice Lamer continued, at paragraph 41, and I quote:

Parliament, after all, has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.

It would therefore be logical and sensible that referral of a case that is defective for the purposes of section 161 of the *National Defence Act* and Chapter 107 of the QR&O to the Director of Military Prosecutions—the authority with exclusive power to prefer charges against persons to be tried by courts martial and to conduct prosecutions at courts martial, under section 165.11 of the *National Defence Act*—could allow it to proceed if the Director of Military Prosecutions decided to prefer a charge. This would mean that, where the issue arose, the Court Martial could, at the request of the accused, examine any irregularities that might have violated the accused's rights of the accused guaranteed under the *Canadian Charter of Rights and Freedoms* or other rights. However, that would not be possible under the legislation and regulations now in force.

### **Disposition**

For these reasons,

The Court allows the application made as a plea in bar of trial in respect of all charges that are the subject of the charge sheet and terminates the proceedings.

COLONEL M. DUTIL, C.M.J.

Counsel:

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Counsel for the prosecutor-respondent  
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