COURT MARTIAL

Citation: *R v Morel,* 2014 CM 3010

Date: 20140530
Docket: 201389

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Sergeant J.E. Morel, Applicant

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

OFFICIAL ENGLISH TRANSLATION

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR DECISION

(Orally)

CONTEXT

[1] Sergeant Morel is accused before this Standing Court Martial of a charge punishable under section 130 of the *National Defence Act* (hereafter the *NDA*), of sexual assault contrary to section 271 of the *Criminal Code* and of two other offences of disgraceful conduct contrary to section 93 of the *NDA*.

[2] At the beginning of the trial, on May 26, 2014, before denying or admitting his guilt with regard to each count, counsel for the defence, who is representing

Sergeant Morel, made a application for which written notice had been received by the Court Martial Administrator on May 21, 2014.

[3] The purpose of this preliminary application is to obtain from the Court Martial a finding that paragraph 130(1)(*a*) of the *NDA* and its regulations, section 103.61 of the Queen's Regulations and Orders (QR&Os) are both null and void under subsection 52(1) of the *Constitution Act, 1982*. Further, if the court arrives at such a conclusion, the applicant requests that this court thereby find him not guilty of the first charge brought under section 130 of the *NDA*.

[4] This preliminary application is filed by the applicant under paragraph 112.05(5)(*e*) of the QR&Os as a question of law or a question of mixed law and fact, to be determined by the military judge presiding the Court Martial, all with reference to section 112.07 of the QR&Os.

THE EVIDENCE

[5] The evidence in support of this application is composed of the notice of preliminary application and an affidavit certifying that the notice of application was served to the Attorney General of Canada.

[6] Given the particular nature of this application and the legal context in which it is made, which I will discuss later, the court considered it appropriate that it should be heard, with the consent of the parties, after the prosecution's evidence was completed in the main trial.

[7] In this regard, by consent the parties requested and received the Court's permission, in the specific context of this application, to enter all the evidence presented by the prosecution in the main trial. It consists of testimony from the complainant, S.J.B., and Master Corporal McCord, the convening order, the charge sheet and a copy of an excerpt from the *Concise Oxford Dictionary* referring to the definition of the word "centrefold".

THE FACTS

[8] As part of training for public affairs officers in the Canadian Forces that was taking place from April 30 to May 2, 2007, in a building located at 45 Sacré-Coeur Blvd. in Gatineau, Quebec, Sergeant Morel, an imagery technician, was given the task of acting as photographer and cameraman to simulate "scrums" and televised interviews to help evaluate the candidates in this course.

[9] S.J.B. was a candidate in this course. As part of preparing for an interview, at the time that Sergeant Morel was installing a microphone on this candidate when they were both in the main lobby of the building, it was alleged that Sergeant Morel allegedly touched one buttock while whispering softly that he wanted to make her a centrefold ("making me a centrefold") or words to that effect.

POSITION OF THE PARTIES

[10] Essentially, the applicant submitted this application to preserve the rights of his client with respect to the constitutional question at paragraph 130(1)(*a*) of the *NDA*, considering that he has been charged under this section.

[11] This issue has been presented and decided by several courts martial and to date has been the subject of three decisions by the Court Martial Appeal Court: *R v Moriarity*, 2014 CMAC 1, *R v Vezina*, 2014 CMAC 3 and *R v Larouche*, 2014 CMAC 6. Specifically, the decisions of *Moriarity* and *Vezina* are currently being appealed to the Supreme Court of Canada, hence the applicant's idea of obtaining a decision in his own court martial on this very subject.

[12] Therefore, the applicant seeks from the judge presiding the Court Martial a declaratory judgment as to the status of paragraph 130(1)(*a*) of the *NDA*.

[13] The respondent in this application is of the view that the above-noted Court Martial Appeal Court decisions have settled the issue and that when an accused now raises this specific issue, it should rather be dealt with by the court as a plea in bar motion regarding the effect that the charge is not within the court's jurisdiction.

ANALYSIS

[14] The Court Martial Appeal Court in *Moriarity* found unanimously that paragraph 130(1)(*a*) of the *NDA* is not overbroad, considering the application of the military nexus requirement and, thus, was not contrary to section 7 of the *Canadian Charter of Rights and Freedom*s or any other right contained in the *Charter*.

[15] At paragraph 45 of this decision, the court noted:

> In turn, the broad scope of paragraph 130(1)(*a*) must be read in the context of a military nexus requirement; otherwise, the military courts would have no authority under the *NDA* over public offences which lacked any clear military connection.

[16] Further, at paragraph 105 of this same decision, it found that:

> In conclusion, properly interpreted, paragraph 130(1)(*a*) of the *NDA* is not overbroad. Its scope, though broad, is restricted by the requirement of a military nexus which, in turn, ensures the provision is no broader than necessary to achieve the purpose of the *NDA*: to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. In the result, the provision does not violate s. 7 of the *Charter*.

[17] The Court Martial Appeal Court decisions in *Vezina* and *Larouche* confirmed this reasoning. In *Vézina*, the court wrote at paragraph 12:

> Turning to the merits of the constitutional issue, we note that in *Moriarity v. The Queen*, 2014 CMAC 1, this Court dismissed an identical challenge. We consider ourselves bound to follow *Moriarity* because the appellant has failed to persuade us that that Court committed manifest error.

[18] In *Larouche*, the Court Martial Appeal Court wrote the following regarding this issue at paragraph 8 of the decision:

> I fully agree with the approach and conclusions of Chief Justice Blanchard in *Moriarity*/*Hannah* with regard to the overbreadth of paragraph 130(1)(*a*) of the NDA and to the violation of sections 7 and 11(*f*) of the Charter.

[19] However, in *Larouche*, the court went one step further by writing at paragraphs 12 to 15:

> [12] Paragraph 130(1)(*a*) of the NDA confers jurisdiction on military tribunals with respect to both military offences covered by the NDA and criminal offences punishable by ordinary law. The issue is whether it is overbroad and whether it deprives persons who are subject to the NDA of the right to the benefit of a trial by jury in respect of offences not related to military justice within the meaning of section 11(*f*) of the Charter.
>
> [13] In *Moriarity*/*Hannah*, Chief Justice Blanchard makes a remarkable summary of the jurisprudence of this Court and of the Supreme Court, the legislative history of the NDA, its purpose and its function as well as the purpose of the *Code of Service Discipline*, which he defines in the words of Chief Justice Lamer in *R. v. Généreux*: "[t]he 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".
>
> [14] Like him, I am of the view that the constitutionality of paragraph 130(1)(*a*) cannot be preserved unless it is interpreted as it was done by Chief Justice Mahoney in *MacDonald v. R.* over thirty years ago:
>
> > An offence that has a real military nexus and falls within the letter of subsection 120(1) [now subsection 130(1)] of the *National Defence Act* is an offence under military law as that term is used in paragraph 11(*f*) of the Charter of Rights.
>
> [15] For the reasons below, I find that subsection 130(1) of the NDA violates sections 7 and 11(*f*) of the Charter because it is overbroad, which is likely – without applying the military nexus test – to deprive Canadian military personnel of their constitutional right to the benefit of a trial by jury.

[20] As a remedy, the Court Martial Appeal Court in this decision found that paragraph 130(1)(*a*) of the *NDA* should be broadly interpreted and must now be read:

[134] Paragraph 130(1)(*a*) of the NDA must now be read as follows:

130. (1) An act or omission which is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service of the Canadian Forces	130. (1) Constitue une infraction à la présente section tout acte ou omission, qui est à ce point relié à la vie militaire, par sa nature et par les circonstances de sa perpétration, qu'il est susceptible d'influer sur le niveau général de discipline et d'efficacité des Forces canadiennes:
(*a*) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	*a*) survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale;
…	[…]
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).

[21] Therefore, it is in this context that the applicant raises the question of the constitutionality of paragraph 130(1)(*a*) of the *NDA*.

[22] The court is of the view that the respondent's position in this application should apply. Indeed, as the Court Martial Appeal Court noted in *Larouche* at paragraph 6:

> Under section 112.24 of the QR&O, the constitutionality of paragraph 130(1)(*a*) of the NDA is an issue of jurisdiction...

[23] Therefore, the court is of the view that in the current context of the law, this question may be raised by the applicant only as part of a plea in bar motion for which he will have the burden of proving that the charge is not within the court's jurisdiction. It is now in this context that I will address the question and hear the application at the time provided in section 112.05 of the *QR&Os*.

[24] As for this application, in light of the Court Martial Appeal Court decisions in *Moriarity*, *Vezina* and *Larouche*, I conclude that paragraph 130(1)(*a*) of the *NDA*, as modified by the decision in *Larouche*, is validly constitutional, as set out in these decisions.

[25] Further, I am of the view that the applicant did not show in this application that the act in the first charge is not, in its nature and in the circumstance of its commission, so connected with the service such that it would tend to affect the general standard of discipline and efficiency of the Canadian Forces.

FOR THESE REASONS, THE COURT

[26] **FINDS** that paragraph 130(1)(*a*) of the *NDA*, as modified by the decision in *Larouche*, is validly constitutional;

[27] **FINDS** that the applicant did not establish the absence of military nexus with respect to the first charge;

[27] **DISMISSES** the application.

Counsel:

Major A.-C. Samson, Canadian Military Prosecution Service
Counsel for the respondent

Major J.L.P.L. Boutin, Defence Counsel Services
Counsel for the applicant, Sergeant J.E. Morel