Citation: *R. v. Master Corporal J.R.J. McRae,* 2007 CM 4003

Docket: 200631

STANDING COURT MARTIAL
CANADA
QUÉBEC
GATINEAU

Date: 19 December 2006

PRESIDING: LIEUTENANT-COLONEL J.-G. PERRON, M.J.

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL J.R.J. MCRAE
(Applicant)

DECISION OF AN APPLICATION UNDER SUB-PARAGRAPH 112.05(5)b) AND 112.24 OF THE QUEEN'S REGULATIONS & ORDERS FOR THE CANADIAN FORCES AND TO DECLARE OF NO FORCE ARTICLE 165.14 AND 165.19 OF THE *NATIONAL DEFENCE ACT*, PURSUANT TO SUB-SECTION 52(1) OF THE *CONSTITUTION ACT 1982*.
(Rendered orally)

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[1] The accused, C84 365 830 Master Corporal McRae, is charged with having committed three offences. More specifically, he is accused of two charges of having disobeyed a lawful command of a superior, and of one charge of neglect to the prejudice of good order and discipline.

[2] The applicant, the accused, has made an application under sub-paragraph 112.05(5)(b) and article 112.24 of the Queen's Regulations & Orders for the Canadian Forces, requesting that I declare this standing court martial as having no jurisdiction over the applicant, and that I terminate the proceedings pursuant to paragraph 112.24(6) of the Queen's Regulations & Orders. The applicant also requests that the standing court martial declare that section 165.14 of the *National Defence Act* to be of no force and effect, pursuant to sub-section 52(1) of the *Constitution Act 1982,* and that the standing court martial declare that section 165.19 of the *National Defence Act*, in article 111.02 of the Queen's Regulations & Orders, insofar as it pertains to the determination of the type of court martial by the Director of Military Prosecution, to be of no force and effect, pursuant to sub-section 52(1) of the *Constitution Act 1982*. Finally, the applicant

requests this standing court martial to declare the determination of the mode of trial in the present case, as well as in all subsequent cases, to be null and void.

[3] The applicant relies heavily on the Court Martial Appeal Court decision of *R. v. Nystrom*, where the Honourable Justice Létourneau, in an *obiter dictum*, commented on the choice of mode of trial within the military justice system. The applicant suggests that this standing court martial should follow the reasoning contained in the *Nystrom obiter dictum*, since the applicant suggests that this *obiter dictum* is no "mere *obiter*." He also quotes portions of the Supreme Court of Canada decision in *R. v. Henry* in support of this position.

[4] The applicant asserts that his rights under section 7 of the *Charter of Rights and Freedoms*, as contained in the *Constitution Act 1982*, have been infringed and this violation is not justifiable under section 1 of the *Charter*. The applicant contends there is no evidence of a pressing substantial societal concern to satisfy the first term of the proportionality test of section 1 of the *Charter*. Finally, the applicant states that, in the circumstances, this standing court martial should apply the conclusions made by the Court Martial Appeal Court in *Nystrom*, and rule on the constitutional questions that are raised in this application.

[5] The evidence presented by the applicant consisted of an agreed statement of facts, as well as information provided by answering one question posed by the court to the applicant. The agreed statement of facts basically provides a chronology of the different events from the time a unit disciplinary investigation was completed on 15 July 2005, to the date the Court Martial Administrator issued a convening order requiring the accused, the applicant, to appear before a standing court martial to be held on 19 December 2006. This convening order was dated 24 October 2006. The accused was charged on 23 September 2005. On 1 February 2006, DDMP preferred the charge sheet concerning the applicant and chose a standing court martial as the mode of trial. Finally, this agreed statement of facts states that since 20 December 2005, the date of the Court Martial Appeal Court decision in *R. v. Nystrom*, only one disciplinary court martial has been held, although the panel did not assemble because the accused pleaded guilty, and six were preferred by the Director of Military Prosecutions, although they are not yet convened.

[6] The respondent is basically stating that this court is bound by *R. v. Lunn*, a Court Martial Appeal Court decision of 1993 and that, in the alternative, no violation of a principle that fundamental justice has been demonstrated in the present case.

[7] I will first address the issue concerning the weight to be given to the *obiter dictum* in the *Nystrom* decision. As mentioned earlier, the applicant suggests that this court should follow the reasoning found in the *Nystrom obiter dictum*. The applicant provided case law, primarily *R. v. Henry*, to buttress this position. The

respondent replies that this *obiter dictum* is but a commentary, as mentioned at paragraph 57 of the *R. v. Henry* Supreme Court of Canada decision.

[8] It appears that, in the *Nystrom* decision, two grounds of appeal were submitted to the Court Martial Appeal Court. The appellant appealed the legality of the guilty verdict, and objected to the holding of the trial by a standing court martial chosen by the Director of Military Prosecutions on the grounds that section 165.14 of the *National Defence Act* is unconstitutional.

[9] At paragraph 7 of the *Nystrom* decision, Justice Létourneau writes:

> I will address first the question of the legality of the verdict, since my determination is such that I do not have to rule on the constitutional questions that are raised ... The court should generally avoid making any unnecessary constitutional pronouncement ...

Thus, it is clear from this paragraph that the court chose not to address the constitutional question raised, other than in an *obiter dictum*.

[10] In *R v. Lunn* [1993] CMAJ No. 7, the power of a convening authority to select the mode of trial was raised at the appeal. The appellant alleged that this power to select the mode of trial violated the rights of an accused under section 15 of the *Charter*. The Court Martial Appeal Court dismissed the appeal. Application for leave to appeal to the Supreme Court of Canada was dismissed without reasons on 14 April 1994.

[11] The Honourable Justice Mahoney, writing for a unanimous court, dealt with the grounds of appeal in the order they were argued. He first addressed the challenge to the constitutionality of standing courts martial because of the discretion provided a senior commander, who also appoints the prosecutor, to select that mode of trial. When one reads this portion of the *Lunn* decision, one can immediately see numerous differences in the convening of courts martial, the conduct of courts martial and the powers of courts martial, as they existed in 1993 compared to today's military justice system, as modified by the 1998 amendments to the *National Defence Act*.

[12] Sections 165.14 and 165.19, that are today at the heart of this constitutional challenge, did not exist in 1993. There was no Director of Military Prosecutions in 1993. Justice Mahoney provides us with a description of the types of courts martial, of the convening process, and of the assignment of a prosecutor to a court martial. As can be understood from his decision, the convening authority was a superior commander called for this specific purpose, the convening authority. The convening authority, a senior officer within the chain of command of the accused, issued the convening order and designated the type of court martial. The convening

authority also, with the concurrence of the Judge Advocate General, appointed the prosecutor. The convening authority had no involvement in the choice of either members or Judge Advocate of a disciplinary court martial, or of the president of a standing court martial.

[13] Justice Mahoney then describes the appellant's *Charter* arguments, and makes certain comments concerning the standing court martial and the disciplinary court martial, and their similar characteristics to civilian criminal trials by judge alone or jury trials. He concludes this portion of his decision by stating:

> Courts martial are *sui generis*. Trial by Disciplinary Court Martial is not, in the military context, intended to be, nor is it, tantamount to trial by jury in the civilian context.

He then, at paragraph 12, states:

> 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.

Finally, he concludes on this matter as follows:

> In my opinion, the existence and exercise of discretion by a convening authority to order a particular mode of court martial do not engage rights of the accused protected under sections 7, 11(d) or 15(1) of the *Charter*. Should, in a particular case, it be established that the discretion has been exercised for an improper purpose or motive, no doubt a remedy under section 24 can be devised. That is not this case.

[14] As can be understood from the *Lunn* decision in 1993, the convening authority, a senior military officer, performed three important duties. Specifically, he or she issued a convening order, designated the type of court martial, and also with the concurrence of the Judge Advocate General, appointed the prosecutor. Bill C-25 greatly modified the military justice system in 1998. Today's *National Defence Act*, at section 165.14 confers to the Director of Military Prosecution, the authority to determine the type of court martial that is to try the accused person. Section 165.19 directs the Court Martial Administrator to convene a court martial in accordance with a determination of the Director of Military Prosecutions under section 165.14. These amendments to the *National Defence Act* have transferred authorities once held by a senior military officer to the Director of Military Prosecutions and to the Court Martial Administrator. What has not changed in the *National Defence Act* is the concept that the choice of mode of

trial is not given to the accused, other than his election to be tried by court martial or by summary trial, should this election be available to the accused.

[15] Although the *Lunn* decision was made in 1993 under a different military justice regime from the military justice system that exists today, the question this court martial appeal Court was asked to answer is basically the same as the question the appellant has put before this court. Although the legislative framework in existence in 1993 is quite different from today's *National Defence Act* provisions pertaining to military justice, the constitutional challenge the applicant is putting forth is identical to the one presented to the Court Martial Appeal Court by Corporal Lunn. The Court Martial Appeal Court answered this question in *Lunn*.

[16] Therefore, based on the doctrine of *stare decisis*, I consider myself bound by the *Lunn* decision on this specific issue of who has the right to elect mode of trial by court martial, the accused or the Crown. Although the Honourable Justice Létourneau did address this issue, he clearly addressed it as an *obiter dictum*. I would also note at this time that he did not refer to the *Lunn* decision in his decision. For the previously mentioned reasons, I consider that, until the Court Martial Appeal Court renders a decision on the constitutionality of sections 165.14 and 165.19 of the *National Defence Act*, the *Lunn* decision must take precedence over the *Nystrom* decision, when an applicant challenges the constitutionality of the discretion of the Director of Military Prosecutions to select a particular mode of trial.

[17] The Honourable Justice Mahoney did indicate in his decision that:

> Should, in a particular case, it be established that the discretion has been exercised for an improper purpose or motive, no doubt a remedy under section 24 can be devised.

I must now ask myself the following question: Has this discretion been exercised for an improper purpose or motive? In the Supreme Court of Canada decision of *R. v. Jolivet*, 144 C.C.C. (3d) 97 (2000), Binni J. delivering the judgement of the five member court, stated at paragraph 19 that:

> [19] The onus to establish an abuse of process on a balance of probabilities rests on an accused: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at p. 461 ...

An abusive use of the discretion given to the Director of Military Prosecution by section 165.14 is tantamount to an abuse of process on the part of the Director of Military Prosecutions.

[18] The applicant states at paragraph 19 of his written submissions:

> There is no need in the present case to demonstrate that the prosecution's power was effectively used abusively. As Justice Létourneau stated at para. 79 of *Nystrom*, the choice of mode of trial conferred by section 165.14 is an advantage conferred on the prosecution that could be abused.

The applicant further states:

> Even if such a proof was needed, however, the Court Martial Appeal Court had the benefit of an extensive trial record as well as the submissions of the Director of Military Prosecutions, and came to the conclusion that the power granted to the prosecution in section 165.14 was being abused. The facts in the present case pertain to essentially the same issue that was before the Court Martial Appeal Court in *Nystrom*, which is the choice of mode of trial.

[19] The applicant has provided this court with specific evidence pertaining to the chronology of the charges before this court. The applicant has provided no evidence to support his allegation that the prosecution's power, under 165.14, was effectively used abusively. I do not know what was the full extent of the evidence provided to the Court Martial Appeal Court in the *Nystrom* case. I can see, by reading the decision, that Justice Létourneau considered the number and type of courts martial convened during the period of September 1, 1999 to March 31, 2003. He also indicated that from 2003 to the date of the *Nystrom* decision, there were between 120 and 125 trials before courts martial. None of these trials have taken place before a panel of members of the military, assisted by a military judge. I can also read that he referred to a portion of the report to parliament by the Right Honourable Lamer, former Chief Justice of the Supreme Court of Canada, entitled, *The First Independent Review of the Provisions and Operations of Bill C-25*. Justice Létourneau then concludes that the power under section 165.14 is being abused.

[20] The applicant cannot expect this standing court martial to speculate as to what evidence was presented to the Court Martial Appeal Court in the *Nystrom* decision, nor can I be expected to speculate as to what elements of that evidence would have indicated, on the balance of probabilities, that the prosecution had abused its power under section 165.14. I will not do that in the *Nystrom*, nor will I do it in this case. The applicant has the burden of proof to present some evidence when he alleges an abuse of process on the part of the Crown. The applicant has chosen not to present such evidence in this application. Therefore, I will not rely on the information contained in an *obiter dictum* to determine that an abuse of process has occurred in the present case. The applicant, at paragraph 34 of his written submissions, alleges that his rights under section 7 of the *Charter* have been infringed and this violation is not justifiable under section 1 of the *Charter*. The applicant has not presented any evidence to this court pertaining to this violation and, again, relies on the *obiter dictum* in the *Nystrom* decision to support his position. With all the deference properly attributed to

any Court Martial Appeal Court decision, including comments made in *obiter dictum*, the applicant cannot expect me to reach such important decisions without the benefit of relevant evidence to the matter at hand.

[20] For these reasons, the court denies the application for an order from this standing court martial declaring sections 165.14 and 165.19 of the *National Defence Act* to be of no force and effect, pursuant to subsection 52(1) of the *Constitution Act 1982*. The court denies the application for an order declaring the determination of the mode of trial in the present case, as well as in all subsequent proceedings, to be null and void. The court also denies the application for an order declaring this standing court martial as having no jurisdiction over the applicant and that this court terminate the proceedings pursuant to QR&O article 112.24(6). These proceedings under subparagraph 112.05(5)(b) and article 112.24 of the Queen's Regulations & Orders for the Canadian Forces are terminated.

LIEUTENANT-COLONEL J.-G. PERRON, M.J.

Counsel:

Major J. Caron, Regional Military Prosecutions Eastern
Counsel for Her Majesty The Queen
Lieutenant-Commander J.C.P. Lévesque, Directorate of Defence Counsel Services
Counsel for Master Corporal J.R.J. McRae