



COURT MARTIAL

Citation: *R. v. LeBlanc*, 2010 CM 4004

Date: 20100201

Docket: 200956

Standing Court Martial

Canadian Forces Base Bagotville
Bagotville, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal A.E. LeBlanc, Applicant

Presiding: Lieutenant-Colonel J.-G. Perron, M.J.

REASONS FOR DECISION ON AN APPLICATION UNDER PARAGRAPH 11(d) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS IN RESPECT OF THE IMPARTIALITY AND INDEPENDENCE OF THE MILITARY COURT

(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] The accused, Corporal LeBlanc, filed an application under subparagraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces (QR&O) for a stay of proceedings under subsection 24(1) of the *Charter of Rights and Freedoms* (Charter), on the grounds of an alleged violation of the accused's rights under paragraph 11(d) of the Charter.

EVIDENCE

[2] The evidence before the court consists of the facts and matters of which the Court has taken judicial notice under section 15 of the *Military Rules of Evidence* and two

exhibits adduced by the applicant with the respondent's consent. Exhibit R1-3 consists of a chronology of decisions, a legislative history and orders-in-council. Exhibit R1-4 consists of five parts: articles 101.15, 101.16, 101.17 and 101.175 of the QR&O, a list of orders-in-council, part of Bill C-7, part of Bill C-45 and a page from the House of Commons Web site.

POSITIONS OF THE PARTIES

Applicant

[3] The applicant is accused of an offence punishable under section 124 of the *National Defence Act*, namely having negligently performed his duties. The applicant wishes to obtain a declaration that this Standing Court Martial is not an independent and impartial tribunal in accordance with paragraph 11(d) of the Charter and that it does not have the jurisdiction to try the applicant, an order for a stay of proceedings under subsection 24(1) of the Charter and an order declaring articles 101.15, 101.16 and 101.17 of the QR&O invalid and of no force or effect under subsection 52(1) of the Charter, since these articles are in violation of paragraph 11(d) of the Charter.

Respondent

[4] The respondent submits that the appointment of military judges for a five-year term does not violate paragraph 11(d) of the Charter and that articles 101.15, 101.16 and 101.17 are also consistent with paragraph 11(d) of the Charter.

DECISION

[5] Paragraph 11(d) of the Charter reads as follows:

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[6] As emphasized by the applicant and the respondent during their addresses, the issue whether the appointment of a military judge for a five-year term violates paragraph 11(d) has been argued before several courts martial over the years. In my opinion, *R. v. Corporal Nguyen*, 2005 CM 57, *R. v. Ex-Leading Seaman Lasalle*, 2005 CM 46, and *R. v. Corporal R.P. Joseph*, 2005 CM 41, disposed of the issue.

[7] I agree with Colonel Dutil in *R. v. Master Seaman R.J. Middlemiss*, 2008 CM 1018, on the effect of these decisions on the statutory provisions at issue. As indicated by Justice Gonthier, writing for the Supreme Court of Canada, at paragraph 28 of *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54,

[t]he invalidity of a legislative provision inconsistent with the Charter does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted,

and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state.

[8] I therefore conclude that the words “for a term of five years” have been removed from subsection 165.21(2) of the *National Defence Act*, which now reads as follows:

A military judge holds office during good behaviour but may be removed by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.

[9] I conclude from this that subsection 165.21(3) was declared invalid and of no force and effect. I therefore agree with the applicant’s view that articles 101.15, 101.16 and 101.17 of the QR&O have no statutory basis.

[10] The applicant alleges that, following the amendments to these articles and the reappointment of Lamont M.J., a reasonable person might wonder whether the judge appointed to preside over the current trial will also be reappointed by an order-in-council. He argues that the uncertainty created by Lamont M.J. in *R. v. Corporal R.D. Parsons*, 2005 CM 16, and Dutil M.J. in *Nguyen, Lasalle and Joseph* give rise to a perception of a lack of independence and that this uncertainty was increased by the reappointment of Lamont M.J..

[11] The state of the law on this point is clear, and it is expressed at paragraph 28 of *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54. The actions taken by every branch of government, apart from legislative action in certain cases, cannot change the state of the law. A court of competent jurisdiction declared that certain statutory provisions violated the Charter and determined what action would be necessary to correct the situation. The Supreme Court of Canada clearly describes the legal effect of this decision. Moreover, in *R. v. Dunphy* and *R. v. Parsons*, 2007 CMAC 1, although it did not have to rule on the constitutionality of subsections 165.21(2) and (3), the Court Martial Appeal Court of Canada clearly stated in an *obiter dictum* at paragraphs 18 to 23 that it agreed that military judges be awarded security of tenure until retirement.

[12] The applicant’s view is that subsection 165.21(2) of the *National Defence Act*, as amended, and the declarations of invalidity of subsection 165.21(3) by the decisions discussed above make this Act consistent with paragraph 11(d) of the Charter. The applicant did not adduce any evidence to support his argument on the possible perception of a lack of independence and impartiality apart from the order to reappoint Lamont M.J. and the amendments made to articles 101.15, 101.16 and 101.17 of the QR&O.

Decision

[13] In light of the state of the law described above and the lack of evidence for the perception of a lack of independence and impartiality, the Court does not find that there is a perception that a military judge presiding a standing or other court martial has

insufficient security of tenure to allow him or her to determine cases on their merits without the interference of any outsider with the way in which the judge conducts his or her case and makes his or her decision.

[14] The application for a stay of proceedings under subsection 24(1) of the Charter on the grounds of an alleged violation of the accused's rights under paragraph 11(d) of the Charter is therefore dismissed.

Counsel:

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Counsel for Corporal A.E. LeBlanc (applicant)

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