Citation: *R. v. ex-Private J.S. Brisson* 2008 CM 3004

Docket: 200618

STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
CANADIAN FORCES BASE GAGETOWN

Date: 11 June 2008

PRESIDING: LIEUTENANT-COLONEL L-V. d'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
EX-PRIVATE J.S. BRISSON
(Accused)

DECISION RESPECTING AN ALLEGED VIOLATION OF SECTIONS 7 AND 11(D) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR NOT ALLOWING THE ACCUSED TO MAKE AN ELECTION AS TO HIS MODE OF TRIAL
(Rendered orally)

INTRODUCTION

[1] Ex-Private Brisson is charged under section 130 of the *National Defence Act*, firstly for possessing PCP for the purpose of trafficking contrary to sub-section 5(2) of the *Controlled Drugs and Substances Act*, secondly for possessing marijuana contrary to sub-section 4(1) of the *Controlled Drugs and Substances Act*, and thirdly he is charged under section 129(2) of the *National Defence Act* for conduct to the prejudice of good order and discipline for using marijuana contrary to article 20.04 of the *Queen's Regulations and Orders*.

[2] After the oaths were taken, and further to a plea of not guilty entered by the accused for the three charges on the charge sheet before this court martial, the prosecution proceeded with its case on 20 September 2007, and the court martial adjourned the trial hearing a first time on that same day. Then, from 18 to 22 February 2008, this court martial continued to hear the evidence from the prosecution, and it made a decision to adjourn the case for continuing the trial hearing on 9 June 2008.

[3] On 9 June 2008, ex-Private Brisson made an application, for which a written notice was received by the prosecutor and by the military judge assigned to preside this court martial on 1 June 2008, in order to object to the trial being proceeded with because this Standing Court Martial will not have jurisdiction to proceed with this matter.

[4] This application is brought by the accused as a motion pursuant to the *Canadian Charter of Rights and Freedoms* (the *Charter*), because he was not provided his constitutional right to make an election as to his mode of trial as guaranteed by section 7 and paragraph 11(d) of the *Charter*, and accordingly he requests that I stay the proceedings in accordance with paragraph 24(1) of the *Charter*.

[5] Alternatively, this application is also brought by the accused by way of a preliminary motion made under *Queen's Regulations and Orders* article 112.05(5)(b) and (e), as a procedural matter to be determined by the military judge presiding at the Standing Court Martial, as mentioned at QR&O article 112.03 (2).

THE EVIDENCE

[6] The evidence on the application, heard in a *voir dire* that I opened, consisted of:

> Exhibit VD3-1, the Notice of Application. This document was entered in evidence by consent;
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> Exhibit VD3-2, the convening order for this court martial signed by M. Cotter, the Court Martial Administrator, on 22 August 2006. This document was also entered in evidence by consent;
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> Exhibit VD3-3, the charge sheet attached to the convening order and signed on 7 November 2005 by Major S.D. Richards, an officer assisting and representing the Director of Military Prosecutions. This document was also entered in evidence by consent; and
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> the judicial notice taken by the court martial of the facts and issues under Rule 15 of the Military Rules of Evidence.

CONTEXT AND FACTS

[7] This application is brought by the accused in the light of the decision of the Court Martial Appeal Court (CMAC) in *Trépanier and Her Majesty the Queen and ex-Corporal Beek*, 2008 CMAC 3, delivered on 24 April 2008. Essentially, this decision was about the constitutionality of the Director of Military Prosecutions' (DMP)

authority to determine the type of court martial (section 165.14 of the *NDA*), and to impose such determination to the Court Martial Administrator (CMA)(subsection 165.19(1) of the *NDA* and *QR&O* article 111.02(1)) in order for her to convene a court martial and appoint panel members of a Disciplinary or a General Court Martial, when applicable.

[8] It is not my intent to proceed again with an analysis of the CMAC decision in *Trepanier*. I refer both parties to what I wrote at paragraph 19 to 33 of the *Corporal Strong* decision on that matter.

[9] However, I want to reiterate that the CMAC decision in *Trepanier* did two things

> a. Declared void *ab initio* the authority given to the DMP in the *NDA* to determine the type of court martial that is to try an accused and consequently declare constitutionally invalid section 165.14 of the *NDA* and the words "in accordance with the determination of the Director of Military Prosecutions under section 165.14" in subsection 165.19(1) of the *NDA* and article 111.02(1) of the *QR&O*;
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> b. Established that a person subject to the Code of Service Discipline and charged with a service offence must be given the opportunity to exercise his right to choose the type of court martial he wants to be tried by further to the preferral of charges by the DMP, and that such right does belong only to that person.

[10] This Standing Court Martial was originally convened for 12 December 2006. However, on request of the prosecutor, who raised unusual but logical circumstances, this court martial was adjourned by me with the consent of both counsel to 13 August 2007. On 13 August 2007, the accused did not show up before me, and then I issued a warrant for arrest for him. On 19 September 2007, the accused was brought before me and I proceeded with the bail hearing. The accused was released by me, with conditions, further to an undertaking he signed.

[11] On 20 September 2007, the accused, the prosecutor, the defence counsel, and I , as the military judge assigned to preside the Standing Court Martial, were present at the Canadian Forces Base Gagetown in order to proceed with the case. Then, the court martial was opened, oaths were taken, all these steps made in accordance with paragraphs 1 to 4 of QR&O 112.05. Then, I asked the accused to enter a plea on the three charges on the charge sheet, one at a time, which he did. The accused pleaded not guilty on the three charges. The trial in respect of those charges started to proceed with, and the prosecutor proceeded with the case for the prosecution, and the first prosecution witness was heard by this court.

[12] However, for strategy reasons, the prosecutor announced that he intended to proceed with a *voir dire* concerning the admissibility of three statements made by the accused. Considering how long would be the *voir dire* and the remaining time to proceed for that week, it was agreed by both counsel and I to adjourn the case to 18 February 2008. From 18 to 20 February 2008, the prosecutor proceeded with the *voir dire*, and on 22 February 2008 I made a decision that these three statements were admissible in this trial. Then, a second witness was heard that same day and I made a determination concerning the admissibility of different exhibits. At that point, considering the unavailability of the defence counsel to proceed on the week after, the trial was then adjourned to 9 June 2008, with the consent of both parties.

[13] It is agreed by both parties that, between the time the CMAC decision was issued to the time counsel addressed the court martial on this application, which is between 24 April and 9 June 2008, the accused was never given an opportunity to choose the type of court martial he would like to be tried by for the charges brought before this court martial.

THE ISSUE

A. The procedure

[14] The substance of the accused's application is exactly about the situation I just described earlier, which he identified in his application as the fact that he was not provided his constitutional right to make an election as to his mode of trial as guaranteed by section 7 and paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*. Because of this situation, he claims that this Standing Court Martial has no jurisdiction to try him anymore, and, as a remedy, he requests that I stay the proceedings in accordance with paragraph 24(1) of the *Charter*.

[15] Before proceeding with the analysis, I have to identify, first, what is the exact nature of this procedure in order to appropriately dispose of the legal issue raised by the accused in his application. In *R. v. Corporal S.A. Strong*, 2008 CM 3019, I made the decision, on 15 May 2008, to allow, in part, the motion raising the same jurisdictional issue as the one in this case, and I terminated the proceedings following the indication of the accused that he did not want to be tried by the Disciplinary Court Martial I was presiding. In *Strong*, the application was brought before the DCM had commenced, which is before the accused pleads to the charges, see the Note under QR&O 110.10 for when a trial by court martial commences.

[16] Because I considered that the jurisdiction of the court was at issue and that this question was brought to the court by the accused as a plea in bar pursuant to QR&O 112.05(5)(b), I made the decision that it shall be treated, at that stage of the proceedings, as a procedural matter only, and that it did not require from me any legal

analysis of an infringement of the constitutional rights of the accused as guaranteed by section 7, paragraph 11(d) of the *Charter*, and also a legal analysis of the necessity for me to order a stay of proceedings in accordance with paragraph 24(1) of the *Charter*.

[17] In other words, at a pre-trial stage of the proceedings, I had to determine if the Disciplinary Court Martial I was assigned to preside was the appropriate forum to hear the disciplinary matter concerning Corporal Strong, considering the latter did not choose to be tried by that type of court. In accordance with the Court Martial Appeal Court decision in *Trepanier* quoted above, my response was that it would be the appropriate forum if he chooses to be tried by it. He clearly told me that he did not want to be tried by it. Then, I terminated the proceedings.

[18] Here, in this case, the application is brought after the accused pleaded not guilty to the charges and after the court martial has commenced. In fact, it is brought while the prosecutor is proceeding with his case. Then, because of the stage of the proceedings that this application is brought, which is directly during the main trial, the approach to the issue raised by the accused must be different. Reality is that, knowing now that the Standing Court Martial has not been chosen by the accused, how does it impact on the continuation of the trial in light of the CMAC decision in *Trepanier*? This legal issue is raising more than a procedural question. It raises a fundamental issue of fairness for the accused to continue to be tried by this court martial while it is well known that he never expressed his intent to do so.

[19] These circumstances clearly call for an analysis by this court of the right of the accused to a fair trial under paragraph 11(d) of the *Charter.* Accordingly, it requires from me a legal analysis of an infringement or denial of the constitutional rights of the accused as guaranteed by section 7 and paragraph 11(d) of the *Charter*, and also a legal analysis of the necessity for me to order a stay of the proceedings, as suggested by the accused, in accordance with paragraph 24(1) of the *Charter.*

B. The questions to be answered by the military judge to determine the issue

[20] Having now established that a legal question raised by the accused's application is about the authority for this Standing Court Martial to continue to try the accused despite the fact that he did not choose such thing, and that this matter must be resolved at this stage of the proceedings in the context of an analysis under the *Charter*, I must answer two questions in order to make my determination on that issue:

> a. Does the fact that ex-Private Brisson never chose the type of court martial he is tried by, which is a Standing Court Martial, constitute a denial of his right to a fair trial as guaranteed by section 7 and paragraph 11(d) of the *Charter*?

b. If the answer to the first question is yes, does a stay of the proceedings by this court, as requested by the accused in his application, constitute the appropriate and just remedy in the circumstances, and, if not, what is?

ANALYSIS

A. THE RIGHT TO A FAIR TRIAL

[21] Elements such as the composition of the court martial and its powers of punishment may influence the way the accused contemplates his defence before it. Then, the CMAC concluded in the *Trepanier* decision that the choice of type of court martial for trying an accused within the military justice system belongs to the accused, considering that it falls under his or her right for a fair trial under section 7 and paragraph 11(d) of the *Charter*, because the election as to the trier of fact or mode of trial is part of the principle of fundamental justice of full answer and defence. It explains well why the CMAC declared constitutionally invalid in *Trepanier* section 165.14 of the *NDA*, and the words, and I quote, "in accordance with the determination of the Director of Military Prosecutions under section 165.14," in subsection 165.19(1) of the *NDA*, and article 111.02(1) of the QR&O.

[22] When consideration is given to courts martial convened before the date of the CMAC decision in *Trepanier*, which is 24 April 2008, but taking place after the same day, then, for the reasons I mentioned in the *Corporal Strong* decision on 15 May 2008, at paragraph 36 to 44, consequently it is my conclusion that the DMP representatives decision on 7 November 2005, to have the accused tried by a Standing Court Martial for the charges on the charge sheet before this court, and the CMA's decision to convene on 22 August 2006 such type of court martial, are both legal and valid.

[23] However, in the absence of a CMAC decision to suspend the effect of its declaration of invalidity in *Trepanier*, the validity of the DMP's legal authority to determine the type of court martial that is to try an accused and to direct the CMA on that matter, that was maintained through the application of the *de facto* doctrine ceased to have any effect on the date of the CMAC decision, which is on 24 April 2008. It means, that since 24 April 2008, the responsibility for choosing the type of court martial that will try a person subject to the Code of Service Discipline belongs to the accused that is the subject of the court martial. Then, every court martial that will take place after 24 April 2008 shall enforce the CMAC *Trepanier* binding decision on that topic, and it does extend to the ongoing courts martial that were convened before that date and at whatever stage they are.

[24] Essentially, as it is in criminal procedure, since 24 April 2008, a court martial of any type will become the trial court if, and only if, the accused made the

choice to be tried by it. As a matter of fact, since 24 April 2008, up to today, ex-Private Brisson was denied an opportunity to choose the type of court martial he wants in order to dispose of the charges on the charge sheet before this court. Put in a different way, he never chose to be tried by this Standing Court Martial. Considering the CMAC's decision in *Trepanier*, and what I have just mentioned about on the matter of an election by an accused concerning the type of court martial, it is my conclusion that by being denied to choose the type of court martial he wants to be tried by, including the fact to confirm that he wants to be tried by this Standing Court Martial, ex-Private Brisson's right for a fair trial under section 7 and paragraph 11(d) of the *Charter* has been denied. This denial extends to all charges before this court.

[25] The CMAC discussed, in *Trepanier*, the issue of the accused's right to choose the mode of trial only with the perspective on service offences punishable under section 130 of the *NDA*. It seems that it was suggested by the CMAC that those offences referring to the *Criminal Code* are serious enough to impose on the system of courts martial the obligation to provide an opportunity to the accused to choose the type of court martial on any of them. Nothing was said by the CMAC about pure military service offences that can be found under the Code of Service Discipline. Considering that for all those pure military service offences it always exists a possibility for a court martial to deprive an accused of his liberty if he is found guilty by it, I conclude that nothing precludes the court martial system to also provide such opportunity to the accused to choose the type of court martial he wants to be tried by for all other service offences of the *NDA* than the one's punishable under section 130 of the *NDA*. Then, the answer to the first question, at paragraph 20 of this decision is yes.

B. THE APPROPRIATE AND JUST REMEDY IN THE CIRCUMSTANCES

[26] The defence counsel, on behalf of the accused, requested that if I came to the conclusion that ex-Private Brisson's right for fair trial under section 7 and paragraph 11(d) of the *Charter* has been infringed or denied, that I stay the proceedings of this court martial. First, this Standing Court Martial is a court of competent jurisdiction to provide a remedy under paragraph 24(1) of the *Charter* because, at this stage of the proceedings, it possesses jurisdictions over the subject matter, over the person, and it has jurisdiction to grant the remedy as established in *R. v. Hynes*, [2001] 3 S.C.R. 623.

[27] Now, under paragraph 24(1) of the *Charter*, a court may craft any remedy that it considers appropriate and just in the circumstances. In doing so it must exercise a discretion based on its careful perception of the nature of the right and of the infringement or denial, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies which usurp the role of the other branches of governance. Boundaries of the court's proper role will vary according to the rights at issue in the context of each case.

[28] There are some broad considerations that I should bear in mind in evaluating the appropriateness and justice of a potential remedy. As mentioned in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3, at paragraph 52 to 59, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants and employs means that are legitimate within the framework of our judged constitutional democracy. It is a judicial one which vindicates the right while invoking the function and powers of a court. An appropriate and just remedy is also fair to the party against whom the order is made. Since section 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*, the judicial approach to remedies must remain flexible and responsive to the needs of a given case. The meaningful protection of *Charter* rights, and in particular the enforcement of paragraph 11(d) referring to the right for a fair trial by allowing the accused to choose the type of court martial, may thus, in some cases, require the introduction of novel remedies.

[29] Concerning the stay of proceedings requested by the accused on all charges, it is true that it would be a meaningful remedy for him. As I mentioned earlier, the accused, not having provided authority to this court to dispose of the charges, it would avoid a situation that may potentially perpetuate the denial of his right by the continuation of this court without asking him what he wants. It will also address the circumstances in which the right was denied, which is the fact that nobody bothered to ask him what type of court martial he wanted since 24 April 2008. It would also be an effective remedy for him by putting an end to a disciplinary procedure before a type of court martial that he never chose.

[30] However, staying the proceedings would be totally unfair to the party against whom the order is made, which is, in this case, the prosecution, who is representing interests of the public, including the Canadian Forces. As mentioned at paragraph 58 of the *Doucet-Boudreau v. Nova Scotia (Minister of Education)* decision, it would, and I quote,"impose substantial hardships that are unrelated to securing the right."

[31] Basically, it would mean that for all courts martial that were convened before 24 April 2008, it would stop the actual proceedings before current courts martial for which the right to elect the type of court martial was denied to the accused, including this court martial, and will preclude the prosecution to proceed with the same charges before any other type of court martial. I think it would go far beyond the idea of providing to an accused the type of court martial he wants to be tried by. The reality is that such remedy would bring the administration of justice into disrepute because it would preclude the prosecution to pursue alleged disciplinary and criminal service offences, like those in the present case for trafficking and possessing and using drugs,

because the person who is the subject of those charges was denied the right to choose an appropriate forum for dealing with the matter.

[32] Then, what would be the appropriate and just remedy in the circumstances? The accused, being before a Standing Court Martial, it would be appropriate at this stage of the proceedings that the court ask to the accused if he still wants to be tried by this Standing Court Martial. By doing so the court will allow a meaningful remedy that will address the circumstances in which the right to a fair trial was denied to the accused. It will be fair to the prosecution by giving it the opportunity to consider starting over again with the same charges before another type of court martial in accordance with the choice made by the accused if the accused decides not to be tried by this Standing Court Martial. It will constitute a legitimate means within the framework of our constitutional democracy because it is a legitimate solution that was contemplated by the CMAC's decision in *Trepanier*, and that such approach already exists in the criminal procedure. It would invoke the function and powers of the court martial, including the one for the due exercise of its jurisdiction pursuant to section 179 of the *NDA*.

[33] Finally, the court will disclose open-mindedness, flexibility, and evolution by providing the accused an opportunity to exercise, in an appropriate and just manner, his right to choose the type of court martial despite the absence of any specific mechanism on that matter. If the accused tells this Standing Court Martial that he wants to be tried by it, then everything that has been done so far since the beginning of it will be considered as legally valid and the court martial would continue to proceed. If the accused declines to answer the question or tells the Standing Court Martial that you refuse to be tried by it, then this court will not have any other choice than to order an interim stay of proceedings on all charges until the Director of Military Prosecutions prefers the charges in accordance with the election of the accused on the type of court martial he wants, and consequently terminate the proceedings of this Standing Court Martial.

Conclusion

[34] The *Charter* application made by the accused is granted on all charges. The fact that ex-Private Brisson never chose to be tried by this Standing Court Martial constitutes a denial of his right to a fair trial as guaranteed by section 7 and paragraph 11(d) of the *Charter*. As the appropriate and just remedy in the circumstances, I will ask the accused if he wants to be tried by this Standing Court Martial for the charges on the charge sheet. If his answer is no, or if he declines to answer to my question, then I will order an interim stay of proceedings on all charges that will take effect until the Director of Military Prosecutions prefers the charges on the charge sheet before this court in accordance with the election that will be made by the accused on the type of court martial he wants, and terminate the proceedings of this Standing Court Martial.

However, if his answer is yes, this Standing Court Martial will consider that everything that has been done so far, since the beginning of it, is legally valid, and the court martial will continue to proceed.

LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.

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