Citation: *R. v. Officer-Cadet J.S.K. Trépanier*, 2007cm1002

Docket: 200660

STANDING COURT MARTIAL
CANADA
KINGSTON, ONTARIO
ROYAL MILITARY COLLEGE OF CANADA

Date: January 26, 2007

PRESIDING: COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
(Prosecutor-respondent)
v.
CADET J.S.K. TRÉPANIER
(Accused-applicant)

Publication ban

The court has directed that the identity of and any information that could disclose the identity of the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON A MOTION UNDER SUBPARAGRAPH 112.05(5)(*e*) OF *THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES* IN RELATION TO A VIOLATION OF SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Delivered from the bench)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] This is a motion by the defence under subparagraph 112.05(5)(*e*) of the *Queen's Orders and Regulations for the Canadian Forces* on the ground that this standing court martial has no jurisdiction to try the accused, because sections

165.14 and 165.19 of the *National Defence Act* are unconstitutional on the ground that they give the power to choose the type of court martial to the director of military prosecutions and not the accused. The applicant submits that the advantage given to the prosecution violates the rights of the accused under section 7 of the *Canadian Charter of Rights and Freedoms*.

[2] The applicant is asking that this Court declare the following statutory and regulatory provisions to be unconstitutional under section 52 of the *Constitution Act, 1982*:

(1) section 165.14 of the *National Defence Act*;

(2) section 165.19 of the *National Defence Act* and section 111.02 of the QR&O.

The applicant is further asking that the Court grant him a constitutional exemption in addition to the declaration of invalidity, so that he will not be prosecuted, if it found that one or more of the impugned provisions was unconstitutional but decided to suspend the declaration or declarations of invalidity. He is also asking that this Court order a stay of proceedings under section 24(1) of the Charter.

EVIDENCE

[3] The evidence before this Court consists of the following:

(1) matters within judicial notice under Rule 15 of the Military Rules of Evidence;

(2) the exhibits filed with the Court with the consent of counsel and solely for the purposes set out in the consent of counsel: Exhibits R1-2 (Joint Statement of Facts), R1-3 (CMPS Policy 016/06) and R1-7 (Judicial Notice under Rule 16 of the Military Rules of Evidence).

POSITIONS OF THE PARTIES

The Applicant

Re: Constitutional violation by sections 165.14 and 165.19 of the National Defence Act

[4] The applicant alleges that sections 165.14 and 165.19 of the *National Defence Act* are unconstitutional because they violate the rights of the

accused guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter), which reads as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[5] In support of his motion, the applicant essentially relies on the *obiter dictum* of Mr. Justice Létourneau of the Court Martial Appeal Court in *R. v. Nystrom* [2005] C.M.A.J. No 8, 2005 CMAC 7, CMAC-483, in which he expressed concerns as to the constitutional validity of section 165.14 of the *National Defence Act*, which gives the director of military prosecutions that absolute power to determine the type of court martial. In *Nystrom*, Létourneau J. stated, at paragraph 64:

> [64] Although it is not necessary to discuss the constitutionality of section 165.14 of the Act, I am unable to overlook the deep concern this provision raises, particularly in view of the recent expansionist context of the military criminal justice system. I reproduce the section in question:
>
> > **165.14** When the Director of Military Prosecutions prefers a charge, the Director of Military Prosecutions shall also determine the type of court martial that is to try the accused person and inform the Court Martial Administrator of that determination.

He went on to say, at paragraphs 68 and 69:

> [68] Furthermore, the 1998 amendments to the Act through Bill C-25, now chapter 35 of the 1998 statutes, section 22, expanded the jurisdiction of the military courts by allowing them to try sexual offences, until then tried only by the civilian courts. Section 165.14 was adopted at the same time, giving the prosecution the power to choose the mode of trial: see S.C. 1998, c. 35, s. 42.
>
> [69] An initial result of this expansion of the military criminal justice system was that members of the Canadian Armed Forces lost the right to trial by jury for common law offences such as those offences provided for in the Criminal Code: paragraph 11(f) of the Canadian Charter of Rights and Freedoms denies members of the Canadian Armed Forces the right to such trials for offences under military law tried before a military tribunal.

The applicant submits that the very important comments made by Létourneau J. allow this Court to conclude that the choice of trial by one type of court martial rather than another must be the accused's because it represents an advantage or

benefit that is intrinsically connected with the right of the accused to control his or her defence, which is a principle of fundamental justice. Accordingly, he submits, sections 165.14 and 165.19 violate the rights guaranteed by section 7 of the Charter. He submits that the choice of the type of court martial that will try the accused, by the accused, must be interpreted as forming part of his right to control his own defence, which is part of the principle of fundamental justice guaranteeing the right to make full answer and defence. The applicant relies on paragraphs 78 and 79 of the decision in *Nystrom* on this point, which read as follows:

> [78] However, with due respect for those who hold a different view, I am of the opinion that the choice of mode of trial partakes of a benefit, an element of strategy or a tactical advantage associated with the right of an accused to present full answer and defence and control the conduct of his or her defence. This right is recognized as a principle of fundamental justice: see *R. v. Swain*, [1991] 1S.C.R. 933, at page 972. The right to elect the mode of trial is, before the civilian courts, a right extended to an accused who makes use of it according to and for the purpose of his defence. In *R. v. Turpin, Siddiqi and Clauzel* (1987), 60 C.R. (3d) 63, the Ontario Court of Appeal held that it was an advantage conferred by law. At paragraph 27, the Court writes:
>
> > What we are faced with in this case is not so much whether one form of trial is more advantageous than another, i.e. whether a person charged with murder is better protected by a judge and jury trial or by a trial by judge alone. Rather, the question is whether having that choice is an advantage in the sense of a benefit of the law. Mr. Gold, on behalf of the respondents in this case, suggested that it is the having of the option, "the ability to elect one's mode of trial", that was a benefit which accused persons charged with murder in Alberta had over accused persons charged with murder elsewhere in Canada. We have to agree with that submission. A choice as to having or not having a jury trial (even though limited by the overriding determination by the trial judge), based upon the advantages of one mode of trial over the other because of a wide range of factors, such as the nature and circumstances of the killing, the amount of publicity, the reaction in the community, the size of the community from which the jury is being drawn, and even the preference of defence counsel with respect to trying to convince a jury or a judge of the defence version of the facts (or leave them with a reasonable doubt), indicates that having that choice must be considered a benefit. The absence of that benefit in Ontario must be considered a disadvantage.
>
> (Emphasis added

Létourneau J. continued, at paragraph 79 of *Nystrom*:

> [79] There is no doubt in my mind that the choice of mode of trial conferred by section 165.14 is an advantage conferred on the prosecution that could be abused. Cory J. states in *R. v. Bain*, [1992] 1 S.C.R. 91, at pages 103 and 104: "Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively."

[6] The applicant also submits that the result of the unilateral decision by the Deputy Director of Military Prosecutions to the type of court martial in this case, a standing court martial, is that the accused has lost the benefit of the power to choose between a panel assisted by a military judge and a judge sitting alone. Citing *Nystrom* again, he adds that it is not necessary to show that the prosecution used its discretion abusively. The applicant submits that sections 165.14 and 165.19 of the *National Defence Act* therefore violate the rights and guarantees set out in section 7 of the Charter.

Re: Remedy sought by the applicant

[7] The applicant therefore asks that, in addition to the declarations of invalidity, this Court grant him a constitutional exemption so that he will not be prosecuted if it found that the impugned provision or provisions are unconstitutional but decided to suspend the declarations of invalidity. As I said a little earlier, he is also asking that this Court direct a stay of proceedings, under section 24(1) of the Charter.

The Respondent

[8] The respondent submits that the applicant has not established that choice of mode of trial is a principle of fundamental justice in Canada, let alone that the choice of the type of court martial that is to try a person subject to the Code of Service Discipline is such a principle that operates in an accused's favour. The respondent adds that the applicant has not satisfied the Court in terms of his burden of proving that there is a principle of fundamental justice, under the tests laid down by the Supreme Court in the recent decision in *Canadian Foundation for Children*, [2004] 1 S.C.R. 76.

[9] The respondent submits that there is no principle of fundamental justice in Canada that gives the accused the right to choose a particular mode of trial in all cases. In the respondent's submission, that choice may be subordinate to other interests in appropriate contexts. In the specific context of the Canadian Forces, the respondent argues that an accused has never been given that choice, as shown by the legislative history of the convening of courts martial submitted by the respondent.

She adds that in criminal law, the law provides for a number of exceptions to an accused's right to elect a particular mode of trial. The respondent drew the Court's attention to Part XXVII (summary convictions) and Part XIX (trial without jury) of the *Criminal Code*, which do not allow the accused to elect the mode of trial.

[10] The respondent submits, on the contrary, that the power assigned to the Director of Military Prosecutions, to choose the type of court martial by which the accused will be tried, is a matter of prosecutorial discretion. The responsibility for choosing the type of court martial found in section 165.14 of the *National Defence Act* is similar, in its submission, to the responsibility of Crown counsel throughout Canada when they have to determine whether they will proceed by indictment or by summary conviction proceedings. The respondent admits that the power to choose the type of court martial, as granted and provided in section 165.14 of the *National Defence Act*, is a purely discretionary power, which is thus not subject to review by the courts unless it is proved that there has been some abuse of that power. The respondent submits that in *R. v. Beare* [1988], 2 S.C.R. 387, the Supreme Court clearly established the importance of prosecutorial discretion, in criminal law, at paragraphs 51 to 53 of that decision. The respondent is of the opinion that if the applicant had proved abuse of the discretion provided in section 165.14 of the *National Defence Act*, the appropriate remedy would be a claim for a remedy under section 24(1) of the Charter.

[11] The respondent submits that what Létourneau J. said in *R. v. Nystrom* is not binding on this Court and that the decision of the Court Martial Appeals Court in *R. v. Lunn* (1993), 5 C.M.A.C. 157 is still the current positive law on this issue. The respondent pointed out that in *Lunn*, the appellant argued that the Standing Court Martial was unconstitutional because of the discretion assigned to a superior officer, to choose the mode of trial.

Re: Remedy sought by the applicant

With respect to the remedy sought, the respondent submits that no remedy is required because the applicant failed to discharge his burden of proof, but added that if the Court were to conclude that the motion should be allowed, in whole or in part, and declare certain provisions of the *National Defence Act* or the regulations under that Act to be void and of no effect, then any declaration of invalidity should be suspended so that Parliament could make the necessary corrections, for a sufficient period of time to enable Parliament to fill the legal void thus created.

DECISION

[12] It must be noted that the applicant's motion is essentially based on the *obiter dictum* of Létourneau J.A. of the Court Martial Appeal Court in *R. v.*

Nystrom, in which he expressed his concern about the constitutional validity of section 165.14 of the *National Defence Act* which gives the Director of Military Prosecutions the absolute power to determine the type of court martial. I would like to reiterate what Létourneau J.A. said in *Nystrom* when he stated, at paragraph 64:

> [64] Although it is not necessary to discuss the constitutionality of section 165.14 of the Act, I am unable to overlook the deep concern this provision raises, particularly in view of the recent expansionist context of the military criminal justice system. I reproduce the section in question:

And I will spare you the reading of 165.14. He went on to say, at paragraphs 68 and 69:

> [68] Furthermore, the 1998 amendments to the Act through Bill C-25, now chapter 35 of the 1998 statutes, section 22, expanded the jurisdiction of the military courts by allowing them to try sexual offences, until then tried only by the civilian courts. Section 165.14 was adopted at the same time, giving the prosecution the power to choose the mode of trial: see S.C. 1998, c. 35, s. 42.

And further, at paragraph 69:

> [69] An initial result of this expansion of the military criminal justice system was that members of the Canadian Armed Forces lost the right to trial by jury for common law offences such as those offences provided for in the Criminal Code: paragraph 11(f) of the Canadian Charter of Rights and Freedoms denies members of the Canadian Armed Forces the right to such trials for offences under military law tried before a military tribunal.

[13] That statement is correct, but with respect, I believe it must be qualified. The amendments to the *National Defence Act* made by the *Act to amend the National Defence Act and to make consequential amendments to other Acts,* 1998, c. 35, which received Royal Assent on December 10, 1998, made major changes to the military justice system. They modernized the Code of Service Discipline and helped to enhance the integrity and impartiality of the system. One of those amendments was to assign the power to choose the type of court martial by which a person subject to the Code of Military Discipline would be tried to the Director of Military Prosecutions, under section 165.14 of the *National Defence Act*. Section 165.19 of the Act merely assigns the Court Martial Administrator responsibility for convening the court martial selected by the Director of Military Prosecutions where a charge is preferred. It is important to note, however, that the power to choose the type of court martial was exercised by the convening authority, and that that authority was part of the chain of command, before the 1998 legislative amendments.

[14] Section 130 of the *National Defence Act,* which deals with common law offences and makes them service offences under the Act, was not amended by Bill C-25, now chapter 35 of the 1998 Statutes, section 22. Rather, it was section 70 of the *National Defence Act* which was revised in relation to the jurisdiction of service tribunals to try a person charged with certain offences. Before 1998, that section read as follows:

> **70.** A service tribunal shall not try any person charged with any of the following offences committed in Canada:
>
> (*a*) murder;
>
> (*b*) manslaughter;
>
> (*c*) sexual assault;
>
> (*d*) sexual assault committed with a weapon or with threats to a third party or causing bodily harm;
>
> (*e*) aggravated sexual assault; or
>
> (*f*) an offence under sections 280 to 283 of the Criminal Code.

while it now provides as follows:

> **70.** A service tribunal shall not try any person charged with any of the following offences committed in Canada:
>
> (*a*) murder;
>
> (*b*) manslaughter; or
>
> (*c*) an offence under sections 280 to 283 of the Criminal Code.

It is entirely true that the jurisdiction of service tribunals was expanded in 1998 to include sexual assaults committed in Canada. However, that is the only amendment that relates to the jurisdiction of the military justice system in Canada. Section 130 was not amended. That section includes the common law offences. While the expansionist nature of that amendment to section 70 cannot be denied, it must be acknowledged that it is hardly the cornerstone of the reform of the military justice system in Canada. Far from it. In terms of jurisdiction to try sexual assault offences, it must be added that service tribunals already exercised that jurisdiction outside Canada before this legislative amendment, and that this is still the situation. Apart from that limited expansion of the jurisdiction of service tribunals, it is not correct to say that the reason that members of the Canadian Armed Forces lost the right to trial by jury is that expansion of the military criminal justice system. With due respect for

the contrary opinion, the loss of the right of a person subject to the Code of Service Discipline to be tried by jury is a result of section 11(*f*) of the Charter.

[15] In *Nystrom*, the Court Martial Appeal Court added: "Section 165.14 was adopted at the same time, giving the prosecution the power to choose the mode of trial ... ." Bill C-25, now chapter 35 of the 1998 Statutes, created the position of Director of Military Prosecutions, appointed by the Minister for a maximum renewable term of four years, subject to removal for cause by the Minister on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. The Director of Military Prosecutions now prefers charges against individuals tried by courts martial, chooses the type of court martial by which the accused will be tried, and conducts prosecutions before courts martial. He or she also represents the Minister in appeals when so instructed. These subjects are covered in sections 165.1 to 165.17 of the Act.

[16] On the question of the power to choose the mode of trial, this Court respectfully believes that it is sometimes difficult to use the mechanisms unique to the civilian criminal justice system set out in the *Criminal Code* and apply them in the context of the military justice system, when they have no equivalent in the latter system. In fact, section 2 of the *National Defence Act* defines "service tribunal" as follows:

> "service tribunal" means a court martial or a person presiding at a summary trial;

That is how the Act defines a service tribunal. The right to a trial before a court martial is set out in sections 162.1 and 162.2, which read as follows:

> **162.1** Except in the circumstances prescribed in regulations made by the Governor in Council, an accused person who is triable by summary trial has the right to elect to be tried by court martial.
>
> **162.2** When an accused person elects to be tried by court martial, the charge in respect of the accused person shall be referred to the Director of Military Prosecutions in accordance with regulations made by the Governor in Council.

A court martial is itself defined in section 2 of the Act:

> "court martial" includes a General Court Martial, a Special General Court Martial, a Disciplinary Court Martial and a Standing Court Martial;

[17] It must be acknowledged, when we read the remarks of Létourneau J.A. in *Nystrom*, that the meaning he gave to the expression "choice of mode of trial" refers solely to the "choice of type of court martial". Although it is true that the

power to choose the type of court martial was assigned to the prosecutor, who is the Director of Military Prosecutions, under section 165.14, it is just as true that that power has never been exercised by an accused in the military justice system in Canada. Immediately before section 165.14 of the Act came into force, that power was in the hands of the convening authority designated by regulations made by the Governor in Council. The parties agree that before 1998, the charge was generally signed by the commanding officer of the accused, who submitted it to the various levels of the chain of command up to the convening authority, who was also part of the chain of command.

[18] In short, the power to choose the type of court martial was, for all intents and purposes, in the hands of the prosecutor. The effect of section 165.14 was to eliminate that power, which was assigned to the chain of command, and turn it over to the Director of Military Prosecutions, who enjoys protection and institutional independence from the executive, the chain of command in the Canadian Forces.

[19] Even though the applicant essential relied on the *obiter dictum* by Létourneau J.A. in *R. v. Nystrom*, he acknowledged that the issue—determination of the type of court martial that is to try an accused by someone other than the accused—that this issue was addressed directly in *R. v. Lunn* (1993), 5 C.M.A.C., in which the former Chief Justice of the Court Martial Appeal Court, Mahoney C.J., writing for a unanimous Court, said, at paragraphs 13 and 14:

> It is not the convening authority, who decides on the mode of court martial and appoints the prosecutor, that may deprive an accused of life, liberty and security of the person; the court martial itself may do that. It is likewise the court martial itself, not the convening authority, that must conduct a fair and public hearing and be independent and impartial. 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.
>
> 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.

[20] Although he acknowledged that the decisions of the Court Martial Appeal Court in *Lunn* and *Nystrom* seem to be irreconcilable, the applicant nonetheless submitted that the remarks of Létourneau J.A. in *Nystrom* are of such importance and legal weight that this Court may disregard *Lunn*. That argument does not seem to me to be sound in law. Whether or not this Court shares the concerns expressed by Létourneau J.A. regarding the underlying principles that today prevent a person subject to the Code of Service Discipline from choosing the type of court martial, by operation of section 165.14, it must be acknowledged that the Court Martial Appeal Court has expressly chosen not to address the constitutionality of section 165.14 of the Act, as Létourneau J.A. himself said in the first sentence of paragraph 64 of *Nystrom*. If that Court had done so, this Court respectfully believes that it could not have disregarded or ignored its own decision in *Lunn* which was decided after the Supreme Court ruled in *R. v. Swain* and *R. v. Bain*, cited by Létourneau J.A. The Court Martial Appeal Court in *R. v. Lunn* had the benefit of the principles stated in *Swain* and *Bain*. It is also worth noting that the comments of Mahoney C.J. in *Lunn* were quoted by the Court Martial Appeal Court on January 6, 1995, in *R. v. Brown*, 5 C.M.A.C. 280, although in another context.

[21] There is no doubt that this Court cannot accept the applicant's arguments because they disregard the rule of *stare decisis*. The Court Martial Appeal Court has already affirmed the principle, in the unanimous decision in *R. v. Lunn*, that the existence and exercise of the discretion on the part of a person other than the accused to choose a particular form or type of court martial has no impact on the rights guaranteed to the accused by section 7, paragraph 11(*d*) and subsection 15(1) of the Charter. However, that power is not exempt from review, if it were established that the discretion had been exercised for irregular purposes or reasons, and in such a case it would in fact be possible to grant the accused a remedy under section 24 of the Charter. It is also true that in this case the applicant has not established that this was the case here.

Disposition

[22] For these reasons, the Court dismisses the motion by the defence.

Addendum

This addendum is taken from the verdict in this case (2007 CM 1003) and is relevant to the decision on the motion.

> [1] Before delivering the verdict of this Court, I would like to make the following comment regarding the decision of the Court on the motion made by the defence last week. You will recall that I said that section 130 of the *National Defence Act* was

not amended by Bill C-25, now chapter 35 of the 1998 Statutes, when I was addressing the expansion of the jurisdiction of service tribunals that was the subject of the amendment to section 70 of the *National Defence Act* to include sexual assaults committed in Canada. That statement is true, but it is true in the sense that it refers to the expansion of the jurisdiction of service tribunals, and it was in that context that I made the statement, because it is not accurate to say that section 130 was not amended at all; there were cosmetic or ancillary amendments in this context, for other reasons. However, I would repeat, that had nothing to do with the actual substance of the section, and so with the comments I made in the specific context of the motion. In other words, it obviously has no effect on the decision of the Court on the motion made by the defence, but I would like to make this clarification.

COLONEL M. DUTIL, M.J.

Counsel:

Major B. McMahon, Directorate of Military Prosecutions
Counsel for the prosecutor/respondent
Évelyne Borkowski-Parent, Directorate of Military Prosecutions
Assistant counsel for the prosecutor/respondent
Major C.E. Thomas, Directorate of Defence Counsel Services
Defence counsel for Cadet J.S.K. Trépanier
Lieutenant (Navy) P. Desbiens, Directorate of Defence Counsel Services
Assistant defence counsel for Cadet J.S.K. Trépanier