Citation: *R. v. Warrant Officer A.S. Laity*, 2007 CM 3011

Docket: 200686

STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO

Date: 17 April 2007

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

HER MAJESTY THE QUEEN
v.
Warrant Officer A.S. Laity
(Accused)

DECISION RESPECTING A PLEA IN BAR OF TRIAL MADE UNDER QUEEN'S REGULATIONS AND ORDERS SUBPARAGRAPH 112.05(5)(b) THAT THE COURT HAS NO JURISDICTION TO TRY THE ACCUSED.
(Rendered orally)

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[1] Warrant Officer Laity is charged with two offences for disobeying a lawful command of a superior officer contrary to section 83 of the *National Defence Act.*

[2] At the opening of this trial by Standing Court Martial on 16 April 2007, prior to plea and after the oaths were taken, Warrant Officer Laity made an application for which a notice was received by the Office of the Court Martial Administrator on 10 April 2007, in order to object to the trial being proceeded with because the charges laid in this matter were void *ab initio.*

[3] The preliminary motion is brought by way of an application made under Queen's Regulations and Orders (QR&O) article 112.05(5)(*b*) as a plea in bar of trial that this court has no jurisdiction to try the accused.

[4] The evidence on the application consisted of:

a. The testimony of Master Warrant Officer Barnes.

b. Exhibit PP1-1, the notice of application. This document was entered in evidence by consent.

c. Exhibit PP1-2, a copy of the Record of Disciplinary Proceedings concerning Warrant Officer A.S. Laity. This document was also entered in evidence by consent.

d. And the judicial notice taken by the Court of the facts in issues under Rule 15 of the Military Rules of Evidence.

[5] On an unknown date, three charges were allegedly laid against Warrant Officer Laity, the accused in this court martial, by Chief Warrant Officer Vigneault, a person authorized to lay charges according to the testimony of Master Warrant Officer Barnes. Captain Hart was appointed by the Commanding Officer as the assisting officer of the accused. On 15 May 2006, Chief Warrant Officer Vigneault provided information to the accused as required by QR&O article 108.15. On the same day, the accused was informed of his right to elect to be tried by court martial. On 19 May 2006, the accused chose to be tried by court martial and informed Chief Warrant Officer Vigneault of his decision. All these information are taken from a photocopy of the Record of Disciplinary Proceedings (RDP) entered on consent by the accused as evidence supporting his application.

[6] As stated by Master Warrant Officer Barnes during his testimony before the court, records he holds on this specific matter indicated that the charges were sent for disposal by a court martial through an application to that effect made by the Commanding Officer of the accused's unit to the referral authority, which is the Land Force Western Area Commander.

[7] Captain Bussey signed a charge sheet containing two offences on 10 August 2006, as an officer authorized to do so in accordance with section 165.15 of the *National Defence Act*. Charges were presumably preferred and a convening order was issued on 20 March 2007 by the Court Martial Administrator convening this court martial and ordering the accused to appear before this standing court martial on 16 April 2007 at 1000 hours, which he did.

[8] In his application, Warrant Officer Laity raised the fact that he was never charged of any military offence because the RDP was not signed, as required by QR&O article 107.015. Then, he requests this court martial to terminate the proceedings because it would not have jurisdiction to try him.

[9] In order to dispose of this application, the court has to make a determination about the fact that charges were laid or not. In the case that charges were not laid, it has to find out if the preferral of charges made by the Director of Military

Prosecutions cures this deficiency in the context of this case, as suggested by the prosecutor.

[10] Commencement of proceedings in the Canadian Military Justice system is governed by section 161 of the *National Defence Act*. It reads as follows:

> 161. Proceedings against a person who is alleged to have committed a service offence are commenced by the laying of a charge in accordance with regulations made by the Governor in Council.

[11] Then, in order to commence any disciplinary proceedings in the Canadian Military Justice system, a charge must be laid. What is a charge and when is it laid?

[12] QR&O article 107.015 provides the answer:

> **107.015 - MEANING OF "CHARGE"**
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> (1) For the purpose of proceedings under the Code of Service Discipline, a "charge" is a formal accusation that a person subject to the Code has committed a service offence.
>
> (2) A charge is laid when it is reduced to writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings (*see article 107.07 - Form of Record of Disciplinary Proceedings*) and signed by a person authorized to lay charges.
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> **(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)**

[13] The above article is regulation made by the Governor in Council, as indicated by the letter "G" in parentheses (see for this interpretation QR&O article 1.24(2)).

[14] I would suggest that being formally accused of a military offence, which in this case is disobeying a lawful command of a superior officer, is a very serious thing, especially when you are objectively facing life imprisonment if you are found guilty of that offence.

[15] Considering the importance of the procedure, it is probably why the authority to lay a charge within the military justice system was limited to some categories of persons, which are, as established in QR&O article 107.02, a commanding officer, an officer or a non-commissioned member authorized to do so by the commanding officer or an investigator with the Canadian Forces National Investigation Service.

[16] As requested by QR&O article 107.015(2), a charge is laid when it is reduced in writing on the appropriate form and signed by a person authorized to do so. On the application, the only RDP put in evidence, which this court can rely on, is the one introduced by the accused and on which it appears that part 1 (charge report) was not signed by a person authorized to lay a charge, nor dated. The prosecution was unable to produce the original and no explanation was provided about the fact it was missing. It is clear from that RDP that the name of the person laying charges was typed, but that person did not testify about the fact that his signature was missing on the RDP. According to Master Warrant Officer Barnes' testimony, that person was authorized by the commanding officer to lay charges.

[17] It is very clear for this court martial that charges were never laid. The fact that the signature of an authorized person to lay charges is missing goes beyond an error of a technical nature. It is true that person accused has the right to know who is accusing him or her. However, the fact to request the signature of the person laying a charge means more than that. A signature is a distinctive and personal way to identify you. As stated by Justice McGillivray in *Regina v. Welsford*, (1967) 2 O.R. 496, at the end of the decision:

> A signature has characteristics which identify it in such a way that I could hardly be denied by the person signing that it is his.

[18] As stated in the note of QR&O article 107.02, the person laying a charge must have an actual and reasonable belief that the accused committed the alleged offence. Moreover, in the present case, the authority laying the charges had an obligation to obtain advice from a legal officer before laying the charges because of the rank of the accused, as required by QR&O article 107.03(1)(*b*). It does indicate how serious and important is the step of laying a charge in a military disciplinary context.

[19] The step of laying charges in the Canadian Military Justice system is more than something of an administrative nature. It constitutes the formal and only legal way to commence disciplinary proceedings. If a charge is not laid, then disciplinary proceedings are not commenced. It is the decision of this court that disciplinary proceedings against Warrant Officer Laity were not commenced because no charges were laid as it was explained above.

[20] QR&O articles 101.06 and 101.07 do not help to conclude to the contrary. This court considers that the missing signature on the RDP is not of the nature of a technical defect or a deviation from a form prescribed by regulation.

[21] However, this court martial is dealing with a charge sheet and not the RDP. The charge sheet was brought to this court martial further to a preferral of the alleged charges made by the Director of Military Prosecutions and a convening order signed by the Court Martial Administrator.

[22] As section 165 of the *National Defence Act* indicates:

> **165.** (1) A person may be tried by court martial only if a charge against the person is preferred by the Director of Military Prosecutions.
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> (2) For the purposes of this Act, a charge is preferred when the charge sheet in respect of the charge is signed by the Director of Military Prosecutions, or an officer authorized by the Director of Military Prosecutions to do so, and referred to the Court Martial Administrator.

[23] Even though it was not proven, it is easy to conclude because of the existence of the charge sheet and the convening order, that the Director of Military Prosecutions preferred the two alleged charges on the charge sheet. However, in the context described above, it would be difficult for this court martial to conclude that the charges in the charge sheet were preferred, considering that no charges were laid, i.e., that no charges legally existed at the time the preferral was made by the Director of Military Prosecutions. Then, this court martial cannot have jurisdiction over the accused if there is no charge to be tried.

[24] The prosecutor in this case suggested that in preferring charges, the Director of Military Prosecutions cured the defect of a technical nature found on the RDP. He concluded that because the charge sheet is a valid document on which this court martial can rely on, this court martial has jurisdiction to try the accused and may proceed.

[25] To support his argument, the prosecutor relied on two Supreme Court decisions. First, he submitted the decision in *R. v. Barbeau*, (1992) 2 S.C.R. 845. In that decision, the accused was charged with a crime that did not exist at the time the alleged offences were committed. However, this issue was raised by the accused just some time before the trial, meaning that information was laid, a preliminary inquiry took place and that a committal order was issued before. The Crown then decided to present a new indictment. The trial proceeded on the new indictment and the accused was convicted of some charges.

[26] The second Supreme Court decision submitted by the prosecutor is *R. v. Chabot*, (1980) 2 S.C.R. 985. In that case, further to a preliminary inquiry for second degree murder, the provincial court judge issued a committal order for a first degree

murder offence. Then the Crown Attorney signed an indictment accordingly. The accused challenged the committal for trial by way of an application for *habeas corpus* with *certiorari*. Justice Dickson delivered the decision for the Supreme Court. He confirmed that the indictment became the operative document and that the accused can no longer attack the regularity of the committal for trial. He also confirmed "that a justice conducting a preliminary inquiry may inquire into, and commit only on, the charge specified in the information or informations." Then, the Supreme Court confirmed the decision of the court of appeal to remit the matter to the Provincial Court Judge to commit for trial on a charge of second degree murder, if so advised.

[27] It is very interesting to note that both decisions were made in the context of the existence of a preliminary inquiry. Such judicial procedure does not exist anymore in the Canadian Military Justice system. As mentioned by Colonel Jim Fay in "Canadian Military Criminal Law; an Examination of Military Justice", (1975) 23 Chitty's L.J. 195 - 216, pages 205 - 206, before the enactment of the first *National Defence Act*, the British disciplinary proceedings used the Canadian Armed Forces included a full preliminary inquiry. With the enactment of the first *National Defence Act*, the preliminary inquiry was reduced to a writing process where a written summary of the evidence was provided with the proposed charges to the convening authority and where the accused has an opportunity to provide in writing his comments to the convening authority. With the important amendments made to the *National Defence Act* in 1998, the procedure confirming the charges to be heard by the court martial totally eliminated, leaving in the hands of the Director of Military Prosecutions to review the matter through the preferral procedure.

[28] The existence of the preliminary inquiry where an investigation is made about the evidence supporting a charge and a judicial decision is made about the sufficiency of the evidence and to commit an accused to trial on that charge is at the heart of both Supreme Court decisions on which the prosecutor relies on. When sometime it is interesting to parallel the Canadian Criminal Justice system and the Canadian Military Justice system, here it does not help at all to resolve the matter. It appears to this court martial that the preferral of a charge by the Director of Military Prosecutions in the Canadian Military Justice system, even though it is similar, has not the same effect as an indictment signed by a Crown Attorney in the Canadian Criminal Justice system because both procedural contexts are different.

[29] The Canadian Military Justice system is a disciplinary process with penal consequences, which makes it very unique. It has a specific procedure, which stands on its own.

[30] Again, it is very clear for this court martial that no charges were laid against Warrant Officer Laity because the Form of Record of Disciplinary Proceedings was not signed by a person authorized to lay charges, as requested by regulation. Then,

disciplinary proceedings against the accused were not commenced and the preferring of charges by the Director of Military Prosecutions could not cure this fundamental deficiency. This court martial cannot have jurisdiction to try Warrant Officer Laity when the charges do not legally exist.

[31] The application made by the accused pursuant to QR&O article 112.05(5)(*b*) is allowed on all charges. The proceedings of this court martial in respect of Warrant Officer Laity are terminated.

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

COUNSEL:

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