



COURT MARTIAL

Citation: *R v Wehmeier*, 2012 CM 1005

Date: 20120601

Docket: 201212

Standing Court Martial

19 Wing Comox
British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Paul Wehmeier, Applicant

Before: Colonel M. Dutil, C.M.J.

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION RESPECTING A PLEA IN BAR OF TRIAL PURSUANT TO ARTICLE 112.05 (5)(B) AND 112.24 OF *THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES* THAT THE COURT HAS NO JURISDICTION TO TRY THE ACCUSED

(Orally)

INTRODUCTION

[1] The defence has made an application in the nature of a plea in bar of trial that this court lacks jurisdiction to try the accused. The applicant argues that this court martial does not have jurisdiction over the civilian accused because the information on the

charge sheet, even if proved, would not disclose a person subject to the Code of Service Discipline. The charge sheet (Exhibit M1-2) dated 16 February 2012 by Major Dylan Kerr, an officer authorized to do so under the *National Defence Act*, reads as follows:

"The accused, Paul Wehmeier, Director Casualty Support Management, Canadian Forces, is charged with having committed the following offences:

FIRST CHARGE, SECTION 130 OF THE *NATIONAL DEFENCE ACT*, AN OFFENCE PUNISHABLE UNDER SECTION OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about 19 March 2011, at Bitburg, Germany, while employed as a Peer Educator, did commit a sexual assault upon S.R.

SECOND CHARGE, SECTION 130 OF THE *NATIONAL DEFENCE ACT*, AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, UTTERING THREATS, CONTRARY TO PARAGRAPH 264.1(1)(A) OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about 19 March 2011, at Bitburg, Germany, while employed as a Peer Educator, did knowingly utter a threat to Corporal Kimberly Caldwell to cause death to Corporal Kimberly Caldwell.

THIRD CHARGE, SECTION 130 OF THE *NATIONAL DEFENCE ACT*, AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, ASSAULT, CONTRARY TO SECTION 266 OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about 19 March 2011, at Bitburg, Germany, while employed as a Peer Educator, did commit an assault upon Corporal Daniel Lesard."

THE EVIDENCE

[2] The evidence before the court in this plea in bar of trial consists of the matters for which the court took judicial notice under section 15 of the Military Rules of Evidence, including but not limited to the *National Defence Act*; the *Queen's Regulations and Orders for the Canadian Forces (QR&O)*; the charge sheet (Exhibit M1-2) an e-mail dated 23 April 2012 from Major R.D. Kerr to Lieutenant-Commander M. Létourneau and Lieutenant-Commander P.D. Desbiens, (Exhibit M1-3); a Ministerial Organization Order 2006001 dated 26 January 2006 organizing Canadian Operational Support Command as a command of the Canadian Forces embodied in the Regular Force (Exhibit M1-4); and the testimonies of Warrant Officer S. Vincent and Captain S. Piché. Exhibit M1-3 reveals an exchange of information between the prosecution and defence counsel where the prosecutor informs his colleague from the defence that he intends to

rely on sections 60(1)(f) and 61(1)(b) of the *National Defence Act* and *QR&O* article 102.09(4) to establish jurisdiction over the accused and how he intends to do it.

[3] The testimonial evidence heard during the plea in bar of trial was called by the prosecutor in rebuttal of the plea. Warrant Officer Vincent testified that for the last four years he is the warrant officer in charge of the Integrated Support Troop at the Canadian Forces Joint Support Group in Kingston, Ontario. He described his role as being in charge of the orderly room and the supply section of his unit. Warrant Officer Vincent testified that in March 2011 he was employed as a member of the Second Line of Communications Detachment (SLOC Det), which he described as a unit that was stood up to provide Home Leave Travel Assistance (HLTA) for military personnel coming out from Kandahar Airfield, Afghanistan, as well as being the main centre for Technical Assistance Visits (TAVs). He was stationed in Germany at Spangdahlem Air Force Base, accommodated in the Eiffel Inn Towers on base and ran by the US Air Force. He stated that they were between 45 to 50 personnel spread in three locations; namely, Spangdahlem, Bitburg with about 25 and Trier, 12 to 15. Warrant Officer Vincent explained that the SLOC Det was also involved with the Out of Cycle TLD (Third Location Decompression Center) in Trier for people coming out of Afghanistan who had to do a five-day stay to decompress and take courses and classes on how to reintegrate with families and the workplace in Canada.

[4] Warrant Officer Vincent stated that while in Spangdahlem, he became the chief clerk in charge of the orderly room. He would process the claims for the people on their arrival in Spangdahlem and the meal claims every 15 days. He was also responsible for the day-to-day administration of the personnel in place. Warrant Officer Vincent stated that the personnel in place were both military and civilian. The number of civilians was between 12 and 15. As to these civilians, they were composed of PSP Personnel and Mental Health Specialists. With regard to his role concerning these civilians, Warrant Officer Vincent stated that his team was just administering where they would be living and abide by the SLOC Det rules depending where they would be located either in Spangdahlem, Bitburg or Trier or a combination of these locations. Warrant Officer Vincent testified that he would normally make these arrangements because he was the point of contact for the three hotels and that they, meaning the Department of National Defence or the Canadian Forces, would pay for the accommodations. He further stated that he would also administer the routine orders, which he said applied to the civilians.

[5] Warrant Officer Vincent testified that Mr Wehmeier was employed as a Peer Educator in Trier, Germany. According to him, the Peer Educators were accommodated in a hotel in Trier that had been contracted by CANOSCOM and administered by SLOC Det. As to Mr Wehmeier, Warrant Officer Vincent said that Mr Wehmeier's hotel accommodation was paid directly by the Canadian Forces after they had received the invoice and certified that the services had been rendered. The invoices were then sent to Ottawa for payment. According to Warrant Officer Vincent, Mr Wehmeier's travel arrangements to and from Germany were made by the Canadian Forces or the Department of National Defence. Finally, Warrant Officer Vincent stated that rations were not provided to Mr Wehmeier, as he was treated pursuant to the applicable *per diem* Treas-

ury Board guidelines for meal entitlement on temporary duty. This statement was corroborated by Captain Piché.

[6] Captain Piché testified that during March 2011, she was a member of a Mental Health Team for decompression of troops coming back from Afghanistan. First, she was part of a two-man team composed of one mental health specialist and one Peer Educator. The team was then augmented to a six-man team composed of three of each, including Mr Wehmeier. She stated that she became the team supervisor because she was the only person wearing a rank. Captain Piché explained that the role of the team was to conduct the whole briefing and that they stayed for the most part at the Park Plaza Hotel in Trier, Germany, for a number of days before moving to Spangdahlem on base, either in quarters or in the hotel on base, and in Bitburg in temporary quarters. To her knowledge, the accommodation arrangements were dictated by the Deputy Commanding Officer of SLOC Det, although she provided input as to where they should be staying, and the process was usually initiated by the chief clerk or the orderly room. Captain Piché testified that during that period she reported to the DCO of SLOC Det, Major Gilbert, who had been also the acting Commanding Officer during the absence of Lieutenant-Colonel Boyle. Captain Piché testified that the Peer Educators could not decide where they would stay while in Germany. They would be on a claim and stay where the services would be provided. As a supervisor, she would follow the applicable policies, directives and directions and she would communicate them to her team members. Captain Piché further testified that Mr Wehmeier, as part of her team, stayed at the Park Plaza Hotel located in Trier, Germany, further to the arrangements made by the chief clerk, Warrant Officer Vincent and two corporals that worked for him. Asked by the prosecution as to who had paid for the hotel arrangements, she stated that she was unaware of exactly whose financial code applied, i.e., Mental Health Budget, SLOC Det budget or some other organization. Finally, her evidence indicates that Park Plaza Hotel was not used exclusively by the Canadian Forces during that period and that there were more than 100 rooms in that hotel. Captain Piché added that the Canadian Forces did not operate the front desk of that hotel and that the hotel administration retained access and control of the rooms.

POSITION OF THE PARTIES

The Applicant

[7] The applicant argued that this court martial did not have jurisdiction over the civilian accused because the information on the charge sheet, even if proved, would not disclose that he was a person subject to the Code of Service Discipline. In absence of additional information, this assertion was well founded. After the evidence filed during the application by the prosecution, the applicant further submits that the evidence provided to the court during this plea in bar of trial is not sufficient to establish that the accused was subject to the Code of Service Discipline at the time of the alleged offences under sections 60(1)(f) and 61(1)(b) of the *National Defence Act*. Counsel for the defence submits that the evidence does not establish that Mr Wehmeier accompanied the Canadian Forces during the time period as he was not accommodated by or provided

with rations by the unit or element that he accompanied within the scope of section 61(1)(1)(b) of the *Act*.

[8] In support of its argument, the defence advances that Mr Wehmeier stayed at the Park Plaza Hotel, in Trier Germany, which is clearly not a Canadian Forces accommodation, which establishment was privately owned, controlled and operated. This establishment was therefore not under the control, owned or operated by the Canadian Forces or by the unit or element that Mr Wehmeier is said to have accompanied; that is, SLOC Det, as specified by the prosecutor. The defence suggests that there is no evidence that CANOSCOM is the unit or element that Mr Wehmeier accompanied. The defence suggests that the fact that SLOC Det made the arrangements for lodging the members of the Mental Health and PSP team who worked with the Out of Cycle TLD (Third Location Decompression Center) in Trier, is not sufficient to meet the requirements under section 61(1)(1)(b) of the *Act*. Counsel for the defence submits that the Park Plaza Hotel did not give the control of their premises to the Canadian Forces, including access to all rooms occupied by Canadian military or civilian personnel whose lodging arrangements had been made by the chief clerk of SLOC Det who also was responsible for the handling of invoices. The defence argues further that the fact that the rooms would have been paid directly by the unit or element or the Canadian Forces is immaterial for the purposes of section 61(1)(b) of the *Act*. Counsel for the defence further submits that there is no evidence as to which unit or element paid for Mr Wehmeier's accommodation.

The Respondent

[9] The respondent submits that the plea in bar should be dismissed. Counsel for the prosecution provided the court with their view that Mr Wehmeier was accompanying the SLOC Det in Trier, Germany, and that this unit or element of the Canadian Forces accommodated and provided rations to Mr Wehmeier in March 2011 when he performed his duties under the terms of his employment as a member of Captain Piché's team. Counsel for the prosecution suggests that the context is sufficient to clearly establish that Mr Wehmeier was accommodated by SLOC Det. In support of his position, he submits that the fact that all accommodations arrangements and their administration were made by the SLOC Det chief clerk or his subordinates including the processing of the related claims as well as the monitoring of whom would stay in which hotel and keeping track of all members of the SLOC Det team is sufficient to establish that Mr Wehmeier was accommodated by that unit and therefore accompanying it and subject to the Code of Service Discipline in the circumstances.

DECISION

Legal Analysis

[10] The field of disciplinary jurisdiction of the Canadian Forces is covered in Division 1 of Part III (Code of Service Discipline) of the *National Defence Act*. Section 60 of the *Act* identifies who are the persons subject to the Code of Service Discipline. It

provides that a person, not otherwise subject to the Code, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place, is subject to the Code of Service Discipline under paragraph 60(1)(f) of the *Act*. A person will be considered as accompanying the Canadian Forces for the purposes of sections 61, 60, 62 and 65 if that person:

(a) participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operations;

(b) is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council;

(c) is a dependant outside Canada of an officer or non-commissioned member serving beyond Canada with that unit or other element; or

(d) is embarked on a vessel or aircraft of that unit or other element.

[11] Section 62 provides also that a person accompanying a unit or other element of the Canadian Forces is deemed to be under the command of the commanding officer of the unit or other element of the Canadian Forces that the person accompanies. It is worth to note that these provisions have not been regularly interpreted in recent years and that they have not been amended at least since 1985.

[12] The plea in bar of trial attacks the jurisdiction of this court to try the accused because he would not have been subject to the Code of Service Discipline at the time of the alleged offences because the facts and circumstances of this case would not support the position of the prosecution that Mr Wehmeier was a person accompanying a unit or other element of the Canadian Forces within the meaning of sections 60(1)(f) and 61(1)(b). If the prosecution had not presented evidence in rebuttal of the plea in bar of trial, the court would have concluded that the charge sheet before it, Exhibit M1-2, did not provide sufficient information to confer jurisdiction to try the accused because it did not establish *prima facie* that Mr Wehmeier, a civilian, was subject to the Code of Service Discipline at the time of the alleged offences.

[13] The credible and reliable evidence provided to the court supports the view that Mr Wehmeier was in Trier, Germany, to fulfil his duties as a Peer Educator within a Mental Health Team for decompression of troops, which was part of the Out of Cycle TLD (Third Location Decompression Center) for service personnel returning from Afghanistan. He worked under the supervision of Captain Piché, who reported to the Deputy Commanding Officer of a unit called SLOC Det that was stood up in Germany for this purpose and also to provide Home Leave Travel Assistance (HLTA) for military personnel coming out from Kandahar Airfield, Afghanistan, as well as being the main center for Technical Assistance Visits (TAVs). The said unit was composed of various personnel, including civilians. The unit was composed of approximately 45 persons, civilians and service persons. The unit headquarters was located at the US Air Force Base in Spangdahlem, Germany but it provided its services also in Bitburg and Trier. Personnel under the control of that unit were provided lodging in quarters on the base in

Spangdahlem, in a US Air Force operated hotel called the Eiffel Towers on that base, as well as in privately owned, controlled and operated hotels in Bitburg and Trier, including the Park Plaza hotel where Mr Wehmeier stayed during the alleged period. The SLOC Det chief clerk was responsible to make all the necessary arrangements with the local hotel, including the reservations, the dispatch of personnel to be lodged in the hotels and the processing of claims and invoices originating from the hotels. The service person or civilian employee lodged in a particular hotel had no say as to where he would stay and there was no contractual agreement between a service person or civilian employee and the hotel management. Rations were not provided to the personnel as they received a *per diem* that was later processed by the SLOC Det chief clerk.

[14] After a careful review of the evidence and the wording of sections 60(1)(f) and 61(1)(b), the court is satisfied that Mr Wehmeier was subject to the Code of Service Discipline at the time of the alleged offence. The circumstances indicate that Mr Wehmeier was not a simple visitor, but that he was accompanying the SLOC Det in order to perform his own duties, which were part of the SLOC Det's mandate. The Concise Oxford Dictionary defines the word "accompany" as "go somewhere with". It also defines the verb "accommodate" as "provide lodging or sufficient space for".

[15] The issue in this application can be expressed in the following terms: In order to be accommodated by a unit or other element for the purposes of section 61(1)(b), does it necessarily require that the person be lodged within the physical establishment of that unit? The answer is no. The Concise Oxford Dictionary states that the term "provide", in the context of "provide for", would include the making of adequate preparation or arrangements. The role and functions of the SLOC Det and its staff in the making of arrangements and the administration for the lodging of the personnel previously described in Spangdahlem, Bitburg and Trier falls within the scope of section 61(1)(b) of the *Act*. Accordingly, Mr Wehmeier was a person accompanying a unit or other element of the Canadian Forces and ultimately subject to the Code of Service Discipline at the time of the alleged offences.

[16] However, the court finds appropriate to reiterate the remarks made by the former Chief Justice of the Court Martial Appeal Court, although expressed in the context of the doctrine of military nexus, in the decision of *R v Reddick*, (1996) 5 C.M.A.R. 485, where Strayer CJA. rightfully stated at page 502:

.... If the *National Defence Act* by its terms clearly confers jurisdiction, as it does in the present case, then the only basis for attacking the jurisdiction of the court martial is to demonstrate that such law cannot constitutionally be applied to this particular accused or offence.

Conclusion and Disposition

FOR ALL THESE REASONS:

[17] The plea in bar of trial is not allowed.

COLONEL M. DUTIL, C.M.J.

Counsel:

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
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