COURT MARTIAL

Citation: *R v Wilks*, 2013 CM 4017

Date: 20130829

Standing Court Martial

Asticou Centre Courtroom
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Ex-Petty Officer 2nd Class J.K. Wilks, Offender

Before: Lieutenant-Colonel J-G Perron, Military Judge

DECISION ON AN APPLICATION BY CANADIAN BROADCASTING CORPORATION TO VARY A PUBLICATION BAN REGARDING IDENTITY OF A COMPLAINANT

(IN WRITING)

1. Ex-Petty Officer Second Class Wilks was tried by a Standing Court Martial presided by me and he was found guilty of one charge of sexual assault and of four charges of breach of trust by a public officer on 17 October 2011. He was sentenced to imprisonment for a period of nine months on 12 December 2011. At the beginning of the trial, the prosecutor requested the court make, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, an order that any information that could identify any of the three complainants shall not be published in any document or broadcasted or transmitted in any way. Defence counsel did not object to this request. I then issued that order on 26 September 2011.

2. The Canadian Broadcasting Corporation has made an application under paragraph 112.03 (preliminary proceedings) of the *Queen's Regulations and Orders for the Canadian Forces* requesting a variance to the publication ban imposed on the identity of the complainant R.W. The Director of Military Prosecutions and the complainant R.W. both agree to the request of the Canadian Broadcasting Corporation. Ms R.W.

wishes to tell her story to the Canadian Broadcasting Corporation and have it broadcasted by the Canadian Broadcasting Corporation. She no longer wishes to conceal her identity (see paragraph 4 of the Notice of Application and the consent form signed by Mr Millar, counsel for Ms R.W.). Counsel for Ex-Petty Officer 2nd Class Wilks, while objecting to the request, mostly argued this application must be dismissed because I have no jurisdiction to hear and decide this application. The Director of Military Prosecutions and the Canadian Broadcasting Corporation argue that I still have jurisdiction to decide this application.

3. The Supreme Court of Canada has held in *R. v. Adams*, [1995] 4 SCR 707 (*Adams*) that an order made under section 486(4) (the precursor provision of section 486.4) may be reconsidered and revoked under certain conditions. The specific facts of that case involved the trial judge, on his own motion, revoking his order prohibiting the publication of the complainant's name at the end of the trial after he had found the accused not guilty. Counsel for the Crown submitted that the publication ban should not have been lifted. At the conclusion of a hearing on this issue the trial judge upheld his revocation order.

4. Sopinka J wrote the following at paragraphs 27 to 30 of *Adams*:

> 27 The respondent submits, however, that there is nothing in the section that prevents a judge from reconsidering and, if appropriate, from revoking the order. Reliance is, therefore, placed on the inherent power of a trial judge to reconsider, vary or rescind previous orders made during the course of trial.
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> 28 I agree with the respondent that nothing in the language of s. 486 of the *Criminal Code* expressly excludes any power possessed by a court to reconsider an order made under s. 486(3) and (4). These provisions address the making of the order but do not deal with whether the order is reviewable after it has been made. It is, therefore, not inconsistent with the interpretation of these subsections to hold that, whatever inherent power to reconsider resides in a court, survives. Indeed, as I shall point out hereafter, it may be desirable and in keeping with the purpose and objects of the section to permit reconsideration and revocation of the order if the circumstances which justified its making have ceased to exist. It is, therefore, necessary to consider what authority a judge has to reconsider a previous order and its application to the circumstances of this case.
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> 29 A court has a limited power to reconsider and vary its judgment disposing of the case as long as the court is not *functus*. The court continues to be seized of the case and is not *functus* until the formal judgment has been drawn up and entered. See *Oley v. City of Fredericton* (1983), 50 N.B.R. (2d) 196 (C.A.). With respect to orders made during trial relating to the conduct of the trial, the approach is less formalistic and more flexible. These orders generally do not result in a formal order being drawn up and the circumstances under which they may be varied or set aside are also less rigid. The ease with which such an order may be varied or set aside will depend on the importance of the order and the nature of the rule of law pursuant to which the order is made. For instance, if the order is a discretionary order pursuant to a common law rule, the precondition to its variation or revocation will be less formal. On the other hand, an order made under the authority of statute will attract more stringent conditions before it can be varied or revoked. This will apply with greater force when the initial making of the order is mandatory.
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> 30 As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have material-

> ly changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place.

[Emphasis added.]

5. Sopinka J begins the Court's judgment with the following sentence:

> This appeal concerns the power of a trial judge to rescind a ban on publication made under s. 486(3) and (4) of the *Criminal Code, R.S.C.*, 1985, c. C-46.

6. It is clear from that sentence and paragraphs 27 to 30 that Sopinka J focuses on the powers of a trial judge or a trial court as they pertain to orders made during a trial. Sopinka J dealt specifically with a situation involving the trial judge revoking an order once he had made and entered a formal judgment and was thus *functus officio*.

7. The Supreme Court of Canada examined the concept of *functus officio* in greater detail in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62. The majority decision dealt with this doctrine as follows:

> 77. A closer examination of the doctrine is helpful. The Oxford Companion to Law (1980), at p. 508, provides the following definition:
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> > *Functus officio* (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted.
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> 78 But how can we know when a judge's function is exhausted? Sopinka J., writing for the majority in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860, described the purpose and origin of the doctrine in the following words:
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> > The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division.
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> 79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal.

8. Section 165.192 and subsections 165.191(2) and 165.193(7) of the *National Defence Act* provide for the convening of a Standing Court Martial. A convening order issued by the Court Martial Administrator must state the type of court martial convened, the date and time the proceedings are to commence, the place where it will be held and the language of proceedings chosen by the accused. It must state the date the Director of Military Prosecutions preferred charges against the accused. It must also identify the accused person and the military judge assigned to preside at the court martial (see article 111.02 of the *Queen's Regulations for the Canadian Forces*).

9. The Chief Military Judge assigns military judges to preside at courts martial and to perform other judicial duties (see section 165.25 of the *National Defence Act*). A Standing Court Martial may try any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence and a military judge constitutes the Standing Court Martial (see sections 173 and 174 of the *National Defence Act*).

10. Chapter 112 of *Queen's Regulations for the Canadian Forces* provides for the procedure at courts martial. A court martial must terminate the proceedings in respect of the accused where the accused has been found not guilty of all the charges (paragraph 20 of article 112.05). Subject to article 112.06 (Termination Procedure When Sentence Includes Detention or Imprisonment) and section 9.1 (DNA Orders), a court martial must terminate the proceedings in respect of the accused after having determined the sentence where the accused has been found guilty of one or more charges (paragraph 22 of article 112.05). A court martial is deemed to be dissolved when it has terminated its proceedings in respect of the accused (see article 112.655). The *National Defence Act*, the *Interpretation Act* and the *Queen's Regulations for the Canadian Forces* do not provide a definition for the term "dissolve". Therefore, one must look at the Concise Oxford Dictionary (see *Queen's Regulations for the Canadian Forces* article 1.04). "Dissolve" is defined as "(with reference to an assembly or body) close down, dismiss, or annul". It is quite evident that I, as the trial judge, am *functus officio* since I have found Ex-Petty Officer 2nd Class Wilks guilty and have sentenced him to imprisonment for nine months.

11. A Standing Court Martial is not a permanent court but an ad hoc court. (see *Her Majesty the Queen and Captain (retired) J.C. MacLellan* 2011 CMAC 5 at paragraphs 42 and 43). A Standing Court Martial is a trial court. A Standing Court Martial is convened to try a specific accused and specific charges. Once the court martial has rendered its final judgment it terminates its procedures and is thus dissolved since there is no more need for that service tribunal. Paragraphs 112.05(20) and (22), articles 112.06 and 112.665 codify for courts martial the common law doctrine of *functus officio* since these paragraphs and these articles specify that a court martial ceases to exist once it has performed its task of rendering a final judgment and has terminated its proceedings.

12. The *National Defence Act* and the *Queen's Regulations for the Canadian Forces* do not contain a provision similar to section 486.4 of the *Criminal Code* that specifically grants the power to a presiding judge to issue a publication ban. In *Canadian Broadcasting Corporation Corp. v. Boland* [1995] 1 FC 323, 93 CCC (3d) 558 (*Boland*), the Federal Court found that a court martial could issue a publication ban order based on the court's inherent common law jurisdiction to exercise control over its proceedings to ensure fairness and integrity in the trial process.

13. Although a court martial is an inferior court (see *Boland* at pages 564 and 565 and *Ryan v. The Queen* (1987), 4 C.M.A.R. 563 (C.M.A.C.), at page 567), amendments to the *National Defence Act* in 1998 conferred upon the court martial certain powers, rights and privileges as are vested in a superior court of criminal jurisdiction. Section 179 of the *National Defence Act* reads as follows:

> 179. (1) A court martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to:
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> (a) the attendance, swearing and examination of witnesses;
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> (b) the production and inspection of documents;
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> (c) the enforcement of its orders; and
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> (d) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt.
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> (2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

14. I find that the decisions in *R. v. Ireland*, 2005 203 CCC (3d) 443 of the Ontario Superior Court of Justice and *R. v. Henley* - RFJ, 2012 BCPC 0071 of the Provincial Court of British Columbia do not assist in determining whether I have the competence to revoke the publication ban because the facts of those cases are quite different from our case. These two courts had to determine whether a judge other than the trial judge could revoke a publication ban. They both concluded based on different reasons that their respective permanent court had the inherent power to control that court's own process.

15. I am the trial judge who issued the order. As it was in *Adams*, the issue is whether the trial court, the Standing Court Martial in our case, still has jurisdiction over the specific matter of reconsidering and revoking the publication ban order. The issue is not whether or not the Standing Court Martial is a permanent court. I do not agree with counsel representing Ex-Petty Officer 2nd Class Wilks that I do not have any jurisdiction over this matter.

16. I interpret the *Adams* and *Boland* decisions to mean that a court martial has a common law jurisdiction to impose a publication ban, that the court martial retains its common law power to reconsider any order made during a trial relating to the conduct of a trial and that the court martial also retains its common law power to vary or revoke such order if the circumstances that were present at the time the order was made have materially changed. The issue before me also pertains to the enforcement of a court's orders and is a matter within the exercise of its jurisdiction (see *National Defence Act* paragraphs 179(1)(c) and (d)). Having concluded that I have authority to make the order sought, I will now address the merits of this application.

17. Sopinka J. stated at paragraph 32 of *Adams* that:

> 32 While this conclusion is sufficient to dispose of this case, it is useful to add that, had the Crown consented to the revocation order but the complainant did not, the trial judge would equally have had no authority to revoke. The complainant was also entitled to the publication ban even if the Crown had not applied for it. If, however, both the Crown and the complainant consent, then the circumstances which make the publication ban mandatory are no longer present and, subject to any rights that the accused may have under s. 486(3), the trial judge can revoke the order. There may be cir-

> cumstances in which the facts are such that both the Crown and the complainant conclude, after hearing the evidence or some of it, that the public interest and that of the complainant are better served if the facts are published.

18. I have not been provided with any information that would indicate Ex-Petty Officer 2nd Class Wilks could be prejudiced by the variance of the publication ban order. Although he is about to face new charges, the facts surrounding Ms R.W.'s interactions with Ex-Petty Officer 2nd Class Wilks are not relevant to this future trial. As such, since the Director of Military Prosecutions does not object to this request by Ms R.W. to disclose her identity in the course of an interview with the Canadian Broadcasting Corporation, I find the circumstances that made the publication ban mandatory are no longer present and that Ex-Petty Officer 2nd Class Wilks will not be prejudiced. Permitting Ms R.W. to tell her story is beneficial to her and to society. Thus, there are no reasons not to vary the publication ban order.

19. The Court Martial Appeal Court had directed that the Canadian Broadcasting Corporation request be presented by way of motion to me for my consideration and disposition because I issued the publication ban. This request is quite novel and the first of its kind. Although it was presented as a motion pursuant to article 112.03 of the *Queen's Regulations for the Canadian Forces*, this motion is not a pre-trial motion or a motion presented during a trial. It is not contemplated by any specific provision of the *National Defence Act* and of the *Queen's Regulations for the Canadian Forces*. Thus, article 101.07 of *Queen's Regulations for the Canadian Forces* is applicable in the present case. Article 101.07 reads as follows:

> When in any proceedings under the Code of Service Discipline a situation arises that is not provided for in QR&O or in orders or instructions issued to the Canadian Forces by the Chief of the Defence Staff, the course that seems best calculated to do justice shall be followed.

20. Since we were dealing with a very novel issue, counsel for Ex-Petty Officer 2nd Class Wilks was given standing at the hearing although the very nature of the hearing was not clearly established at the time of the hearing. I find this hearing is related to the Standing Court Martial since it involves the reconsideration of an order relating to the conduct of a trial. The representations of counsel for Ex-Petty Officer 2nd Class Wilks were quite helpful, as were those of counsel for the Canadian Broadcasting Corporation and for the Director of Military Prosecutions. They provided a counter-argument to those provided by the Canadian Broadcasting Corporation and the Director of Military Prosecutions and every representation assisted me greatly in this unfortunately lengthy process. I thank counsel for their submissions and their patience.

FOR THESE REASONS, THE COURT

21. **DIRECTS** that the order issued pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code* that any information that could identify any of the three complainants shall not be published in any document or broadcasted or transmitted in any way is varied. The order dated 26 September 2011 as it relates to the identity of the complainant R.W. is revoked.

(Original signed by)
J-G Perron, Lieutenant-Colonel
(Presiding Military Judge)

Counsel:

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