

Citation: *R. v. Sergeant E.B. Thompson*, 2008 CM 2010

Docket: 200782

**DISCIPLINARY COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA**

Date: 16 May 2008

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

SERGEANT E.B. THOMPSON

(Accused)

**DECISION RESPECTING AN ALLEGED VIOLATION OF SECTION 7 OF
THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered orally)**

[1] Sergeant Thompson is charged in a charge sheet with three offences contrary to section 129 of the *National Defence Act*. Charge No. 1 is framed as an offence of conduct to the prejudice of good order and discipline, in that the accused "entered into an inappropriate personal relationship with" a named private, contrary to the Land Forces Western Area Training Centre Relationship Policy. Charge No. 2 is framed as an offence of neglect to the prejudice of good order and discipline, in that the accused "failed to report that he had entered into an inappropriate relationship" with the same private in contravention of the Land Forces Western Area Training Centre Relationship Policy as it was his duty to do pursuant to article 5.01(e) of the *Queen's Regulations and Orders for the Canadian Forces*.

[2] QR&O article 5.01(e) reads:

A non-commissioned member shall:

...

(e) report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and

instructions governing the conduct of any person subject to the Code of Service Discipline.

[3] A similar obligation is imposed upon commissioned officers by QR&O 4.02(e), with the addition at the end of the words, "when the officer cannot deal adequately with the matter."

[4] At his trial by Disciplinary Court Martial, Sergeant Thompson applies by counsel, at the opening of the trial and prior to plea, for an order dismissing charge No. 2 on the ground that it does not disclose a service offence, or, in the alternative, for an order declaring that article 5.01(e) is of no force and effect to the extent that it requires a member of the Canadian Forces to report to the proper authorities his or her own infringement of pertinent statutes, regulations, rules, orders and instructions on the ground that such a requirement would violate the right against self-incrimination guaranteed by section 7 of *The Canadian Charter of Rights and Freedoms*.

[5] Following argument, I ruled that in my view charge No. 2 does not disclose an offence known to military law. Properly interpreted, QR&O article 5.01(e) does not place a burden upon members of the Canadian Forces to report an infringement by the reporting person of pertinent statutes, regulations, rules, orders and instructions. I pronounced Sergeant Thompson not guilty with respect to charge No. 2 and undertook to give reasons for my decision. These are those reasons.

[6] Subsection 129 (2) of the *National Defence Act* provides:

(2) An act or omission constituting ... a contravention by any person of

...

(b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof

...

...

is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[7] Thus, the prosecutor argues that article 5.01(e) is a regulation imposing a burden on all non-commissioned members of the Canadian Forces to report breaches of military discipline so that they can be properly investigated and if necessary punished. It is argued that there is no reason to limit the application of this provision only to reports of the misconduct of other persons, but the plain meaning of the provision extends the obligation upon all members to report their own misconduct.

[8] On a first reading of the provision, I can see that it might bear the interpretation the prosecution urges, but in my view the provision is at least ambiguous as to whether or not it attaches penal liability for the failure to observe the obligation created by article 5.01(e) in respect of one's own misconduct.

[9] Because this provision is ambiguous, it is necessary to resort to the canons of statutory interpretation to assist in determining the meaning and scope of article 5.01(e). Traditionally, the rules of construction of statutes have required a strict construction of penal statutes on the theory that where the legislator seeks to impose a penalty, it must make its meaning plain. This rule applies equally to penal provisions created by regulation as well as by statute (see *Bristol-Myers Squibb Company v. Canada* (A.G.) [2005] 1 S.C.R. 533 per, Bastarache J. dissenting at paragraph 97).

[10] The rule of strict construction of penal laws has to be considered in the light of section 12 of the *Interpretation Act*, which reads:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[11] But the rule still applies when attempts at the neutral interpretation suggested by section 12 still leave a reasonable doubt as to the scope and meaning of the statute. (*R. v. Hasselwander* [1993] 2 S.C.R. 398)

[12] In my view there still remains ample scope for the operation and application of article 5.01(e) to the regulation and governance of the Canadian Forces if the provision is read only to impose an obligation to report the misconduct of others. Indeed, I would suggest that this is the context in which the provision usually has application. In answer to a question from the court, the prosecutor was unable to refer to any previous case in which it was sought to hold a member of the Canadian Forces liable under section 129 for the failure to report his own misconduct, contrary to article 5.01(e).

[13] If the provision were to bear the meaning the prosecutor attributes to it, it would appear that in many and perhaps most cases of a violation of the Code of Service Discipline, the prosecution could as well charge the offence of failing to report the wrongdoing, as was done in this case. The fact that no other cases of the kind were found suggests to me that this provision has been interpreted in the past in a way that is contrary to the submissions of the prosecutor.

[14] For these reasons, I concluded that article 5.01(e) does not impose an obligation upon the member to report his own infringement of the statute. There is, thus,

no offence charged in the second charge. The application succeeds and the accused was found not guilty in respect of charge No. 2.

COMMANDER P.J. LAMONT, M.J.

COUNSEL:

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