Citation: *R. v. Corporal A.E. Liwyj,* 2008 CM 2012

Docket: 200719

DISCIPLINARY COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO

Date: 28 May 2008

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

HER MAJESTY THE QUEEN
v.
CORPORAL A.E. LIWYJ
(Accused)

DECISION RESPECTING JURISDICTION
(Rendered orally)

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[1] The accused, Corporal Liwyj, is charged with three charges of disobeying a lawful command of a superior officer contrary to section 83 of the *National Defence Act*. He is named in a convening order, Exhibit 1 before me, dated 23 August 2007 and signed by M.S. Morrissey, the Court Martial Administrator. The convening order requires the accused to appear before a Disciplinary Court Martial at CFB Shilo on 11 December 2007, appoints members and alternate members of the panel of the disciplinary court, and recites that I have been assigned to preside at the court martial as the military judge.

[2] Pursuant to the convening order, the court assembled in December of last year, at which time I heard a pre-trial application brought by the accused. I reserved my decision on that application, and the accused entered pleas of not guilty to the three charges. The trial was adjourned to 27 May 2008. In the meantime, I ruled on the pre-trial application with reasons that I put on the record yesterday. In ordinary circumstances then, I would now ask the Officer of the Court to invite the members of the panel to take their places in court and continue with the evidence.

[3] On 24 April 2008, the Court Martial Appeal Court released reasons for judgment in the case of *R. v. Trépanier*, 2008 CMAC-498, holding that sections 165.14 and 165.19(1) of the *National Defence Act* are unconstitutional and declaring these provisions to be of no force and effect as they violate section 7 and the right to a fair

trial guaranteed by paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Section 165.14 gives the Director of Military Prosecutions the power to decide the type of court martial before which an accused is to be tried, either a Standing Court Martial consisting of a military judge sitting alone, or a Disciplinary or General Court Martial in which the military judge sits with a panel of three or five members of the Canadian Forces, whose role is very much like that of a jury trying a case on indictment under the *Criminal Code*. In *Trépanier*, the court decided that as a matter of trial fairness the accused, rather than the prosecutor, must have the right to elect the type of court martial by which he is to be tried in order to be able to make full answer and defence and control the conduct of the defence.

[4] Upon the resumption of his trial the accused, by counsel, relying upon the holding in *Trépanier,* now applies for an order that he be tried by Standing Court Martial and dispensing with the requirement for the panel appointed by the convening order, Exhibit 1. I am told by counsel that the accused chooses to be tried by a Standing Court Martial and has not at any stage to this point been given the opportunity to choose the type of court martial he would like to be tried by.

[5] The prosecutor replies that this court does not have jurisdiction to change the type of court martial established in the convening order, Exhibit 1, and unless the accused agrees to trial by Disciplinary Court Martial as contemplated by Exhibit 1, the court is without jurisdiction to proceed further, and should therefore terminate the proceedings.

[6] It is clear that the convening order before the court was issued at a time when the Director of Military Prosecutions thought that she could exercise the power conferred by section 165.14 to choose the type of court martial. The Court Martial Administrator in turn acted pursuant to section 165.19(1) which authorizes her to make the convening order and requires her, in so doing, to implement the decision of the Director of Military Prosecutions as to the type of court. The effect of the ruling in the case of *Trépanier* is to put beyond doubt the right of the accused to choose his method of trial, and in the view of the prosecution, as I understand it, puts into considerable doubt the authority of the Court Martial Administrator to convene courts martial.

[7] There are some issues arising out of the decision of the court in *Trépanier* on which counsel before me are agreed. For example, both sides seem to agree that in finding that the right to elect the type of court martial belongs to the accused, that right is not limited to cases of service offences under section 130 of the *National Defence Act*, but applies to prosecutions for all offences contrary to the Code of Service Discipline, including, of course, the offence of disobeying a lawful order with which this court is concerned. But it is at least arguable that the right to choose arises only with respect to section 130 offences as it is this provision which makes ordinary

criminal offences under the *Criminal Code* into service offences under the *National Defence Act*. Thus, for example, the court says, at paragraph 103 of *Trépanier*:

> ... to give the prosecution, in the military justice system, the right to choose the trier of facts before whom the trial of a person *charged with serious Criminal Code offences* will be held, as do section 165.14 and subsection 165.19(1) of the NDA, is to deprive that person, in violation of the principles of fundamental justice, of the constitutional protection given to offenders in the criminal process to ensure the fairness of their trial. [Emphasis added]

And at paragraph 117 in the discussion of remedies:

> For all *charges under section 130* of the NDA, the accused can be offered an election as to his or her trier of facts. [Emphasis added]

[8] But I am persuaded that Military Judge d'Auteuil was correct when he held in the case of *Corporal Strong*, 2008 CM 3019, that the right of the accused at court martial to choose the type of court is not limited to cases of service offences contrary to section 130. Counsel before me are of the same opinion. Indeed, it would seem incongruous that an accused at court martial should have the right to choose his method of trial when charged with some relatively less serious offences contrary to the *Criminal Code*, but should not have that right when charged with any of the very serious offences contained in, for example, sections 73 to 76 of the *National Defence Act*.

[9] It might also be argued that the right of the accused to choose the type of court martial as found in *Trépanier* relates only to the right to choose a panel court; that is, either a Disciplinary or General Court Martial, and not the right, for which the accused contends here, to a trial by military judge sitting alone. The prosecutor does not advance this argument and I therefore do not deal with the issue.

[10] Both counsel before me also appear to agree that the convening order issued in this case is still efficacious, at least for some purposes, following the decision in *Trépanier*. Again, it is at least arguable that the convening order rests upon an unconstitutional choice by the prosecution, and the denial of a constitutional right to choose belonging to the accused, and is therefore no longer a valid convening order even if it were valid at the time it was issued. In view of the positions of counsel before me, I do not have to deal with this issue.

[11] In my view, the real issue raised by counsel in this case has to do with the nature of a convening order made under section 165.19(1) of the *National Defence Act*. Counsel for the applicant accused submits that the order is of a merely administrative nature designed to bring the parties before the court at the appointed place and time. She submits that I have been properly assigned as the trial judge, and in that capacity I can ensure that the right of the accused to elect the type of court martial is properly respected. To this end, I am invited by counsel for the accused to simply

substitute myself as a Standing Court Martial for the disciplinary court provided for in the convening order.

[12] The prosecutor on the other hand submits that it is only the convening order that gives jurisdiction to this court to do anything by way of dealing with the charges. He argues, in my view correctly, that this is an inferior court created by statute, but unlike other inferior courts, such as for example the Provincial Court of Manitoba, this court only comes into existence for the purpose of dealing with a specific case on the authority of a valid convening order, and then ceases to exist when its function has been performed and the proceedings of a specific court are terminated. Shortly put, the *National Defence Act* does not create any kind of court martial. What it does do is create the office of the Court Martial Administrator, and it gives to that official the power to bring a court martial into existence in order to deal with a specific case.

[13] In my view, the transient nature of a court martial under the *National Defence Act* was succinctly described by the former Chief Justice of Canada, Antonio Lamer, in his report to the government on the operation of the *National Defence Act*, at page 18:

> The establishment of a military judiciary has created unforeseen problems, one of which (and not the least problematic) is the fact that military judges are "judges" when sworn in to judge, but are stuck in a sort of temporal no man's land between each courts martial because they do not belong to a permanent court …

[14] Thus, although a convening order deals with many of the administrative requirements to set up a judicial proceeding, the convening order is much more than merely administrative in nature. It is properly considered the foundational instrument for the exercise of judicial authority at a trial under the *National Defence Act*. In the case, such as this one, of an order convening a Disciplinary Court Martial, judicial authority is divided between the military judge who determines all questions of law or mixed law and fact (*National Defence Act* section 191), and the members of the panel who determine the finding of the court and any other matter that is not a question of law or mixed law and fact (*National Defence Act* section 192(1)).

[15] I conclude that I do not have the authority to accede to the request of the accused and simply turn this Disciplinary Court Martial into a Standing Court Martial presided over by me. As an inferior court, I must look to the statute for the source of my authority to act. I do not find in the statute, either expressly or by necessary implication, the authority to arrogate to myself the roles of the panel of this Disciplinary Court Martial to assess the credibility of witnesses, to find the facts and to return a finding of guilty or not guilty in this case. It might be otherwise if there were no other way of

vindicating the undoubted right of the accused, since *Trépanier*, to elect his method of trial by court martial. For example, the court might fashion an appropriate and just remedy under section 24(1) of the *Charter*. But in the present case, the applicant does not suggest that there has been any infringement of a *Charter*-guaranteed right which would support the granting of a remedy.

[16] I note that the conclusion I have reached accords with the decision of His Honour, Judge d'Auteuil, presiding at the Disciplinary Court Martial of *Corporal Strong*. In that case, the accused raised a plea in bar of trial that the court was without jurisdiction to proceed with the case because the accused had not been afforded his right to choose his method of trial by court martial. Noting that:

> … since 24 April 2008, no court martial of any type can proceed with the charges brought before it for a specific accused until a choice is made by this same accused on the type of court martial he wants.

Judge d'Auteuil went on to inquire of the accused whether he wished to be tried by the Disciplinary Court Martial that had been convened. I am told that upon receiving a reply in the negative, Judge d'Auteuil concluded he was without jurisdiction to proceed, allowed the plea in bar of trial, and terminated the proceedings in accordance with QR&O 112.24(6).

[17] In the present case, the accused similarly has not been afforded his right of choice until now, and declines to be tried by this Disciplinary Court Martial. I therefore conclude that this court cannot proceed further on these charges. The accused goes on to ask the court to turn itself into a Standing Court Martial. For the reasons I have given, I decline to do so and the application is dismissed.

[18] The only remaining question is what, if any, order should the court make as a result of this conclusion. I am invited by the prosecutor to terminate the proceedings on the ground that the court does not have jurisdiction to proceed. It is clear that on an application by an accused by way of plea in bar of trial that the court does not have jurisdiction, QR&O specifically provides that, as occurred in the case of *Corporal Strong*, where the plea in bar is allowed the court shall terminate the proceedings. But it is not clear to me that the court should merely terminate proceedings simply because the prosecutor has satisfied the court that it does not have jurisdiction to proceed to the trial of the charges.

[19] In my view, the court has a duty to ensure that the right of the accused to choose the method of trial by court martial is honoured. As the judge appointed to preside at this Disciplinary Court Martial, I have jurisdiction to order a conditional stay of proceedings on these charges until such time as the accused is named in a convening order for trial by Standing Court Martial in accordance with his election.

[20] In *R. v. Rowbotham* (1988) 41 C.C.C. (3d) 1, the Ontario Court of Appeal held that even in the absence of a *Charter* breach, but in order to avoid an anticipated breach of the right to a fair trial, in certain circumstances a court may order the state to fund the costs of representation of an indigent accused person by counsel. In my view, there is a parallel to be drawn in the present situation where, although there has not yet been a breach of a *Charter*-protected right, the accused would be denied his right to a fair trial if the prosecution does not honour his election to be tried by a Standing Court Martial.

[21] Therefore, on the charges contained in the charge sheet, Exhibit 2, I order a stay of proceedings until such time as the Director of Military Prosecutions refers the charges to the Court Martial Administrator with a request to convene a Standing Court Martial in accordance with the election of the accused.

[22] The panel is discharged with my thanks.

COMMANDER P.J. LAMONT, M.J.

COUNSEL:

Major R.J. Henderson, Regional Military Prosecutions Central
Counsel for Her Majesty the Queen
Lieutenant-Commander S.C. Leonard, Directorate of Defence Counsel Services
Counsel for Corporal Liwyj