COURT MARTIAL

Citation: *R v Arsenault*, 2013 CM 4006

Date: 20130423
Docket: 201254

Standing Court Martial

Valcartier Garrison
Valcartier, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer P.D. Arsenault, Applicant

Presiding: Lieutenant-Colonel J.G. Perron, M.J.

Corrected decision:	The text of the original decision was corrected on April 15, 2016.
Corrections made:	In paras. 1 and 19, the sub-paragraph "139(1)(*a*)" has been replaced by "130(1)(*a*)".

OFFICIAL ENGLISH TRANSLATION

REASONS FOR DECISION

(Rendered orally)

[1] The accused, Warrant Officer Arsenault, brought a motion pursuant to sub-paragraph 112.05(5)(*e*) of the Queen's Regulations and Orders for the Canadian Forces (ROCF) seeking a declaration that subsection 117(*f*) and sub-paragraph 130(1)(*a*) of the *National Defence Act* are unconstitutional pursuant to section 52 of the *Constitution Act, 1982* because of the alleged violation of the accused's rights set out in section 7 of the *Canadian Charter of Rights and Freedoms* and a declaration acquitting the applicant of the first, second and third charges. The applicant alleges

subsection 117(*f*) and sub-paragraph 130(1)(*a*) of the *National Defence Act* are overbroad contrary to section 7 of the *Charter*.

[2] The applicant stands accused of one charge laid under section 130 of the *National Defence Act*, namely, having committed a fraud contrary to subsection 380.(1) of the *Criminal Code of Canada*, two charges laid under subsection 117(*f*) of the *National Defence Act*, namely, having committed two fraudulent acts not particularly specified in sections 73 to 128 of the *National Defence Act* and one charge laid under subsection 125(*a*) of the *National Defence Act*, namely, having wilfully made a false statement in an official document signed by him. He was convicted of the first and fourth charges, and the court ordered a stay of proceedings for the second and third charges.

EVIDENCE

[3] The evidence before the court consists of all the evidence received during the trial as well as the facts and issues judicially noticed pursuant to section 15 of the Military Rules of Evidence and Exhibits R1-2, R1-3 and R1-4.

POSITION OF THE PARTIES

The applicant

[4] The applicant alleges that sub-paragraph 130(1)(*a*) clearly goes beyond the objective of the Act because this sub-paragraph incorporates all criminal and penal acts even though those acts have no nexus to discipline in the Canadian Forces. He relies on his interpretation of paragraph 60 of *R v Généreux*, [1992] 1 S.C.R. 259 to support this position. He submits that one cannot rely on the prosecutor's discretion in the fair application of this statutory provision. He also states that subsection 117(*f*) is too broad and must have a nexus to discipline.

The respondent

[5] The respondent submits that the applicant's interpretation of the objective of the Code of Service Discipline is too narrow and that the provisions are not overbroad given the purpose of the Code of Service Discipline.

DECISION

[6] Section 7 of the *Charter* reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[7] As the Court Martial Appeal Court stated in *Her Majesty the Queen and Captain Langlois* 2001 CMAC 3 at paragraph 7:

> Section 7 protects the right to life, liberty and security of the person. This right is infringed when the person is deprived of it contrary to the principles of fundamental justice. To determine whether there is a breach of s. 7 it must first be decided whether the individual has been deprived of the right to life, liberty or security of the person; the relevant principles of fundamental justice must then be identified and defined; finally, it must be determined whether the deprivation has occurred in accordance with those principles.

[8] The applicant must persuade the court on a balance of probabilities that there has been a violation of his rights or freedoms conferred on him by the *Charter* (see *R v Collins* [1987] 1 S.C.R. 265). Both parties agree that the applicant's right to liberty is engaged. It is well settled in Canadian law that the right to liberty is at issue when a person faces a charge that can lead to imprisonment upon conviction.

[9] The applicant submits that the objective of section 130 is to confer jurisdiction on service tribunals over issues that directly affect troop discipline, effectiveness and morale and that a number of federal offences have nothing to do with this objective. Accordingly, the scope of section 130 is overbroad.

[10] The Supreme Court of Canada has established the test that any tribunal dealing with this type of issue must follow. Paragraph 49 of *R v Heywood* [1994] 3 S.C.R. 761 reads as follows:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose.

When it examines whether a statutory provision is overbroad, a tribunal must consider the following question:

> . . . are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[11] The Code of Service Discipline is defined in section 2 of the *National Defence Act* as being the provisions of Part III of the Act. Part III consists of sections 60 to 249.26. The Code of Service Discipline assigns jurisdiction, creates offences, establishes arrest and detention law, establishes service tribunals, namely, summary trials or courts martial, and other procedural measures necessary for the proper administration of military justice. In other words, these sections as well as Volume II of the Queen's Regulations and Orders for the Canadian Forces govern the application of military criminal law.

[12] The Supreme Court of Canada described the objective of the Code of Service Discipline in *R v Généreux* at paragraph 31:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by

> punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the *Narcotic Control Act*. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*).

[13] Section 130 creates a service offence consisting of an act or omission that is punishable under Part VII of the Act, the *Criminal Code* or any other Act of Parliament. Subsection 117(*f*) creates a service offence consisting of any act of a fraudulent nature not particularly specified in sections 73 to 128. It is not section 117 or section 130 that confer jurisdiction on a service tribunal but the Code of Service Discipline and many sections of the *Act* and the QR&O, but primarily sections 2, 60, 67, 68, 69, 117, 125, 130 and 173 of the *National Defence Act* in our case.

[14] 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 (see section 173). Section 60 describes who is subject to the Code of Service Discipline. Sections 67 and 68 establish territorial jurisdiction for the commission of the offence and the place of trial. Section 70 limits the jurisdiction of service tribunals to try certain offences committed in Canada, namely, murder, manslaughter and abduction of children and persons under sixteen years of age.

[15] The purpose of the Code of Service Discipline is not as limited as the applicant suggests. The Supreme Court of Canada also attributes a public function to it because the court accepts that the military justice system plays the same role as the civil criminal justice system, allowing service tribunals to punish conduct that threatens public order and welfare. Subsection 117(*f*) and sub-paragraph 130(1)(*a*) existed in their current form at the time of the *Généreux* decision as indicated in paragraph 49 of *Heywood*. The court must consider whether subsection 117(*f*) and sub-paragraph 130(1)(*a*) are necessary to achieve the State objective.

[16] The issue of a military nexus was discussed in *Her Majesty the Queen and Sergeant Reddick* 1996 CMAC 393. The proceeding before the Court Martial Appeal Court was an appeal concerning the application of subsection 60(2) of the *National Defence Act* to the trial of a retired member, hence a civilian at the time of trial, with respect to acts that were criminal offences and acts that were service offences. Although *Reddick* was primarily concerned with a question of the division of constitutional powers, the Court Martial Appeal Court, referring to the *Généreux* decision, stated at paragraph 28:

> I therefore conclude that the nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court. Indeed I think it can be put aside as distracting from the real issue which is one of the division of powers. In addressing that issue

> a court martial must start by considering whether the Code of Service Discipline gives it jurisdiction in the circumstances alleged in the charges. If so, it can presume that the Code, as part of the *National Defence Act*, is constitutionally valid unless the accused can demonstrate that in his particular circumstances the application of the Code to him would have an unconstitutional consequence.

[17] The applicant invites the court to examine certain assumptions that could show how this section, section 130, may be overbroad and refers to the *Heywood* decision. The court prefers to follow the principle that *Charter* decisions must not be made in a factual vacuum (see *Ex-Ordinary Seaman C.A.E. Ellis v Her Majesty the Queen* 2010 CMAC 3 at paragraph 28 and *McKay v Manitoba* [1989] 2 S.C.R. 357 at pages 361 and 362.

[18] Warrant Officer Arsenault committed these offences while he was a member on a military establishment. He committed a fraud on Her Majesty in right of Canada. The Court Martial Appeal Court referred to fraud at paragraph 22 of *Her Majesty the Queen v Sergeant St-Jean* 2000 CMAC 429 and its negative impact on every organization and employer. This is clearly a fact situation where this statutory provision meets the objectives of the Act exactly.

[19] For these reasons, the motion for a declaration that subsection 117(*f*) and sub-paragraph 130(1)(*a*) of the *National Defence Act* are unconstitutional pursuant to section 52 of the *Constitution Act, 1982* because of the alleged violation of the accused's rights set out in section 7 of the *Canadian Charter of Rights and Freedoms* and a declaration acquitting the applicant of the first, second and third charges is dismissed.

Counsel:

Major G. Roy, Canadian Military Prosecution Service
Counsel for the respondent

Lieutenant-Commander M. Létourneau, Defence Counsel Services
Counsel for the applicant