**Citation:** *R. v. Sergeant C.G. Duhamel*, 2004 CM 32

**Docket:** F200432

**STANDING COURT MARTIAL**
**CANADA**
**QUEBEC**
**CHARLES-MICHEL DE SALABERRY ARMOURY**

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**Date:** October 15, 2004

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**PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.**

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**HER MAJESTY THE QUEEN**
**v.**
**SERGEANT C.G. DUHAMEL**
**(Accused**

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**FINDING**
**(Delivered from the bench)**

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**OFFICIAL ENGLISH TRANSLATION**

[1] This Court has allowed the first count to be withdrawn, and must now dispose solely of the second count. That count was laid under subsection 129(2) of the *National Defence Act*, an act to the prejudice of good order and discipline, for using a Government of Canada MasterCard credit card for personal purposes, contrary to DAOD 1016-1, on or about August 3, 2002.

[2] The only question before this Court may be stated as follows: was Sergeant Duhamel subject to the Code of Service Discipline, under section 60 of the *National Defence Act*, at the time the offence was committed, as alleged in the details of the second count?

[3] To circumscribe the discussion, all of the essential elements of the charge were admitted by the defence, which also concedes that the offence will have been proved beyond a reasonable doubt if the Court finds that the accused was subject to the Code of Service Discipline when he committed the act with which he is charged on August 3, 2002.

[4] The evidence before this Court consists of the facts and issues set out in Rule 15 of the Military Rules of Evidence of which judicial notice has been taken, and

more specifically the substance of chapter 204 of the Compensation and Benefit Instructions relating to the pay of officers and non-commissioned members in the reserve force other than Class "C" reserve service, and NDHQ Instruction ADM (Per) 2/93 which deals with Class "A", Class "B" and Class "C" Reserve Service, including Annexes A, B and C. Those documents were filed with the Court, as Exhibits 11 to 14 inclusive. The Court has also taken judicial notice that August 3, 2002, was a Saturday.

[5] The evidence also consists of Exhibits 3 to 10 and oral admissions by the defence. We need not provide a detailed description of that evidence here, given the position taken by the defence, which admits all of the relevant facts. Further evidence was provided by the testimony of Captain Carrier, Captain St-Denis and Sergeant Thériault.

[6] The Court would note that it would be unable to conclude from the evidence as set out in the various testimony and the evidence as a whole that Sergeant Duhamel was on military service on Saturday, August 3, 2002, at his unit workplace or elsewhere, or that he had received a specific instruction in that regard from a superior officer. The testimony of Captain Carrier and Captain St-Denis does not confirm that hypothesis. Moreover, the Court cannot draw a reasonable inference from that testimony that Sergeant Duhamel should have been at the workplace of the 4th Battalion, Royal 22nd Regiment, on Saturday, August 3, 2002.

[7] Having regard to the prosecution's position, the absence of such evidence would not be fatal. For the purposes of the analysis, the only facts relevant to the question in issue are as follows: Sergeant Duhamel agreed to perform Reserve Class "B" service for the period beginning on April 1, 2002, to end on October 31, 2002. On August 5, 2002, Sergeant Duhamel asked his commanding officer to terminate his Class "B" service contract, and here I am referring to Exhibit 8 and also to paragraph 9 of Exhibit 10, and that request was granted. The Class "B" contract terminated on August 13, 2002. The act charged was committed on August 3, 2002. In short, Sergeant Duhamel committed the act with which he is charged while he was on Class "B" service, that is, while he was on full-time service.

[8] The parties agree that Sergeant Duhamel was on Class "B" reserve service of the type described in subparagraph 9.07(1)(*c*) of the QR&O during the term of his contract.

[9] The parties' positions may be summarized as followed. The prosecution submits that Sergeant Duhamel was subject to the Code of Service Discipline when the offence was committed because he had agreed to be employed on full-time service, Class "B" reserve service, between April 2002 and the end of his contract on August 13, 2002. In the prosecutions's submission, a person who is on Class "B" reserve service comes under subparagraph 60(1)(*c*)(vi) because he has been called out on service, and accordingly the person is comparable to a member of the regular forces. The

prosecution cited section 15 and section 33 of the *National Defence Act* in support of its argument.

[10] The defence submits that this cannot be the case. The defence position is that the expression "called out on service" in subparagraph 60(1)(*c*)(vi) refers only to special and essential situations, which are essentially found in domestic operations such as the ice storm, the floods in Manitoba or the SwissAir crash, to give only a few examples. The defence submits that Parliament has specifically chosen to make members of the reserve force subject to the Code of Military Discipline when they are on service in a unit of the regular force under subparagraph 60(1)(*c*)(x), Roman numeral 10. It invites the Court to consider Exhibit 13, and in particular paragraph 4(b), and adds that the situation covered by that paragraph deals precisely with Class "B" service in support of the essential activities of the regular force. Accordingly, the defence argument is that if Parliament had intended that reservists on Class "B" reserve service who are on full-time service in a reserve unit be subject to the Code of Service Discipline, it would have done this expressly and in the same manner as in subparagraph (x), Roman numeral 10.

[11] It is clear that the prosecution has the burden of proving beyond a reasonable doubt that the Court has jurisdiction to try an accused person, that is, that the person is subject to the Code of Service Discipline under section 60 of the Act, at the time the offences charged were committed, in addition to its burden of proving each of the essential elements of the charges beyond a reasonable doubt.

[12] A court martial is a statutory court, and unlike a superior court sitting in a criminal matter a court martial cannot assume that it has jurisdiction to try an accused. That jurisdiction must be proved. A court martial does not have jurisdiction to try a person for an offence he or she allegedly committed unless the person was subject to the Code of Military Discipline at the time the offence was committed. Section 60 of the *National Defence Act* lists the situations in which a person may be tried by a service tribunal. The list is exhaustive. Officers or non-commissioned members of the reserve force, as in the accused's case, are subject to the Code of Military Discipline when they fall within any of the situations set out in paragraph 60(1)(*c*). A member of the military may be subject to the Code for more than one reason at once. For example, if he was in uniform aboard a Canadian Forces vehicle while on service in a unit of the regular force. That is of little consequence. Status as being subject to the Code is based on one of the situations referred to in paragraph 60(1)(*c*) being present.

[13] The prosecution addressed section 15 of the *National Defence Act*, and in fact subsection 15(3) of the Act reads as follows:

> (3) There shall be a component of the Canadian Forces, called the reserve force, that consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service.

[14] It is also worth noting that under subsection 33(2) of the *National Defence Act*:

> (2) The reserve force, all units and other elements thereof and all officers and non-commissioned members thereof
>
> > (*a*) may be ordered to train for such periods as are prescribed in regulations made by the Governor in Council; and
> >
> > (*b*) may be called out on service to perform any lawful duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.

[15] The provisions in question here, in section 33, are found in chapter 9 of the QR&O, entitled "RESERVE SERVICE". The reserve force consists of three classes of service, and it can be determined, from the class of service, what rate of pay reservists will receive and what the nature of the service is: part-time or full-time. Reservists may serve in more than one class during their service in the Reserve. For example, reservists who are employed on Class "A" and Class "B" reserve service are paid according to the reserve pay rates, which are 85 percent of the regular force rates. Reservists on Class "C" service are paid at the same rate as members of the regular force. This is the effect of Chapter 9 of the QR&O which deals with reserve service and chapter 204 of the compensation and benefit instruction of which the Court has taken judicial notice.

[16] As I said earlier, the parties agree that at the time the act charged was committed, Sergeant Duhamel was in one of the situations covered by subparagraph 9.07(1)(*c*) of the QR&O and was on full-time service.

[17] Counsel for the prosecution submits that this case is no different from the decision of a standing court martial at which Ménard M.J. presided, in April 1999, in *The Queen v. Dumont*, in which the issue here was considered: whether the accused was subject to the Code of Service Discipline. In that case, Major Dumont was on Class "B" reserve service and had been suspended from his military duties. While he was suspended, he made contact with certain persons, outside the limits of his unit, contrary to an order he had been given by a superior officer. Although the issue in that case was very different, it was not disputed that Major Dumont was on Class "B" reserve service at the time he was suspended. The fact on which *Dumont* turned was that the act charged had been committed while he was still suspended.

[18] Ménard M.J. said, at lines 10 and 11 on page 60 of the transcript, in relation to the status of the accused as subject to the Code of Service Discipline while on Class "B" reserve service, and I quote:

> [TRANSLATION] He therefore meets the requirement set out in subparagraph 60(1)(*c*)(vi) of the *National Defence Act*.

[19] The prosecution relies only on that statement, while the defence respectfully submits that that statement is in error.

[20] The prosecution seems to be suggesting that a member on Class "B" reserve service is comparable to a soldier in the regular force and accordingly is on service 24 hours a day, seven days a week. That is not correct. A member of the regular force is permanently subject to the obligation to perform lawful service and indeed his or her service is continuous, unlike that of a reservist. The continuity of that service is important, for example, for purposes of eligibility for the Canadian Forces pension plan. A member of the regular force is nonetheless not on duty 24 hours a day. In any event, these comparisons, and this type of reasoning, are not only of no utility, they are not relevant for the purposes of disposing of the issue in this case.

[21] The prosecution submitted that the Court should not analyze the status of the accused, as subject to the Code of Service Discipline, based solely on an examination of section 60, and that reference should be made to sections 15 and 33, among others. I do not agree with that approach, because it does not adhere to the statutory scheme of the *National Defence Act* and it would go beyond a contextual analysis.

[22] The fact that a member of the regular force is subject to the Code of Service Discipline at all times is solely the result of the wording of paragraph 60(1)(*a*) of the *National Defence Act*. The disciplinary powers of the Canadian Forces in respect of an officer or non-commissioned member of the regular force do not derive from section 15 or section 33. The Code of Service Discipline is a separate part of the *National Defence Act*, Part III. It must be acknowledged that the jurisdiction of a service tribunal cannot be derived from something outside the boundaries of Division 1 of Part III of the Act. That division provides an exhaustive listing of the parameters that apply in order for a person, whether a member of the forces or a civilian, to be subject to the Code, but it also sets out the circumstances in which a person who is subject to the Code of Service Discipline may raise grounds that affect the jurisdiction of the service tribunal to try the accused.

[23] In addition, the Court is not persuaded by the arguments presented by counsel for the defence, even though they are effective and were made with conviction. By that approach, a superior officer could obviously give an order by telephone to a subordinate on Class "B" reserve service in a reserve unit, directing him or her, for example, to attend at the workplace the following morning, but by that approach, a member on Class "B" reserve service could disregard that order because he or she would not be subject or liable to any disciplinary action since he or she would not be subject to the Code of Military Discipline, even if the person had voluntarily agreed to

be called into service for a temporary period, however specific, but in particular full-time. That situation is different from the situation of a member on Class "A" reserve service.

[24] If we adopted the defence reasoning it would mean that a reservist in that situation could say: "My 37 and a half hours are over for the week, see you Monday morning!" That situation would be entirely bizarre, in a system in which the person has voluntarily agreed to serve full-time for a fixed period. Serving full-time in the Canadian Forces does not mean serving solely according to a pre-established work schedule.

[25] A person who is on Class "B" reserve service in a reserve unit, after accepting the call-out by a competent authority for a fixed period, under subparagraph 9.07(1)(1)(*c*) is subject to the Code of Military Discipline under subparagraph 60(1)(*c*)(vi) of the Act. On this point, the Court agrees with the conclusion stated by Ménard M.J. in *R. v. Major Dumont*.

[26] Having concluded that Sergeant Duhamel was subject to the Code of Military Discipline under subparagraph 60(1)(*c*)(vi) of the Act for the period between April and August 2002, the term of his contract for Class "B" reserve service in his reserve unit, the Court is satisfied that the prosecution has proved all of the essential elements of the offence, given that they were admitted by the defence. The Court is also satisfied that the act in question was an act to the prejudice of good order and discipline. On the one hand, this is a case in which the prosecution has chosen to rely on the presumption in subsection 129(2) of the *National Defence Act* by alleging the contravention of an order, and on the other hand there is an admission by the defence which chose to admit the existence of the order, the sufficiency of its publication and notification and knowledge of the order on the part of the accused.

[27] Sergeant Duhamel, please rise. Accordingly, having regard to the reasons I have explained and based on those reasons, the Court finds you guilty on the second count of the charge. Please be seated.

LIEUTENANT-COLONEL M. DUTIL, M.J.

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