

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20190218

Docket: CMAC-596

Citation: 2019 CMAC 1

Present: BELL C.J.

BETWEEN:

MASTER CORPORAL C.J. STILLMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, via Teleconference on February 14, 2019.

Order delivered at Ottawa, Ontario, on February 18, 2019.

ORDER AND REASONS BY:

CHIEF JUSTICE BELL

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ORDER AND REASONS

CHIEF JUSTICE BELL

[1] On October 23, 2013 a Standing Court Martial found Master Corporal C.J. Stillman [the Applicant] guilty of offences under s. 130(1)(a) of the *National Defence Act*, R.S.C., 1985, c. N-5 [the NDA], related to the discharge of a firearm with intent contrary to s. 244 of the *Criminal Code*, R.S.C., 1985, c. C-46 [the Code], the reckless discharge of a firearm contrary to s. 244.2 of the Code, aggravated assault contrary to s. 268 of the Code, as well as offences under s. 85 and s. 95 of the Code. At trial and before this Court, the Applicant contended that s. 130(1)(a) of

the NDA, which provides for trial by one's peers in the Canadian Armed Forces rather than a jury trial, is unconstitutional. This Court rejected the Applicant's contention that s. 130(1)(a) of the NDA is unconstitutional and affirmed the convictions and sentence (*R. v. Déry*, 2017 CMAC 2 [*Déry*]). In reaching its conclusion in *Déry*, this Court followed its decision in *R. v. Royes*, 2016 CMAC 1, 486 N.R. 257 [*Royes*]. On June 20, 2017 the Applicant filed a notice of appeal in the Supreme Court of Canada. That appeal is scheduled to be heard on March 26, 2019. Following this Court's decisions in *Royes* and *Déry*, a differently constituted panel in *R. v. Beaudry*, 2018 CMAC 4 [*Beaudry*], decided that s. 130(1)(a) of the NDA is indeed unconstitutional in that it violates the right to a jury trial set out in s. 11(f) of the of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. On January 15, 2019 the Supreme Court of Canada refused the Director of Military Prosecution's application for a stay of this Court's decision in *Beaudry* pending final determination of that matter by the Supreme Court (*R. v. Beaudry*, 2019 SCC 2).

[2] It is against that confusing jurisprudential backdrop that the Applicant now seeks release pending final determination of his appeal to the Supreme Court of Canada. The Applicant relies, in part, on s. 248.2 of the NDA in support of his motion for judicial interim release.

[3] For reasons expressed in *R. v. Royes*, 2016 CMAC 3, this Court has concluded it has no jurisdiction to order the judicial interim release of a convicted person pending his or her appeal to the Supreme Court of Canada. The NDA contains no provision equivalent to s. 679(1)(c) of the Code which explicitly permits provincial and territorial appellate courts to order judicial

interim release pending the determination of such appeals. This Court's jurisdiction to intervene in such circumstances is via application of the stay provisions found in s. 65.1(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26. It reads as follows:

Stay of execution — application for leave to appeal

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

[4] In considering whether a stay should be granted, this Court must consider the tri-partite test set out in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 and *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. This Court must be satisfied that there is a serious issue to be determined, that the Applicant would suffer irreparable harm if the stay is not granted and that the balance of convenience favours the granting of the stay.

[5] I have no hesitation in concluding that there is a serious issue to be determined. The uncertainty concerning the constitutionality of s. 130(1)(a) of the NDA raises a serious issue that will soon be decided by the Supreme Court of Canada.

[6] I am aided in my analysis with respect to the issues of irreparable harm and balance of convenience by the consent of the parties. Both parties acknowledge that a complete stay of the sentence imposed, particularly as it relates to ancillary relief ordered by the military judge, might result in some disagreement relating to the issues of irreparable harm and balance of convenience. The parties have therefore agreed to a stay of the sentence imposed upon terms

which include the Applicant's release from custody; that he keep the peace and be of good behaviour; that he abstain from communication with the victims, Bombardier Trimm and Bombardier Coté; that he reside at 10221, 86th Street, Grande Prairie, Alberta T8X 05B, subject to the requirement that he notify the Military Police, in writing, 24 hours prior to any anticipated change of residence with full details of the new address; and that he surrender himself into custody when directed by this Court, the Supreme Court of Canada or any committal authorities of the Canadian Armed Forces. I find those terms acceptable.

[7] There will be an Order partially staying the sentence imposed, which includes the release of the Applicant from incarceration subject to the terms set out above.

THIS COURT ORDERS that the sentence imposed upon Master Corporal C.J. Stillman by the Military Judge on the 24th day of October, 2013 is partially stayed subject to the following terms and conditions:

- a) That the Applicant be released from custody;
 - b) That he keep the peace and be of good behaviour;
 - c) That he abstain from communication with the victims, Bombardier Trimm and Bombardier Coté;
 - d) That he reside at 10221, 86th Street, Grande Prairie, Alberta T8X 05B subject to the requirement that he notify the Military Police, in writing, 24 hours prior to any anticipated change of residence with full details of the new address;
 - e) That he surrender himself into custody when directed by this Court, the Supreme Court of Canada or any committal authorities of the Canadian Armed Forces; and
- Except as set out herein, no other portion of the sentence is stayed.

"B. Richard Bell"
Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: CMAC-596

STYLE OF CAUSE: MASTER CORPORAL C.J.
STILLMAN v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: FEBRUARY 14, 2019

ORDER AND REASONS BY: CHIEF JUSTICE BELL

DATED: FEBRUARY 18, 2019

APPEARANCES:

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Major Dominic Martin FOR THE RESPONDENT

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