Date: 20020111

Docket: CMAC-437

Neutral citation: 2002 CMAC 1

C O R A M: STRAYER C.J.
LYSYK J.A.
DAWSON J.A.

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

SERGEANT (RETIRED) MICHAEL KIPLING

Respondent

Heard at Winnipeg, Manitoba on Thursday, October 25, 2001

JUDGMENT delivered at Ottawa, Ontario on Friday, January 11, 2002

REASONS FOR JUDGMENT BY: STRAYER C.J.

CONCURRED IN BY: LYSYK J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

STRAYER C.J.

Introduction

[1] This appeal raises questions as to whether a member of the Canadian Armed Forces may be prosecuted under section 126 of the *National Defence Act* (RSC 1985, c. N-5) for refusing to submit to a vaccination when ordered to do so if, in the opinion of a military court, the vaccine was "unsafe and hazardous". It also raises the question as to whether such a decision should be made by a Standing Court Martial in a proceeding said to be a plea in bar of trial; and further, whether the proceedings in this Court would require a pronouncement by the Court as to the "constitutional validity, application or operability" of section 126 and if so, whether any such

pronouncement can be made in the absence of service on the attorneys general of a notice as required by section 57 of the *Federal Court Act* (RSC 1985, c. F-7).

Facts

[2] The salient facts as to the respondent's conduct are not in dispute.

[3] The respondent had been in the Armed Forces since 1973. At the time relevant to this proceeding he was a flight engineer with 435 Squadron. In early 1998 a detachment from the Squadron was ordered to go to the Middle East as part of a multi-national force deployed to put pressure on Iraq to comply with UN Security Council resolutions in respect of submitting to weapons inspections. The deployment of the respondent's unit was originally to Bahrain but while it was en route the destination was changed to Kuwait City, some 61 kilometres from the Iraq border. There was evidence that Canadian authorities had an intelligence assessment indicating that Iraq might use weaponised anthrax against the multinational forces if armed conflict ensued. On March 12, 1998 the Commander of the respondent's detachment ordered all personnel to undergo vaccination with an anthrax vaccine. The respondent refused to undergo such vaccination and on March 14, 1998 he was charged under section 126 of the *National Defence Act*. Section 126 provides as follows:

126. Every person who, on receiving an order to submit to inoculation, re-inoculation, vaccination, re-vaccination, other immunization procedures, immunity tests, blood examination or treatment against any infectious disease, wilfully and without reasonable excuse disobeys that order is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment. i	126. La transgression, délibérée et sans motif valable, de l'ordre de se soumettre à toute forme d'immunisation ou de contrôle immunitaire, à des tests sanguins ou à un traitement anti-infectueux constitue une infraction passible au maximum, sur déclaration de culpabilité, d'un emprisonnement de moins de deux ans.

Shortly thereafter he was deployed back to Canada because of his refusal.

[4] It must be emphasized that at no time was the respondent physically forced to undergo vaccination.

[5] The charge was brought before a Standing Court Martial in February, 2000. Some 16 days of hearings took place but no trial was ever held. Instead the military judge first heard various motions, including a plea in bar of trial with respect to the jurisdiction of the court, and he disposed of them. He then went on to consider what he regarded as another plea in bar of trial based on sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms.* How this matter was raised and dealt with requires close examination.

[6] The parties have been unable to produce for this Court any written description by the respondent of the issues he intended to raise in a plea in bar of trial relevant to sections 7, 12 and 15 of the Charter. I must assume that the military judge accurately summarized what he understood to be the issue in the following passage:

> This court understands that the defence will soon present a plea in bar of trial based on section 7, 12 and 15 of the *Charter of Rights and Freedoms*. The defence has already notified the court in writing that it intends to argue that imposing inoculation with an unlicenced vaccine without obtaining an informed consent from the members of the Canadian Forces subjected to the vaccination program constituted an infringement of the accused's Charter rights to life, liberty and security of the person, the right not be subjected to cruel and unusual treatment, and the right to equal protection and equal benefit of the law. (1 appeal book p. 116 lines 1-11)

Neither counsel took exception to that description. It will be noted that the learned military judge states that "the defence has already notified the court in writing that it intends to argue . . .". When asked by this Court to produce this notice in writing neither party could find any such

notice, nor was one included in the record of the Standing Court Martial. The only notice produced by the parties was in the form of a letter from counsel for the respondent dated February 10, 2000 in which he notified the prosecutor in writing, with a copy to the military court, of the particulars of his intended plea in bar of trial which in no way mentioned the Charter issues. Attached to that letter was a copy of a Notice of Application filed previously in the Federal Court Trial Division, but not yet dealt with there, in which the respondent was seeking, in that court, prohibition and declaratory relief related to sections 7, 11(d), 12 and 15 of the Charter. That Notice did not allege that the anthrax vaccine was "unsafe" but only that it was "unlicensed". The Federal Court application was of course a proceeding for remedies which were in no way available in the Standing Court Martial.

[7] It must also be noted that the respondent's counsel affirmed to the Standing Court Martial, at the request of the prosecutor, that in the issues he raised he was not attacking the validity of section 126 of the *National Defence Act*. (1 AB, p. 121, lines 21-4; 6 AB, p. 984, lines 29-32).

[8] The court martial then proceeded to hold hearings on this "plea in bar of trial", presumably on the issue of "informed consent" as stated at the outset by the military judge. Much evidence was heard touching on the circumstances of the deployment, considerations by the military authorities of the need for anthrax vaccination, the use of this particular vaccine elsewhere, and conflicting expert opinions as to the degree of risk associated with the use of the vaccine.

[9] Following this evidence counsel for the respondent made a lengthy argument as to the need for "informed consent" to comply with section 7 of the Charter. His argument was somewhat ambiguous. His basic premise was, and remains as confirmed by him at the hearing of this appeal, that every one has the right to choose whether he or she will permit a medical intrusion into his or her body by means such as a vaccine. He would permit no distinction as between members of the Armed Forces and civilians in this respect. This is a clear and understandable proposition. In his view this right has become constitutionalized by section 7 where it guarantees security of the person. However he then proceeded to argue that there was enough information then available (apparently, whether known to Sergeant Kipling at the time or not) which would have given him a "reasonable excuse" (as permitted by section 126) to refuse the vaccine. He argued that the respondent's superiors should have, there and then at the site of deployment, decided whether the respondent's concerns provided him with a "reasonable excuse" and that the matter should not have proceeded by way of prosecution. He characterized this as consistent with a requirement for "informed consent". Near the end of his argument on section 7 counsel for the respondent stated:

> So we're not attacking section 126 per se as it is now enacted. We're not attacking the law, as such, but rather the way it was interpreted and implemented in this particular case. And I say to you, "Well, then, what was done in this particular case?" We say, Your Honour, that the command in effect, the order in effect was unlawful. And why was it unlawful? Because section 126 does not allow senior officers to say to enlisted personnel, "you must take that vaccine." So section 126 does not say and does not authorize senior officers to say to the troops, "you must take that vaccine", that's not what it says. Rather, it says, "you must take that vaccine unless you have a reasonable excuse"; a reasonable excuse. And we submit that those words, "reasonable excuse",, in effect equate to informed consent. The Charter is in effect, in this case, a tool of statutory interpretation and, again, informed consent equates to reasonable excuse in the legal sense. (6 AB p. 984, lines 29-45).

(At this point I feel obliged to remark, parenthetically, that it is hard to understand how the concept of "informed consent" relates to the respondent's arguments concerning the

requirements of section 7 of the Charter or section 126 of the *National Defence Act*. The respondent's basic premise is that service personnel, like all Canadians, have a right to security of the person under section 7, which means *inter alia* that they cannot be vaccinated unless they consent. This right is a right to refuse consent for some good reason or for no reason at all. A prosecution under section 126 also is based on the refusal of a member of the forces to consent. Yet the normal use of the doctrine of "informed consent" is in situations where some form of consent has been given, and it is contended that such consent is not valid unless it was "informed". Counsel seems to have confused these disparate concepts in order to employ the mantra of "informed consent".)

[10] The associate counsel for the respondent thereafter argued the applicability of sections 12 and 15 of the Charter. As the military judge did not rely on these sections in his disposition of the case, I need not consider further this part of the argument.

[11] After counsel for the respondent had completed their arguments the military judge stated as follows:

> Now, Major Fullerton, before I ask you to proceed, in early February of thisyear, Mr Prober, you served the court by sending to my attention some documents which contained a notice of application that you intended to place before the federal court seeking for, amongst other things, a writ of prohibition. In that document you refer to the administration of an unlicensed anthrax vaccine as infringing the accused's rights under sections 7, 12 and 15. In your final remarks today you referred to the unlicensed vaccine, and Ms Duncan when she spoke on section 12, referred to the unsafe vaccine and she mentioned the evidence of Dr Nass.
>
> Now we've been going at this for awhile and in some three weeks of evidence that was heard here the issue of the safety of the anthrax vaccine, and specifically of lots 020 and 030, was canvassed at length. And yet, basically, you have not, nor you nor Ms Duncan, commented on this part of the evidence in your final remarks on this plea in bar of trial.
>
> So, Mr Prober, could you comment on the issue of the lack of safety of these two vaccine lots, lack of safety — or safety, on the issue of safety of these two

> vaccine lots as it relates to the right to the security of the person under section 7 of the *Charter*, since you're the one that argued section 7.
>
> If the court were to be satisfied on the balance of probabilities that the vaccine in lots 020 and 030 was unsafe, what effect could such a conclusion have on the application of section 7 of the *Charter*?
>
> Conversely, if you do not want or do not care to comment on this issue, feel free to confirm that to the court that this is your informed decision. (6 AB p. 1010, lines 11-45)

Counsel for the respondent replied by assuring the court that his client did consider the vaccine in question to be unsafe and he asked the military judge to consider carefully the evidence which would support that belief. He did not specifically ask for a finding that the vaccine was unsafe: his argument appeared to rely in part on that alleged unsafety to support variously his position that every one should have the absolute right to refuse a vaccination, regardless of their occupation, or that no one should be deemed to have consented unless their consent was "informed" which, according to his argument, the respondent was not in this case in respect of much of the material put before the court. (6 AB p. 1011-12).

[12] It is true that the prosecutor did not take objection to the question of safety as such being addressed. However it appears from his argument that he did not understand (and there was no written or oral formulation by the respondent's counsel to so indicate) that safety as such was the central issue. He dealt with the conflicting evidence as to safety in the context of whether the vaccine also represented a threat to "life" as protected by section 7 of the Charter and he argued that the evidence disclosed no threat to life (6 AB p. 1033-35). It is clear that he still understood the issue to be, as formulated by counsel for the respondent, that the constitution somehow mandates the unqualified right of every one, including service personnel, to refuse a vaccination; that, apparently, "reasonable excuse" as a matter of constitutional principle must be taken to

require “informed consent”(presumably one cannot be asked to consent unless one has been informed); and that it is constitutionally impermissible to require that in order to establish the existence of “reasonable excuse” one must face prosecution. (6 AB p. 1032, lines 16-29).

[13] Notwithstanding this background, the military judge in his decision in respect of the “plea in bar of trial” characterized the most important issue as being whether the “substance which was used in Kuwait City on 12 March 1998 was safe”. This he regarded as a prior question to a determination of the validity of section 126, which in fact he never did decide. (6 AB 1065, lines 21-28). After reviewing the conflicting evidence on the question as stated by him he reached these conclusions:

> . . . no evidence has shown any malice or negligence on the part of the Canadian Forces authorities in deciding to go with the mandatory anthrax vaccine program on the basis of their knowledge in 1998.
>
> *
>
> There was no requirement to show that the vaccine was deadly or would’ve caused irreparable or incurable physical or psychological damages to our soldiers. It was sufficient and the court is satisfied on the balance of probabilities that the defence has successfully demonstrated that the anthrax vaccine contained in lot 020 was unsafe and hazardous and could be responsible for the important symptoms reported by so many persons who received that vaccine.
>
> In those circumstances, the court concludes that the accused’s right to life, liberty and security of the person in section 7 of the *Charter of Rights and Freedoms* were infringed. And as the court stated earlier, the government, through its Department of National Defence and the Canadian Forces, could never be justified to impose inoculation of soldiers with an unsafe and dangerous vaccine as a limit of their rights under section 7.
> (6 AB p. 1072, lines 7-10, 15-32).

He then proceeded to allow the plea in bar of trial and stayed the charge under section 126.

[14] The Crown appeals from that decision and requests that a new trial be ordered. In its requisition for hearing of the appeal the appellant affirmed that there was no requirement to serve a notice of constitutional question. At the opening of the hearing both parties confirmed that they

did not consider there to be any constitutional question, as defined in section 57 of the *Federal Court Act*, to be before the Court Martial Appeal Court, and that therefore no notice of constitutional question was required.

Issues

[15] Counsel for the appellant principally invited this Court to set aside the findings of fact of the Standing Court Martial as to the anthrax vaccine being "unsafe and hazardous", as unreasonable and unsupported by the evidence. He argued that the military judge denied the prosecution an opportunity to present its case fairly by treating the issue as one of determining the safety of the vaccine, whereas the argument as presented by the defence before the learned judge, and responded to by the prosecution, involved the question of whether no vaccination could be constitutionally required of military personnel without their consent and the rule of "informed consent". The appellant also raised several arguments to the effect that section 126 could be constitutionally applied in these circumstances.

[16] The respondent before this Court mainly argued in support of the correctness of the learned military judge's findings of fact and against the right of an appeal court to alter or reverse those findings. He reverted to the argument based on "informed consent". He also countered the arguments raised by the appellant concerning the constitutional applicability of section 126.

Analysis

[17] I have concluded that this appeal must be allowed, the stay of prosecution set aside, and a new trial ordered.

[18] Before going into the reasons for this conclusion I believe it is important first to understand what section 126 of the *National Defence Act* provides and what the decision of the military judge, in staying the prosecution under section 126, really means.

[19] Section 126 does three things. First, it makes clear by implication that an order to submit to vaccination is an order authorized by Parliament under the *National Defence Act*. Secondly, it exposes to prosecution anyone who refuses to obey such an order. Thirdly, it allows that person, if tried under section 126, to raise the defence of "reasonable excuse". (Counsel could not refer the Court to any jurisprudence interpreting "reasonable excuse" in this context).

[20] As for the legal meaning of the decision of the military judge, it appears to be that a mere order, made in good faith and without negligence, to submit to a vaccination, where at that time or at some time in the future there may be opinions expressed that such vaccine is unsafe, is *per se* a violation of section 7 of the Charter. It is apparently not relevant that the authorities acted with reasonable care and without malice as the trial judge found, or that personnel are allowed to refuse vaccination and raise their reasonable concern about the safety of the vaccine as a defence in a prosecution under section 126. The thrust of the decision is that no one should be exposed even to an order to take a vaccine about which he has concerns, though he is not physically forced to receive the vaccine, if he thereby runs the risk of prosecution and the possibility that he

could not sustain a defence of "reasonable excuse". (While the matter is perhaps not free from doubt and I need not decide it here, it is probable that at such a trial the burden of negativing "reasonable excuse" would be on the Crown and the burden would not be on an accused to prove it).

[21] Thus the effect of the decision of the military judge in reality is that section 126 cannot be interpreted to authorize an order requiring the taking of a vaccine thought by some to be unsafe, nor can it authorize a prosecution for refusal, nor can the defence of "reasonable excuse" provided in section 126 be constitutionally applied because it apparently is thought not to be adequate to relieve an accused of culpability even if at trial it appears from the evidence that, on the balance of probabilities, the vaccine is unsafe. In other words, section 126 cannot be applied or made operable constitutionally.

[22] With this understanding of the legal finding with which we are faced, I will proceed to demonstrate why a trial must be ordered.

Not a Proper Matter for a Plea in Bar of Trial

[23] Subsection 112.24(1) of the *Queen's Regulations & Orders* ("QR&O's) prescribes the situations in which an accused may plead in bar of trial. These are as follows:

(a) the court has no jurisdiction; (b) the charge before the court or a substantially similar charge arising out of the facts that gave rise to the charge before the court was dismissed; (c) the accused was previously found guilty or not guilty of the charge before the court or a substantially similar charge arising out of the facts that gave rise to the charge before the court; (d) the accused is unfit to stand trial on account	*a*) la cause n'est pas de la compétence de la cour; *b*) l'accusation devant la cour ou une accusation sensiblement comparable découlant des faits qui ont donné .lieu à l'accusation devant la cour a fait l'objet d'une ordonnance de non-lieu; *c*) l'accusé a déjà été reconnu coupable ou non coupable de l'accusation ou d'une accusation sensiblement comparable découlant des faits qui ont donné lieu à l'accusation devant la cour; *d*) l'accusé est inapte à subir son procès pour

of mental disorder ...; or (e) the charge does not disclose a service offence.	cause de troubles mentaux ...; *e*) l'accusation ne révèle pas une infraction d'ordre militaire

.

By subsection 112.24(6) it is provided that where a plea in bar of trial is allowed the court shall terminate the proceedings. That is the whole purpose of a plea in bar of trial.

[24] It will be noted that the argument which the respondent sought to make before the Standing Court Martial in respect of "informed consent" or the constitutional requirement that there should be no vaccination without consent is not a plea described in subsection 112.24(1). It was therefore not a fit matter for a plea in bar of trial. The fact that the Crown did not strenuously object to this procedure is irrelevant: jurisdiction cannot be conferred by consent.

[25] There are good legal and practical reasons why such an argument should not be raised by counsel or disposed of by a Standing Court Martial in this kind of proceeding. If it had been dealt with in the trial itself, the elements of section 126 would have been addressed: that is, the actual case that was before the Standing Court Martial. The meaning of "reasonable excuse" would have been considered, and then its possible constitutional implications might have been more clearly seen. The trial would have been conducted by the same judge sitting alone. No panel of officers was being spared listening to legal arguments by this preliminary procedure as would have been the case for example, in a General Court Martial. Nearly all the evidence that would be required to try the charge would either concern matters not in dispute or concern the safety of the vaccine and the circumstances of the order given, all of which was heard on the plea but which could have more appropriately been heard at the trial. I say more appropriately, because at

the trial the burden of proof would have been on the prosecution to establish the elements of the offence (and possibly to negative the defence of "reasonable excuse"), not on the accused as it was in the plea proceedings to establish the facts which the trial judge thought to be the central issue. The decision under section 7 of the Charter as taken by the trial judge was of extreme importance not only for its implications as to the use of a vaccine which, for example, had been licensed for use in the United States for 28 years prior to 1998, but also for the constitutional implications with respect to other laws in various Canadian jurisdictions which require immunization, quarantine, etc. The unwisdom of dealing with such grave matters in the kind of loose procedure employed here is obvious. As noted above, there was no proper written notice or clear oral definition of the issue which was in fact decided. It appears from the record as demonstrated that counsel for the respondent framed his issue orally in terms of the need for consent as a constitutional principle. This was the issue which the appellant thought it had to meet, and this was the issue upon which both parties presented evidence and crossexamined adverse witnesses. The only written basis upon which it might have been thought by the military judge that the issue was the safety of the vaccine *per se*, as far as counsel can demonstrate to me, was to be found in a copy of a pleading in the Federal Court Trial Division, in a proceeding for remedies not within the jurisdiction of a Standing Court Martial, in which there was only an allegation that the vaccine was "unlicensed". ("Unlicensed", meaning presumably unlicensed in Canada, is not automatically equivalent to "unsafe"). Counsel have been unable to show this Court any other basis in writing for that issue being considered by the military judge. As demonstrated above in quotations from the proceedings, it was in fact the military judge who at the end of the respondent's case raised the safety question as the issue to be determined.

[26] Constitutional issues should be addressed in circumstances of the greatest clarity as to what is in issue.

[27] In my view the military judge had no authority to deal with this on a plea in bar of trial. Subsection 112.03(2) of the Q.R. & O's does provide

112.03(2) At any time after a Standing Court Martial or Special General Court Martial has been convened, the military judge assigned to preside at the court martial may on application, hear and determine any question, matter or objection.	112.03(2) À tout moment après la convocation de la cour martiale générale spéciale, le juge militaire désigné pour présider la cour martiale peut, sur demande, entendre et statuer sur toute question ou objection.

Even if, notwithstanding the terminology employed by the parties in the court, this matter were not regarded as a plea in bar of trial but instead as a preliminary objection to the prosecution on constitutional grounds, the exercise by the trial judge of his discretion to deal with it as such was wrong in principle. This was not an objection based on matters extraneous to the substance of the charge, such as delay in bringing the accused to trial, but instead involved the same facts as would have to be considered to determine guilt or innocence.

The Decision was Wrong in Law

[28] Without going into all the problems inherent in the decision, one thing is apparent. The learned military judge found that to order, in good faith and with reasonable care, the administration of a vaccine that in future some court might hold on the balance of probabilities to be unsafe, is *per se* a violation of section 7 as an invasion of a right to personal security. I think the parties would agree that forcible vaccination of an individual would *per se* be an infringement of the right to security, but that is not what was involved here. Sergeant Kipling was never vaccinated but sent home instead to face the consequence of a possible trial where it

might be demonstrated that he had a "reasonable excuse" for refusing vaccination. In my view it was not sufficient for the military judge simply to conclude as he did that by the mere order there was an infringement of personal security *per se*; he was also obliged to consider, in applying section 7, whether this right to security was nevertheless denied in accordance with the principles of fundamental justice. It is well established that a court must balance individual interests *versus* the public interest in deciding whether in the final analysis there is a denial of a right contrary to the principles of fundamental justice so as to invoke the protection of section 7. For example in *Rodriguez v. Attorney General of Canada et al* ([1993] 3 S.C.R. 519) the Supreme Court was considering whether *Criminal Code* provisions making it an offence for a person to assist another person in committing suicide contravene section 7. The criminalization of the act of assisting suicide is perhaps even more intrusive of a person's bodily autonomy, since it may mean that if they are unable to commit suicide themselves and would require assistance, they may be prevented from making a personal choice whether to live or die. While in *Rodriguez* the Court found there to be an invasion of security of the person, it proceeded carefully to consider whether such intrusion was in accordance with the principles of fundamental justice. There it balanced the interests of the individual against societal interests in the preservation of life, and ultimately found the *Criminal Code* provision to be in accordance with the principles of fundamental justice. (*Ibid* at pp. 582-608). In the present case the prosecutor did argue before the military judge in opposing the plea in bar of trial that if there were a denial of the security of the person involved it was in accordance with the principles of fundamental justice. In this respect he relied mainly on the fact that Sergeant Kipling was not forced to have the vaccination and that he could not be sanctioned for refusing it except through the process of a trial where he would have the defence of "reasonable excuse". The conclusions of the military judge as quoted above do not

consider whether the invasion of security of the person under section 7, which he found, was or was not in accordance with the principles of fundamental justice. This is an error of law in the application of a constitutional sanction.

[29] Even if such issues are not adequately argued, a judge is obliged to apply the whole of section 7 and not just part of it if he undertakes to strike down legislation or administrative acts. A cursory review of the evidence reveals many other questions which should have been considered in determining whether the alleged invasion of "security" interests was nevertheless in accordance with the principles of fundamental justice. For example, were there balancing societal interests such as the defence of Canada and of Canadian interests abroad or the effectiveness and efficiency of the Canadian Forces? Are decisions as to the administration of vaccines, or as to their refusal, to be based on absolutely verifiable determinations as to "safety" or are they to be made on the basis of reasonable risk assessment? (The trial judge seems to have ruled out reasonable care as a justification for the determination of safety, as he held the military authorities not to have been negligent in ordering the vaccinations here). If such decisions must be made on the basis of absolute verifiable certainty, how is this to be achieved? The evidence in this case demonstrated some conflicting views of experts. All agreed that there are some short-term side effects from the vaccine for some people, and that there have been no studies of its long-term effects or indeed of many vaccines which continue to be used because the benefits outweigh any known risks. (5 AB 905-06, 919). If on the other hand the requirements of fundamental justice could be met by some form of rational risk assessment, who is to make it, by what standards, at what time, and on the basis of what knowledge? Must it be all the knowledge available in the world, or simply all the knowledge available to the relevant parties at the time

when circumstances appear to require a decision? In the present case, for example, as noted earlier, the negative opinion as to the safety of the vaccine had been formed in the United States by one of the expert witnesses only at about the time the order for vaccination was being issued to Canadian Forces in Kuwait in March, 1998; and a negative study on short-term effects of the vaccine was not completed until some 8 months later. Both of these sources were taken into consideration by the trial judge when in May, 2000 he found the vaccine to be unsafe.

CMAC Cannot deal with the Constitutional Issue

[30] Subsection 57(1) of the *Federal Court Act* provides as follows:

57.(1) Where the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of any province, or of regulations thereunder, is in question before the Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be adjudged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	57.(1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

It is not in dispute that this section applies to the Court Martial Appeal Court as a "federal board, commission or other tribunal, other than a service tribunal. . .".

[31] In this case the subject-matter of the proceeding, which has often been lost sight of, is a prosecution under section 126 of the *National Defence Act*. While all the time insisting that he was not challenging the validity of section 126, the respondent has obtained a decision of the Standing Court Martial that a prosecution may not constitutionally proceed under this section because, apparently, it could have the forbidden effect of permitting the military command to require a vaccination and thereby subject service personnel to a possible trial where their only

defence would be “reasonable excuse”. Since that is precisely what section 126 provides for, its “constitutional . . . applicability or operability”, as referred to in subsection 57(1) *supra* must be in issue. Indeed counsel for the respondent recognizes this in his memorandum of fact and law which states as follows:

> It is respectfully submitted that S. 126 of the National Defence Act, which requires an individual to submit to a vaccine unless there is a reasonable excuse, must be read in a way consistent with the provisions of Section 7 of the Charter.

Counsel for the appellant recognized that an issue of constitutional applicability was involved. In argument he said that the respondent was challenging not the constitutionality of section 126 but “its application within the specific circumstances of this case”. (6 AB p. 1014, lines 3-4, emphasis added).

[32] One may criticize the breadth of subsection 57(1) of the *Federal Court Act* but we must obey the law as we find it. In this particular case some attorneys-general might well have an interest in intervening, as counsel for the prosecution demonstrated to the Standing Court Martial that there are other federal and provincial laws which require immunization or quarantine in certain circumstances. (6 AB 1017-21). Compliance with the notice section is not difficult, and either party could have served the required notices in the present case. They chose not to do so. Consequently this Court is precluded by the subsection from adjudging section 126 to be either constitutionally inapplicable or inoperable, which is what we would have to do if we were to dismiss the appeal and confirm the decision of the Standing Court Martial.

Remedy

[33] This is an appeal under paragraph 230.1(d) of the *National Defence Act* involving the legality of a decision of a court martial that terminated proceedings on a charge. Under section 239.2 on such an appeal this Court may, where it allows the appeal, "set aside the decision and direct a new trial on the charge".

[34] As I have concluded that we must set aside the decision on the "plea in bar of trial", our only authority is to direct a new trial on the charge. Considering that some of the same evidence will probably be called but the issues may well be defined differently, it would probably be appropriate for a different judge to preside at the new trial.

Disposition

[35] The appeal should be allowed and a new trial should be ordered.

(s) "B.L. Strayer"
C.J.

(s) "B.L. Strayer"
C.J.

I agree
K.M. Lysyk J.A.

I agree
Eleanor R. Dawson J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-437
STYLE OF CAUSE:	The Queen v. Sergeant (Retired) Michael Kipling
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CONCURRED IN BY:	Lysyk & Dawson JJ.A.
DATED:	January 11, 2002

APPEARANCES:

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Mr. Jay Prober Ms Jill Duncan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Office of the Judge Advocate General Ottawa, Ontario	FOR THE APPELLANT
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