Date: 20081114

Docket: CMAC-495

Citation: 2008 CMAC 7

CORAM: **DAWSON J.A.**
McCAWLEY J.A.
TRUDEL J.A.

BETWEEN:

CAPTAIN KEITH NOCIAR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Winnipeg, Manitoba on Friday, April 25, 2008

JUDGMENT delivered at Ottawa, Ontario on Friday, November 14, 2008

REASONS FOR JUDGMENT BY: **DAWSON J.A.**

CONCURRED IN BY: **McCAWLEY J.A.**
TRUDEL J.A.

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REASONS FOR JUDGMENT

DAWSON J.

[1] The effect of section 165.14 and subsection 165.19(1) of the *National Defence Act*, R.S.C. 1985, c. N-5 (Act) and article 111.02(1) of the *Queen's Regulations and Orders for the Canadian Forces* (QR & Os) was to give exclusive power to the Director of Military Prosecutions (Director) to choose the court that would try an accused person. These provisions are set out in the appendix to these reasons.

[2] On April 24, 2008, in *Trépanier v. Her Majesty the Queen*, 2008 CMAC 3, this Court declared that these provisions violate sections 7 and paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* (Charter), and so were of no force or effect.

[3] On April 25, 2008, Captain Nociar's appeal came on for hearing before the Court. At issue are the effect of the *Trépanier* decision upon this appeal, and what remedy should be granted to Captain Nociar. For the reasons that follow, I conclude that Captain Nociar is entitled to the benefit of the decision of this Court in *Trépanier*, and that the appropriate remedy is to quash the conviction, the sentence and the convening order and to order a new trial.

Background Facts

[4] On April 26, 2005, Captain Nociar was charged with two offences under the Act. The charge sheet evidences the decision of the Director that Captain Nociar be tried by Standing Court Martial, that is by a military judge alone. Other choices available to the Director were trial by General Court Martial and trial by Disciplinary Court Martial. Those latter courts are comprised of a military judge sitting with a panel of military members.

[5] The convening order required Captain Nociar to appear before a Standing Court Martial on October 4, 2005. At that time, Captain Nociar pleaded not guilty to both charges. The Standing Court Martial sat on October 4-6, 2005, May 9, 2006, October 17-19, 2006 and finished its proceedings on November 16, 2006. On November 16, 2006, Captain Nociar was found guilty of one charge and acquitted of the other. He was sentenced to a reprimand and a fine.

[6] In consequence, Captain Nociar filed an appeal with this Court in which he appealed the legality of the conviction and sentence, and sought leave to appeal against the severity of the sentence. The application for leave was to be heard with the appeal of the conviction.

[7] At the commencement of the hearing of the appeal, the Court directed the attention of the parties to the *Trépanier* decision. After hearing brief submissions, the Court adjourned to allow the parties to serve and file written submissions about the effect of the decision in *Trépanier* on this proceeding.

The Position of the Parties

[8] In his brief written submissions, Captain Nociar argued that he was entitled to the benefit of the *Trépanier* decision because he is still "in the judicial system." Reliance was placed upon the decision of the Supreme Court of Canada in *R. v. Sarson*, [1996] 2 S.C.R. 223 at paragraphs 26 and 27. Captain Nociar submitted that a new trial should be ordered.

[9] In response, the Crown agreed that Captain Nociar was still in the "judicial system" and so could rely upon the declaration of unconstitutionality made in *Trépanier*. However, the Crown argued that no new trial should be ordered. The Crown submitted that:

- The Court should first decide the merits of the appeal before considering the effect of *Trépanier*, and only consider *Trépanier* if Captain Nociar otherwise failed in his appeal. This position was said to reflect the general rule that courts should avoid making unnecessary constitutional pronouncements. Further, the Crown argued that this would

allow Captain Nociar to argue his appeal on the merits so as to seek the benefit of an acquittal or a stay.

- Relying on a number of decisions, particularly that of the Supreme Court of Canada in *Schachter v. Canada*, [1992] 2 S.C.R. 679, the Crown observed that individual remedies are independent of declarations of invalidity as they arise from different sources - subsection 24(1) of the Charter and subsection 52(1) of the *Constitution Act, 1982* respectively. The Crown also noted that a remedy under subsection 24(1) of the Charter is rarely granted together with a remedy under subsection 52(1) of the *Constitution Act, 1982*. For these reasons, the Crown argued that Captain Nociar must demonstrate that his case is an "exceptional situation" where an individual remedy under subsection 24(1) of the Charter is appropriate. Given that "no specific or individual remedies" were granted in *Trépanier*, the Crown reasoned that Captain Nociar "cannot automatically" be granted the individual remedy of a new trial. As to the effect of this Court's recommendation in *Trépanier* about the appeal of the intervener Beek, the Crown argued that Captain Nociar is not similarly situated to Beek because he is not "a successful applicant" in a Charter challenge. The Crown relied on cases such as *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 and *Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 (*Prince Edward Island*) to argue that it is litigants, such as Beek, who are generally entitled to take immediate advantage of the finding of unconstitutionality.
- Relying upon the decision of the Supreme Court of Canada in *Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449, the Crown submitted that the actions of the

Director pursuant to sections 165.14 and 165.19 of the Act, taken before the issuance of the *Trépanier* decision, "are of full force and effect." However, the Crown acknowledged that "since 24 April 2008, according to [the] *Trépanier* decision, [Captain Nociar] has the right to elect his mode of trial." The Crown submitted that "there is a conflict in regard to these two legal rights and principles only in circumstances where the evidence indicates that an accused wishes to be tried by a mode of trial different than that selected by the [Director]." The Crown relied upon the fact that there is no evidence about what trier of fact Captain Nociar wished, or wishes, to be tried by. Further, the Crown pointed to the Director's Policy Directive 016/06 "Determining the Type of Court Martial to Try an Accused Person," issued on May 5, 2006 (Policy Directive). The Crown observed that Captain Nociar did not ask the Director to withdraw his decision, and instead direct that a Disciplinary Court Martial be convened, as Captain Nociar was entitled to do under the Policy.

- In the alternative, the Crown argued that, if Captain Nociar's rights were violated, he is not entitled to a specific remedy in light of the decisions in *Schachter* and *Corbière*. These cases are said to stand for the principle that such remedies are only granted in exceptional circumstances. The Crown asserted that Captain Nociar has not shown that his case is of an exceptional nature and that a new trial is the only suitable remedy.

- Further, the Crown submitted that there is no evidence that Captain Nociar did not receive a fair hearing by an independent and impartial tribunal. Thus, it is said that there is no evidence of any real prejudice that warrants the ordering of a new trial.

- Finally, the Crown asked that, if the Court was to rely upon the *Trépanier* decision, the Court postpone its decision until the Crown's application to the Supreme Court of Canada for leave to appeal that decision was adjudicated upon.

The Court's Direction in Response

[10] In response to the Crown's request that the Court await the result of the application for leave to appeal the *Trépanier* decision, Captain Nociar agreed that his appeal should not proceed until the application for leave was dealt with.

[11] Having considered the written submissions of the parties, the Court agreed to await the decision of the Supreme Court of Canada on the *Trépanier* application for leave.

[12] On September 25, 2008, the Supreme Court of Canada dismissed the application for leave, [2008] S.C.C.A. No. 304.

[13] By Direction dated October 3, 2008, the Court offered the Crown and Captain Nociar the opportunity to make further written submissions, the final submission to be served and filed by October 24, 2008. Neither party filed additional submissions.

Consideration of the Issues

[14] Having set out the necessary background facts and issues, I turn to the submissions of the parties.

[15] I first note that I agree with the parties that, because Captain Nociar had appealed his conviction, he is in the judicial system. He is, therefore, entitled to rely upon the decision in *Trépanier* to challenge the fairness of the Standing Court Martial that gave rise to his conviction.

Should the Court first consider the merits of the appeal?

[16] Central to this Court's decision in *Trépanier* was its conclusion that the impugned provisions unjustifiably violate an accused's constitutional right to make full answer and defence and to control that defence. At paragraph 102, the Court wrote that it "is trite law that findings made by juries (or a panel in the military justice system) are those which afford an accused the best protection."

[17] The Crown's submission that the Court should first consider the merits of Captain Nociar's appeal disregards the seriousness of the Court's conclusion in *Trépanier*. The trial process was found to be unfair and to violate the Charter. This is a situation that should not be countenanced. The Court will not, therefore, ignore this issue unless all of Captain Nociar's other issues fail.

[18] As to the Crown's assertion that this approach would give effect to the general rule that a court will avoid making unnecessary constitutional rulings, the ruling in question has already been made by the Court in *Trépanier*.

[19] The Crown submitted that considering the merits of the appeal first would confer a benefit upon Captain Nociar. The answer to that submission is that Captain Nociar wishes a new trial in which he can elect the trier of fact.

[20] For these reasons, the Court will not first consider the merits of Captain Nociar's appeal.

The Crown's reliance upon the Schachter decision

[21] The Crown relied heavily upon the decision of the Supreme Court of Canada in *Schachter*. It argued that a specific or individual remedy requires the application of subsection 24(1) of the Charter, and that remedies under subsection 24(1) of the Charter and section 52 of the *Constitution Act, 1982* are rarely granted conjunctively. Specifically, the Crown relies upon the following passage from paragraph 89 of the Supreme Court's reasons in *Schachter*:

> 89. An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken. [emphasis added]

[22] However, in the present case, the Court has already granted a declaration of invalidity pursuant to subsection 52(1) of the *Constitution Act, 1982*. No further declaration is required in this case. Arguably this distinguishes cases such as *Schachter*.

[23] Moreover, the rule articulated in *Schachter* may be stated as follows: courts are generally precluded from granting a subsection 24(1) individual remedy during a period of suspended invalidity. However, in *Trépanier*, this Court refused to suspend the declaration of invalidity. Further, the ruling in *Schachter* does not preclude a court from awarding prospective remedies

under subsection 24(1) of the Charter in conjunction with section 52 remedies. See: *R. v. Demers*, [2004] 2 S.C.R. 489, at paragraphs 62 and 63.

[24] Thus, in a number of cases courts have granted prospective relief under subsection 24(1) of the Charter in conjunction with a remedy under subsection 52(1) of the *Constitution Act, 1982*. See, for example, *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, and *R. v. Morales*, [1992] 3 S.C.R. 711.

[25] I see no impediment at law to granting relief to Captain Nociar under subsection 24(1) of the Charter.

[26] Turning to the Crown's reliance on the fact that no specific remedy was granted in *Trépanier*, no individual remedy under subsection 24(1) of the Charter was sought in that case. The declaration of unconstitutionality was sufficient to dispose of the matter and to provide Trépanier with an effective remedy. The intervener Beek, given his status as an intervener, was unable to seek individual relief. However, the recommendation of this Court in *Trépanier* about Beek is, in my view, relevant and helpful in determining the proper course in this matter. At paragraph 141 of its decision in *Trépanier,* the Court wrote:

> We believe that a recommendation which best reconciles the interests of justice, the accused and the prosecution as well as respects and promotes the Charter is to give the accused a right to choose his trier of facts. Therefore, we would quash the conviction, the sentence and the convening order issued in file 200532. We would order a new trial and give Ex-Corporal Beek the right to an election as to the choice of the trier of facts before whom that new trial will be held.

[27] The Crown relies on the decisions in *Corbière* and *Prince Edward Island* to suggest that the circumstances of the intervener Beek may be distinguished from those of Captain Nociar. However, one must consider the context surrounding the comments of the Supreme Court in *Corbière* and *Prince Edward Island*. In *Prince Edward Island*, the Supreme Court recognized that, in cases where a prospective ruling (i.e. suspension of invalidity) is made, it has always allowed the successful party to nonetheless take advantage of the finding of unconstitutionality. See: *Prince Edward Island* at paragraph 20. Similarly, in *Corbière*, the Supreme Court considered whether a party ought to be granted an exemption from the suspension of invalidity. See: *Corbière* at paragraphs 118 and 122. Thus, both cases relied upon by the Crown were decided in the context of a suspended declaration of invalidity. In light of that suspension, the Supreme Court of Canada considered whether to exempt the successful party, thereby allowing the party to take advantage of the finding pursuant to subsection 52(1) of the *Constitution Act, 1982*. In essence, these decisions contemplate allowing a successful party to take advantage of a remedy the party would not otherwise enjoy due to the suspension of the Court's judgment.

[28] In *Trépanier*, however, the request for suspension of the declaration was refused. The Crown argues that the intervener, Beek, in *Trépanier* may be distinguished from Captain Nociar because Beek fell within the exemptions discussed in *Prince Edward Island* and *Corbière*. However, this is not the case. In *Trépanier*, the intervener was not confronted with any suspension of invalidity. Thus, the recommendation of this Court in *Trépanier* concerning Beek remains, in my view, helpful.

[29] To find otherwise would be to deprive Captain Nociar of his right to reply upon the decision in *Trépanier*, a right acknowledged in cases such as *Sarson*, cited above, and *R. v. Wigman*, [1987] 1 S.C.R. 246.

The Crown's reliance upon Bilodeau and the absence of evidence about Captain Nociar's choice of trier of fact

[30] The Crown submitted that Captain Nociar's Standing Court Martial was properly convened and that the actions of the Director before the decision in *Trépanier* are of full force and effect. On this point, the Crown relies upon the decision of the Supreme Court of Canada in *Bilodeau*. Nevertheless, the Crown concedes that post *Trépanier,* Captain Nociar has the right to elect his mode of trial. It follows, the Crown submitted, that Captain Nociar was bound to adduce evidence of a violation of his right to elect his mode of trial. This required him to adduce evidence that he wished, or wishes, to be tried other than by Standing Court Martial.

[31] In my view, such evidence is not needed in order to dispose of this appeal. In *R. v. Weir* (1999), 181 D.L.R. (4th) 30, the Alberta Court of Appeal observed that there is a qualitative difference between a Charter argument rooted in the narrative giving rise to a criminal charge and one grounded in the invalidity of the statute. In the latter case, the absence of an evidentiary record is not fatal to an accused who wishes to raise such an argument on appeal (see *Weir* at paragraph 14).

[32] Captain Nociar should not stand convicted after a trial that was predicated upon a procedure that has been found to violate his constitutional right to make full answer and defence.

[33] The Crown relied upon the Policy Directive, referred to above at page 5, to argue that Captain Nociar did not take advantage of the Policy Directive and ask the Director to withdraw his decision to direct a Standing Court Martial. However, the Policy Directive was issued on May 5, 2006. Captain Nociar's Standing Court Martial commenced on October 4, 2005. It is unreasonable to suggest that Captain Nociar should have made such a request seven months after his trial commenced.

Are specific remedies only granted in exceptional circumstances?

[34] The Crown argues that *Corbière* and *Schachter* stand for the proposition that specific remedies should only be granted in exceptional cases. With respect, that represents a narrow reading of cases that turned on their respective facts. Indeed, in *Corbière,* at paragraph 110, the Court set out the following general principle:

> In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the Charter, and respect for the role of the legislature: Schachter v. Canada, [1992] 2 S.C.R. 679, at pp. 700-701; Vriend, supra, at para. 148. The first principle was well expressed by Sopinka J. in Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, at p. 104:
>
> > In selecting an appropriate remedy under the Charter the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada. [emphasis added]

[35] Thus, I am not persuaded that it is only where exceptional circumstances are shown to exist that a remedy will be granted. Where a trial process has been found to violate rights guaranteed by the Charter, generally a remedy should be fashioned.

The absence of evidence of prejudice

[36] The Crown argues that there is no evidence that Captain Nociar did not receive a fair hearing by an independent and impartial tribunal. It follows, according to the Crown, that there is no evidence of any real prejudice that would warrant a new trial.

[37] I repeat the comment of this Court in *Trépanier,* that findings made by a jury or a panel of military members are those which afford the best protection to an accused. Captain Nociar was not permitted to elect this mode of trial. It follows that he has been prejudiced because his rights, protected by section 7 and subsection 11(*d*) of the Charter, have been violated.

The Remedy

[38] As referred to above, in *Trépanier* the Court was of the view that the just remedy for the intervenor Beek would be to quash the conviction, the sentence and the convening order and to order a new trial. In my view, given the invalidity of section 165.14 and subsection 165.19(1) of the Act and the article 111.02(1) of the QR & Os, that is the appropriate remedy for Captain Nociar. In the new trial proceeding, Captain Nociar will be entitled to elect his mode of trial.

"E.R. Dawson"

_____

J.A.

I agree:

"J. Trudel"

_____

J.A.

I agree:

"D. J. McCawley"

_____

J.A.

APPENDIX

Section 165.14 and subsection 165.19(1) of the *National Defence Act* and article 111.02(1) of the Queen's Regulations and Orders for the Canadian Forces read as follows:

165.14 When the Director of Military Prosecutions prefers a charge, the Director of Military Prosecutions shall also determine the type of court martial that is to try the accused person and inform the Court Martial Administrator of that determination.	165.14 Dans la mise en accusation, le directeur des poursuites militaires détermine le type de cour martiale devant juger l'accusé. Il informe l'administrateur de la cour martiale de sa décision.
[…]	[…]
165.19(1) When a charge is preferred, the Court Martial Administrator shall convene a court martial in accordance with the determination of the Director of Military Prosecutions under section 165.14 and, in the case of a General Court Martial or a Disciplinary Court Martial, shall appoint its members.	165.19(1) L'administrateur de la cour martiale, conformément à la décision du directeur des poursuites militaires prise aux termes de l'article 165.14, convoque la cour martiale sélectionnée et, dans le cas d'une cour martiale générale ou d'une cour martiale disciplinaire, en nomme les membres.
[…]	[…]
111.02(1) Subsection 165.19(1) of the National Defence Act provides :	111.02(1) Le paragraphe 165.19(1) de la Loi sur la défense nationale prescrit :
"165.19(1) When a charge is preferred, the Court Martial Administrator shall convene a court martial in accordance with the determination of the Director of Military Prosecutions under section 165.14 and, in the case of a General Court Martial or a Disciplinary Court Martial,	« 165.19(1) L'administrateur de la cour martiale, conformément à la décision du directeur des poursuites militaires prise aux termes de l'article 165.14, convoque la cour martiale sélectionnée et, dans le cas d'une cour martiale générale ou d'une cour martiale disciplinaire, en nomme les

shall appoint its members.” membres. »

COURT MARTIAL APPEAL COURT OF CANADA
SOLICITORS OF RECORD

DOCKET:	CMAC-495
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	HER MAJESTY THE QUEEN, Respondent
PLACE OF HEARING:	WINNIPEG, MANITOBA
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APPEARANCES:

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