

Date: 20080807

Docket: CMAc-502

Citation: 2008 CMAC 6

Ottawa, Ontario, August 7, 2008

**CORAM: LANDRY J.A.
BEAUDRY J.A.
MARTINEAU J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

SERGEANT NICOLAS COUTURE

Respondent

Heard at Ottawa, Ontario, on June 13, 2008.

Judgment delivered at Ottawa, Ontario, on August 7, 2008.

REASONS FOR JUDGMENT BY: LANDRY J.A.

CONCURRED IN BY: BEAUDRY J.A.
MARTINEAU J.A.

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REASONS FOR JUDGMENT

[1] This appeal concerns a court martial decision dismissing a charge on the grounds that the person who instituted the proceedings failed to comply with the requirements of article 107.03 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). Essentially, the court martial decision criticized the original complainant for having failed to obtain legal advice, as required by the above-mentioned provision, before initiating the disciplinary process.

I. The facts

[2] The facts relevant to this case can be summarized as follows. Following the alleged disciplinary offences committed in September 2005, an investigation was conducted and the investigation report was given to Captain Boucher on March 16, 2006. Captain Boucher requested legal advice in accordance with the requirements in article 107.03 of the QR&O. On May 2, the legal advice was forwarded to Captain Boucher with a draft Record of Disciplinary Proceedings (RDP).

[3] For reasons that were not explained, it was Master Warrant Officer Brown who, on May 16, laid charges by completing the record. That same day, the respondent was informed of the charges, and Master Warrant Officer Brown informed him of his right to be tried by court martial. On June 6, the respondent elected to be tried by court martial.

[4] On June 13, 2006, the respondent's commanding officer referred the charges to the Directorate of Military Prosecutions. On June 12, 2007, the Deputy Director of Military Prosecutions signed the charge sheet, which now contained five charges pursuant to sections 84, 85 and 129 of the *National Defence Act*.

II. Legislative provisions

[5] The procedure for laying a charge is set out in Chapter 107 of the QR&O. Generally, the facts are submitted to a person authorized to prepare an RDP. That person must obtain legal advice pursuant to article 107.03 before laying a charge in cases where the matter is likely to be tried by court martial. Then, the RDP is referred to the unit

commanding officer (art. 107.09). The officer must also obtain legal advice if the matter is likely to be tried by court martial (art. 107.11).

[6] The commanding officer or the person authorized to try the accused by summary trial in respect of a charge must refer the file to the Director of Military Prosecutions when the charge must be tried by court martial (art. 109.05). Then, the Director of Military Prosecutions signs a charge sheet if, in his or her opinion, prosecution is warranted (s. 165 NDA).

[7] Article 107.03 of the QR&O, the interpretation of which has given rise to this proceeding, reads as follows:

(1) An officer or a non-commissioned member having authority to lay charges shall obtain advice from a legal officer before laying a charge in respect of an offence that:

(a) is not authorized to be tried by summary trial under article 108.07 (Jurisdiction – Offences);

(b) is alleged to have been committed by an officer or a non-commissioned member above the rank of sergeant; or

(c) if a charge were laid, would give rise to a right to elect to be tried by court martial (see article 108.17 – Election to be tried by Court Martial).

(2) The officer or non-commissioned member shall obtain legal advice concerning the sufficiency of the evidence,

(1) Un officier ou militaire du rang qui a le pouvoir de porter des accusations doit obtenir l'avis d'un avocat militaire avant de porter une accusation à l'égard d'une infraction qui selon le cas :

a) n'est pas autorisée à être instruite sommairement en vertu de l'article 108.07

b) a été présumément commise par un officier ou un militaire du rang d'un grade supérieur à celui de sergent

c) donnerait droit à être jugé devant une cour martiale si une accusation était portée
(

2) L'officier ou le militaire du rang doit obtenir un avis juridique portant sur la suffisance des éléments de preuve sur la

whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge.

question de savoir si une accusation devrait ou non être portée dans les circonstances, et lorsqu'il faudrait porter une accusation, sur le choix de l'accusation approprié.

III. Court martial decision

[8] The court martial judge found that Master Warrant Officer Brown had a statutory obligation to read the legal advice obtained at the request of Captain Boucher. The evidence demonstrated that Master Warrant Officer Brown had failed to read the legal advice before completing the RDP. The judge noted that procedure would have been followed had Master Warrant Officer Brown read the legal advice, even though it had been requested by another officer.

[9] In the judge's opinion, failure to comply with the requirements of article 107.03 invalidated the RDP. Since the RDP was null and void, all subsequent procedures also became null and void, even if in the following stages all of the requirements of the Act and the QR&O were complied with. Therefore, the judge found that the charge sheet that was referred to the Court was vitiated because, in his opinion, the initial proceeding further to which the file was referred to the Director of Military Prosecutions was null and void.

IV. Discussion

[10] For the following reasons, I am of the view that the appeal should be allowed and a new trial ordered.

[11] Generally, in criminal matters, anyone having reasonable grounds to believe that an offence has been committed can lay an information. In this case, the evidence shows that Master Warrant Officer Brown conducted his own investigation and met with witnesses, including Sergeant Couture, before completing the RDP. Nothing in the evidence suggests that Master Warrant Officer Brown did not have reasonable grounds warranting the charges laid.

[12] In the context of the Act and QR&O, the true aim of article 107.03 is to control the exercise of the power to lay an information, undoubtedly in order to prevent people who have no legal knowledge from laying unfounded charges. It is an administrative control imposed by the QR&O.

[13] It is interesting to note that article 107.03 does not require the officer who receives the legal advice to then act in accordance with that advice. It seems then that the officer would not in any event be bound by the advice.

[14] The QR&O appear to attach greater importance to the legal advice that must be obtained by a commanding officer before following up on an RDP. In fact, paragraph 107.11(2) provides that a commanding officer who decides not to act on the advice provided by the unit legal adviser shall, within 30 days of receiving the advice, state the reasons for his or her decision in writing.

[15] A charge laid by an authorized person is reviewed by the commanding officer and then by the Director of Military Prosecutions before the Director signs a charge sheet.

[16] The military judge had before him a charge sheet that was duly signed by an authorized person. That is to say that, following Master Warrant Officer Brown's RDP, the unit commanding officer received his own legal advice and then referred the file to the Director of Military Prosecutions. Then the Director or his representative, after analyzing the file, signed a charge sheet containing five charges instead of the six contained in the RDP. That charge sheet was valid.

[17] It should be noted that the pleading on which a court martial judge must rule is the charge sheet signed by the Director of Military Prosecutions or his representative. In fact, the Director does not have to follow up on an RDP. He or she may refuse to submit a charge sheet and decide to return the file to the unit commanding officer with instructions to try the accused by summary trial. In addition, as it is set out in section 165.12 of the Act, the Director may sign a charge sheet containing the charges proposed in the RDP "or prefer any other charge that is founded on facts disclosed by evidence in addition to or in substitution for" the charges proposed in the RDP.

[18] The court martial judge does not have to rule on the RDP because the respondent must answer only to the charges found in the charge sheet.

[19] In any case, I am of the view that the word “shall” in article 107.03 is a prescribing rule that, if not complied with, does not cause an RDP to become null and void. The author Pierre-André Côté (*The Interpretation of Legislation in Canada*, 3rd ed., Scarborough: Carswell, 2000, p. 229) wrote the following on the question of when the violation of an imperative enactment could result in the nullity of an act:

The imperative nature of an enactment is often indicated by “shall” or “must”. The Interpretation Acts set forth that “shall” is to be construed as imperative (Quebec, s. 51, and federal, s. 28). But these provisions are only one indication, among others, of legislative intent. The words “shall” or “must” certainly mean that the rule in question ought to be respected. But this does not imply that failure to conform to the rule necessarily implies the nullity of the act in question.

[20] At page 236, that same author continues as follows:

Statutes prescribing formalities to be observed by administrative officials can be classified as either imperative or directory. Used in this context, the words “imperative” and “directory” suggest two meanings, and this is a frequent source of ambiguity. A formality is said to be imperative if it is mandatory to comply with it; it is not optional or permissive. But a formality can also be described as imperative if the consequences of non-compliance are nullity. As Pigeon has pointed out, a distinction must be made between “an absolute requirement that cannot be omitted without nullifying the operation, and requirements that are less absolute – prescribing rules to be followed but for which non-compliance does not lead to nullity.

[21] In this legislative context, I am of the view that the obligation to obtain legal advice in some cases, which is set out in article 107.03, is a directive, and failure to comply with it does not invalidate the RDP. In any case, there is nothing on the record that would enable the Court to find in these circumstances that this failure caused harm to

the respondent. It can be concluded that the authorities who reviewed the file before the charges were laid were satisfied that the charges were warranted in the circumstances. There was nothing left for the court to do but hear the evidence and determine whether that evidence could give rise to a conviction.

[22] It should be noted that paragraph (1) of article 101.06 of the QR&O states the following regarding irregularities in procedure:

(1) A finding made or a sentence passed by a service tribunal shall not be invalid by reason only of deviation from the procedure prescribed in QR&O, unless it appears that injustice has been done to the accused person by the deviation.

(1) Un verdict ou une sentence prononcée par un tribunal militaire n'est pas invalide en raison seulement d'un écart de la procédure prescrite dans les ORFC à moins qu'il n'apparaisse qu'une injustice a été commise à l'égard de l'accusé par suite de l'écart.

[23] That provision confirms that failure to observe the procedure prescribed by the QR&O does not necessarily invalidate the instituted proceedings as long as the failure does not cause harm to the accused.

V. Conclusion

[24] For the foregoing reasons, I would allow the appeal and return the matter to the Chief Military Judge for a new trial.

“Louis Philippe Landry”
J.A.

« I concur.

Michel Beaudry”

“I concur.

Luc Martineau”

Certified true translation
Susan Deichert, Reviser

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET: CMAC-502

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MARTINEAU J.A.

DATED: August 7, 2008

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