Date: 20090327

Docket: CMAC-516

Citation: 2009 CMAC 1

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL ANTHONY E. LIWYJ

Respondent

Heard at Ottawa, Ontario, on March 13, 2009.

Judgment delivered at Ottawa, Ontario, on March 27, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: PELLETIER J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

The issue in this appeal

[1] Did Lamont J. (judge) err in law when he granted a conditional stay of the proceedings against the respondent until such time as the Director of Military Prosecutions (Director) refers the charges to the Court Martial Administrator with a request to convene a Standing Court Martial in accordance with the election of the accused? This was the issue to be argued in this appeal.

[2] However, at the hearing, after a useful exchange with the members of the panel, the parties have agreed to file a consent to judgment seeking from the Court an order that embodies the terms of that consent.

[3] In order to understand the consent and the judgment to follow, it is necessary to provide some background information.

Background information, facts and proceedings

[4] The appeal is part of the fall-out from the decision of this Court in *R. v. Trépanier*, 2008 CMAC 498 and the subsequent passing of Bill C-60 *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*. The Bill received royal assent on June 18, 2008 and came into force on July 18, 2008 (S.C., c. 29).

[5] Prior to the most recent amendments, section 165.14 of the *National Defence Act*, R.S., c. N-5 (Act) gave the military prosecution the right to choose the court martial before which an accused's trial would be held.

[6] In *Trépanier*, *supra*, this Court found that the choice of the mode of trial, in the sense of choosing the court before which a trial would be held, conferred a tactical advantage upon the party given that choice. Given to the prosecution, this tactical advantage violated an accused's constitutional right to a full answer and defence embodied in the constitutional right to a fair trial

guaranteed by paragraph 11(*d*) of the *Charter of Rights and Freedoms* (Charter). It also violated the principles of fundamental justice guaranteed by section 7 of the Charter. This Court, therefore, found the provision to be unconstitutional and, consequently, of no force and no effect.

[7] In striking down section 165.14 of the Act, our Court was aware there were a few pending prosecutions that would be affected by the ruling. It, therefore, proposed a simple and efficient remedy to deal with these cases.

[8] Where the court had already been selected by the Director, the military judge simply had to put the accused to an election. It was anticipated that in the majority of the few outstanding instances, the accused would most likely adopt the Director's choice. Where the choice of the court had still not been made, the solution was even simpler: put the accused to an election and convene the court he selected.

[9] In the present instance, a court martial was convened by the Court Martial Administrator in accordance with the choice that the then section 165.14 authorized the Director to make. The Director chose a Disciplinary Court Martial and the convening order reflected that choice.

[10] At the time the respondent was charged, the Disciplinary Court Martial was a court composed of a judge and a panel of three military peers. Its sentencing power, however, was similar to the limited sentencing power of a Standing Court Martial, a court presided over by a judge alone.

The maximum sentence which these two courts could impose was dismissal with disgrace and imprisonment for less than two years.

[11] Before Parliament enacted Bill C-60, the respondent sought in vain to obtain a trial before a Standing Court Martial. The convening order was issued on August 23, 2007. The respondent's appearance before the judge was scheduled for December 11, 2007. On that date, the respondent pleaded not guilty to the three charges against him.

[12] The Disciplinary Court Martial was adjourned until May 27, 2008. On April 24, 2008, this Court issued its decision in *Trépanier*, *supra*. Pursuant to that decision, the respondent applied on May 20, 2008 for an order to have his trial held before a Standing Court Martial instead of the Disciplinary Court Martial chosen by the Director.

[13] On May 28, 2008, the judge discharged the panel selected for the Disciplinary Court Martial. He also dismissed the respondent's application for a trial by a Standing Court Martial. He then heard submissions from the parties on the appropriateness of issuing a conditional stay of the proceedings and issued the stay.

[14] As previously mentioned, however, subsequent to the *Trépanier* decision, Parliament legislated to reduce the number of courts martial from four to two. The Special Court Martial and the Disciplinary Court Martial were abolished, leaving in place only the General Court Martial and the Standing Court Martial. In addition, the legislation eliminated the limitations on the sentencing

powers of the Standing Court Martial such that both Courts now possess the same sentencing powers.

[15] In its attempt to implement the *Trépanier* decision regarding the choice of the mode of trial, Parliament created categories of offences similar to those found in the *Criminal Code*. At one end of the spectrum, there are serious military offences and serious *Criminal Code* offences for which the court before which the trial will be held is determined by the Act. An accused who commits these offences must have his trial held before a General Court Martial: see section 165.191 of the Act.

[16] At the other end of the spectrum, an accused who commits service offences, i.e. military offences, *Criminal Code* offences and other federal statutory offences, of a less serious nature is similarly forced to have his trial held before a pre-determined court, in this case the Standing Court Martial: see section 165.192 of the Act.

[17] For any other service offence not falling into these two categories, the accused is given an election. He may choose judge alone (Standing Court Martial) or judge with a panel of five military peers (General Court Martial): see section 165.193 of the Act.

[18] The Bill was expeditiously processed by Parliament pursuant to allegations that the military prosecution system would break down or come to a halt unless urgent and immediate legislative measures were enacted. While remedial measures were eventually needed to ensure the fairness of

an accused's trial, these measures have aggravated the situation of the accused and deprived him of his right to choose his trial court pursuant to the *Trépanier* decision.

[19] In the case at bar, the respondent was charged pursuant to section 83 of the Act with three counts of disobeying a lawful command. On conviction, he is liable to imprisonment for life or to a lesser punishment. As a result of the July 2008 amendments brought to the Act, these military offences now fall into the category of offences described in the new section 165.191 for which an accused has no right to elect his mode of trial. Hence the appellant's objection to the condition imposed and attached by the judge to the conditional stay of proceedings, i.e. that the Director in effect consents to a trial by a Standing Court Martial. She submits in her memorandum of facts and law that this condition cannot now legally be fulfilled by the Director and the Court Martial Administrator.

The charges against the respondent

[20] Section 83 creates a military offence. It punishes disobedience to a lawful command. In a hierarchical organization like the military where great emphasis is put on discipline and obedience, a charge under section 83 is a very serious one. The maximum sentence of life imprisonment provided by Parliament indicates the objective gravity that it attaches to the offence.

[21] However, in terms of the actual gravity, the charge is also misleading. This stems from the fact that the terms "disobedience of lawful command" is quite encompassing. They cover a broad

spectrum of refusals, ranging from a refusal to sweep the floor to a refusal to participate in an assault against an enemy while under fire.

[22] Because the offence is punishable with life imprisonment, a charge under section 83 carries a serious stigma and has a significant impact on the career of a member of the Forces. It is only through the details of the charge, not easily accessible to the public, that one familiar with the process can determine whether the charge of disobeying a lawful command was with respect to a serious matter or not. In the general public, disobeying a lawful command will generally be perceived as something highly reprehensible while in a given case the refusal or failure to obey may in fact be in relation to a relatively minor, if not petty matter.

[23] In the present instance, the actual charges of disobeying a lawful command refer to a failure to carry out a brake adjustment on a beavertail trailer.

[24] It is in this context that the debate about the respondent's right to elect his mode of trial took place.

The decision under review

[25] There is no need to review the decision of the court martial since the parties have agreed on the terms of a consent to judgment. I would say this however. In my respectful view, the judge had

the jurisdiction under section 24 of the Charter to acquiesce to the respondent's choice of court by which he wished to be tried.

[26] Subsection 165.191(2) of the Act allows an accused charged with a serious offence of the exclusive jurisdiction of the General Court Martial the possibility of being tried by a Standing Court Martial if both the accused and the Director consent in writing:

165.191 (1) The Court Martial Administrator shall convene a General Court Martial if any charge preferred against an accused person on a charge sheet is	**165.191** (1) L'administrateur de la cour martiale convoque une cour martiale générale dans le cas où l'une ou l'autre des infractions dont la personne est accusée dans l'acte d'accusation est :
(*a*) an offence under this Act, other than under section 130 or 132, that is punishable by imprisonment for life;	*a*) soit une infraction prévue par la présente loi — autre que celles visées aux articles 130 et 132 — qui est passible de l'emprisonnement à perpétuité;
(*b*) an offence punishable under section 130 that is punishable by imprisonment for life; or	*b*) soit une infraction punissable en vertu de l'article 130 qui est passible d'une peine d'emprisonnement à perpétuité;
(*c*) an offence punishable under section 130 that is referred to in section 469 of the *Criminal Code*.	*c*) soit une infraction punissable en vertu de l'article 130 qui est visée à l'article 469 du *Code criminel*.
(2) An accused person who is charged with an offence referred to in subsection (1) may, with the written consent of the accused person and that of the Director of Military Prosecutions, be tried by Standing Court Martial.	(2) La personne accusée d'une infraction visée au paragraphe (1) peut être jugée par une cour martiale permanente si elle-même et le directeur des poursuites militaires y consentent par écrit.

[Emphasis added]

Both parties have agreed to consent to the election provided for in this subsection.

[27] Moreover, in fairness to the respondent, counsel for the appellant has agreed to consent, as an appropriate remedy under section 24 of the Charter, to an order of this Court directing the Standing Court Martial not to impose a heavier sentence on the respondent, if found guilty, than it would have imposed pursuant to the limited sentencing powers that it had before their broadening by Bill C-60. This is an option that was envisaged by this Court in *R. v. Langlois*, 2001 CMAC 3, 54 W.C.B. (2d) 466. If necessary, rather than ordering a stay of proceedings, our Court would have restrained the court martial to imposing the penalty that could have been imposed if the accused had been judged by summary trial and found guilty.

[28] This order would reflect and be consistent with the choice originally made by the Director to try the respondent before a court (the Disciplinary Court Martial) which, as previously mentioned, possessed the same limited sentencing powers as the then Standing Court Martial. In addition, the order would mirror both the objective and the subjective gravity that, in choosing a Disciplinary Court Martial, the Director envisaged for the offences allegedly committed by the respondent.

[29] Finally, the remedy agreed to by the parties fosters the values of the Charter. As Dawson J.A. wrote in *Nociar v. Her Majesty the Queen*, 2008 CMAC 7, at paragraph 34, quoting the Supreme Court of Canada in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 3, at paragraph 110:

> 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 Sopenka 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]

Conclusion

[30] For these reasons, I would allow the appeal and set aside the decision of Lamont J. In accordance with the consent to judgment filed with this Court, I would order the Court Martial Administrator to convene a Standing Court Martial to try the respondent on the charges preferred on February 22, 2007 by Capt. R.J. Henderson.

[31] As an additional measure which best vindicates the values expressed in the Charter and remedies the breach of the respondent's Charter rights in the present instance, I would restrain the sentencing power of the Standing Court Martial to imposing a punishment which cannot exceed dismissal with disgrace and an imprisonment for less than two years.

"Gilles Létourneau"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Yves de Montigny J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
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