Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20111028

Docket: CMAC-546

Citation: 2011 CMAC 5

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
DAWSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN (retired) J.C. MACLELLAN

Respondent

Heard at Ottawa, Ontario, on October 21, 2011.

Judgment delivered at Ottawa, Ontario, on October 28, 2011.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

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

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20111028

Docket: CMAC-546

Citation: 2011 CMAC 5

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
DAWSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN (retired) J.C. MACLELLAN

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on appeal

[1] This appeal concerns the respondent's right to make a new choice as to his mode of trial on three charges of having used insulting language to a superior officer contrary to section 85 of the *National Defence Act*, R.S.C. 1985, c. N-5 (Act).

[2] At issue is the interpretation of section 165.193 of the Act which reads:

165.193 (1) An accused person may choose to be tried by General Court Martial or Standing Court Martial if a charge is preferred and sections 165.191 and 165.192 do not apply.

(2) The Court Martial Administrator shall cause the accused person to be notified in writing that he or she may make a choice under subsection (1).

(3) If the accused person fails to notify the Court Martial Administrator in writing of his or her choice within 14 days after the day on which the accused person is notified under subsection (2), the accused person is deemed to have chosen to be tried by General Court Martial.

(4) The accused person may, not later than 30 days before the date set for the commencement of the trial, make a new choice once as of right, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.

(5) The accused person may also, with the written consent of the Director of Military Prosecutions, make a new choice at any time, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.

(6) If charges are preferred jointly and all of the accused persons do not choose — or are not deemed to have chosen — to be tried by the same type of court martial, they must be tried by a General Court Martial.

165.193 (1) La personne accusée peut choisir d'être jugée par une cour martiale générale ou une cour martiale permanente si la mise en accusation est prononcée et les articles 165.191 et 165.192 ne s'appliquent pas.

(2) L'administrateur de la cour martiale fait informer l'accusé par écrit qu'il peut faire le choix prévu au paragraphe (1).

(3) Si l'accusé n'avise pas par écrit l'administrateur de la cour martiale de son choix dans les quatorze jours suivant le jour où il est informé au titre du paragraphe (2), il est réputé avoir choisi d'être jugé par une cour martiale générale.

(4) L'accusé peut de droit, au plus tard trente jours avant la date fixée pour l'ouverture de son procès, faire une seule fois un nouveau choix, auquel cas il en avise par écrit l'administrateur de la cour martiale.

(5) Il peut aussi, avec le consentement écrit du directeur des poursuites militaires, faire un nouveau choix à tout moment, auquel cas il en avise par écrit l'administrateur de la cour martiale.

(6) Dans le cas où des accusations sont prononcées conjointement, si tous les accusés ne choisissent pas — ou ne sont pas réputés avoir choisi — d'être jugés par la même cour martiale, ils sont jugés par une cour martiale générale.

(7) The Court Martial Administrator shall convene a General Court Martial or Standing Court Martial in accordance with this section.	(7) L'administrateur de la cour martiale convoque une cour martiale générale ou une cour martiale permanente conformément au présent article.

[Emphasis added.]

[3] As a result of the military judge (judge) granting the respondent's application for re-election from trial before a General Court Martial to a Standing Court Martial, this Court is called upon to adjudicate on the following questions:

a) Did the judge err in law in interpreting section 165.193 of the Act and concluding that it did not apply to, and in the circumstances of, this case?

b) Did the judge err in law in giving the respondent a right to re-elect his mode of trial in the absence of consent from the prosecution?

c) Did the judge err in law in terminating the proceedings of the General Court Martial and continuing to try the charges as a Standing Court Martial?

[4] In answer to the appellant's grounds of appeal, the respondent submits that the appellant is estopped from pursuing Her appeal because She agreed to the transfer of the case to the Standing Court Martial. In all other respects, he supports the decision of the judge. At the hearing, however, counsel for the respondent on behalf of his client requested a stay of the proceedings before the court martial with costs throughout. I shall also deal with this request.

[5] For reasons which follow, I believe this appeal should be allowed. A brief summary of the facts and history of the proceedings is in order for a better understanding of the issues.

Facts and History of the Proceedings

[6] Allegedly the respondent said to his superior on July 24, 2010, in the course of a heated verbal exchange, the following word or words to that effect:

> "What the fuck are you doing sending emails to Navy guys?"
>
> "Go fuck yourself", and
>
> "You're fucking everything up, nobody knows what the fuck is going on around here."

[7] Charges were laid on November 29, 2010. Pursuant to subsection 165.193(2) of the Act, the respondent was advised of his right to elect his mode of trial. Having failed to do so within the prescribed time, he was deemed to have chosen trial by a General Court Martial pursuant to subsection 165.193(3) of the Act. A judge was assigned to preside at that court martial.

[8] The respondent sought on February 18, 2011 and obtained on February 25, 2011 an adjournment of the proceedings to April 4, 2011. A convening order for a General Court Martial to be held on April 4, 2011 was issued. On March 1, 2011, the Court Martial Administrator issued an "Order to Assemble" to the officers she had selected and appointed as members of the General Court Martial for the trial of the respondent.

[9] The proceedings of the General Court Martial began as scheduled on April 4, 2011. After a lengthy exchange between counsel, a decision was made to conduct as a preliminary matter a "voir-dire" as to the admissibility of a statement allegedly made by the respondent.

[10] Thereafter followed a discussion about a Charter application based on an abuse of process which allegedly resulted in a violation of the respondent's right to security guaranteed by section 7 of said Charter. The judge ruled that the Charter application would be heard in the absence of the panel. He indicated his intention to send the members of the panel home, to be recalled at a later date.

[11] It is at that time that counsel for the respondent inquired about the possibility of re-electing for trial before the same judge sitting alone. There was some uncertainty as to the procedure to be followed for a possible re-election at that stage of the process.

[12] Chief among the concerns expressed was whether the consent of the prosecution was necessary for a valid re-election. At that time, no formal application for re-election was made by counsel for the respondent.

[13] On April 16, prior to the judge retiring to decide the Charter application, counsel for the respondent indicated that he might seek re-election for a trial before judge alone, i.e. a Standing Court Martial.

[14] On April 20, counsel for the respondent filed a revised Notice of Application seeking an order permitting him to re-elect trial by a Standing Court Martial. The application was made pursuant to subsection 179(1) of the Act and sections 7 and 11 of the Charter. Section 179 gives a court martial the same powers and rights as are vested in a superior court of criminal jurisdiction with respect to matters regarding the attendance of witnesses, the production of documents and the enforcement of its orders. In the case at bar, the respondent was invoking paragraph (*d*) which gives the court martial residual powers and rights with respect to "all other matters necessary or proper for the due exercise of its jurisdiction".

[15] Counsel for the respondent also requested that he be authorized to use at trial by a Standing Court Martial all the evidence tendered or elicited during the "voir-dire" and the Charter application.

[16] Relying on subsection 165.193(5) of the Act, the prosecution refused to consent to a re-election and provided no reasons for its refusal to consent. It also opposed the request that the evidence gathered at the "voir-dire" and Charter application be filed at trial.

[17] Before addressing the question of re-election, the judge dismissed the Charter application based on abuse of process, but concluded that the prosecution had not established beyond reasonable doubt on the "voir-dire" that the alleged statement was voluntarily made.

[18] On the issue of re-election, the judge ruled that section 165.193 of the Act did not apply in the circumstances of this case. Relying on previous decisions he had rendered (*R. v. Strong*, 2008 CM 3019 and *R. v. Brisson*, 2008 CM 3004) as well as on the decision of our Court in *R. v. Trépanier*, 2008 CMAC 3, he concluded that the respondent's right to full answer and defence and to control the conduct of his defence entitled him to a re-election as of right, i.e. without the consent of the prosecution.

[19] The judge issued an order allowing the respondent to re-elect trial by a Standing Court Martial, but dismissing the respondent's request to file in the main trial the evidence adduced on the "voir-dire" and the abuse of process application.

[20] The respondent re-elected to be tried by a Standing Court Martial. The judge, as of then, sat as President of a Standing Court Martial. Counsel for the prosecution did not object to the respondent entering a plea of not guilty before the Standing Court Martial. Nor did he object to the judge conducting the trial and taking judicial notice of the facts and matters contained in rule 15 of the *Military Rules of Evidence*.

[21] The hearing was then adjourned to June 6, 2011. Five days prior to the date set for the hearing, the prosecutor filed the present appeal. On June 6, he sought but was refused by the judge an adjournment of the proceedings pending the appeal. The next day, the Attorney General applied in the Federal Court for an order prohibiting the judge from proceeding with the Standing Court Martial's trial of the respondent. The Federal Court declined to hear the application because an

appeal was already pending before our Court. It left it to us to issue an interim stay of the proceedings if appropriate.

[22] Pursuant to an application made on June 10 to our Court, an order issued on June 14 suspending the proceedings before the Standing Court Martial until a decision is rendered on the appeal. Being a Superior Court of Record, our Court invoked its inherent power to prevent that its process be abused, defeated or rendered moot or futile: see *Her Majesty the Queen v. Captain J.C. MacLellan*, 2001 CMAC 546.

Whether the judge erred in law in concluding that section 165.193 of the Act did not apply to, and in the circumstances of, this case and whether consent of the prosecution was necessary for the respondent's re-election

[23] The judge approached the issue in the following manner. He asked himself whether section 165.193 of the Act applied at the stage at which the proceedings before the General Court Martial stood when the re-election application was made. In the affirmative, he would then question the manner in which it should be applied to the case. In the negative, he would proceed to see whether there was in the Act or any other act a provision which would indicate if the respondent could make a new choice as to his mode of trial.

[24] On the first question, the judge was of the view that section 165.193 of the Act granted an accused the right to elect in certain circumstances, but that the section had no application once a court martial had started in accordance with the convening order. Therefore, the section could not be

applied in the present instance. With respect, I believe this conclusion proceeds from a misinterpretation of the provision and its scope of application.

[25] For the sake of convenience, I reproduce again with some underlining, subsections 165.193(4) and (5) of the Act:

(4) The accused person may, not later than 30 days before the date set for the commencement of the trial, make a new choice once as of right, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.	(4) L'accusé peut de droit, au plus tard trente jours avant la date fixée pour l'ouverture de son procès, faire une seule fois un nouveau choix, auquel cas il en avise par écrit l'administrateur de la cour martiale.
(5) The accused person may also, with the written consent of the Director of Military Prosecutions, make a new choice at any time, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.	(5) Il peut aussi, avec le consentement écrit du directeur des poursuites militaires, faire un nouveau choix à tout moment, auquel cas il en avise par écrit l'administrateur de la cour martiale.

[Emphasis added.]

[26] It is an undisputed rule that provisions of a section have to be read together so as to place a rational and probable meaning on the section. Each provision must be given a meaning which gives effect to the others rather than a meaning which would render them obsolete or meaningless. "It is of course trite law", the Supreme Court of Canada wrote in *Subilomar Properties v. Cloverdale*, [1973] S.C.R. 596, at page 603, "that no legislation whether it be by statute or by-law should be interpreted to leave parts thereof mere surplusage or meaningless".

[27] When section 165.193 is read as a whole and subsections 165.193(4) and (5) are read together, with the rest of the section, it becomes obvious that Parliament intended to give an accused, in relation to electable offences:

a) a right to elect his mode of trial;

b) a right to make a new choice only once as of right up to 30 days before the date set for the commencement of the trial; and

c) thereafter, at any time with the written consent of the Director of Military Prosecutions.

[Emphasis added.]

[28] In my respectful view, the words "any time" obviously refer to any time after the period mentioned in subsection 165.193(4). It is also my opinion that these words, unqualified as they are, contemplate and do not prevent a re-election, even when the trial has commenced, if the prosecution consents to it. There may be valid reasons for the prosecution to consent to a re-election in the course of the proceedings. If Parliament had intended to limit the re-election with consent of the prosecution to any time up to the commencement of the proceedings it would have said so by restraining the words "any time" and qualifying them accordingly or it would have drafted the provision differently.

[29] In *R. v. MacLean*, [2002] N.S.J. No. 543, a case that I brought to the attention of the parties at the hearing, the Nova Scotia Supreme Court allowed a re-election with consent of the Crown

even after the accused had pleaded not guilty, been put in the charge of the jury and, legally, the trial had begun. As Hall J. said, relying on the decision of the Supreme Court of Canada in *Korponay v. Attorney General of Canada*, [1982] 1 R.C.S. 41 where the accused waived the procedural requirements regarding his re-election for trial by judge alone, a trial by jury is for the benefit of the accused and, with the consent of the Crown, the accused can waive that benefit. I see no reason why it could not be the same with a trial by a General Court Martial.

[30] The learned judge, however, refrained from deciding whether re-election is permitted when the jury has begun to hear evidence since no evidence had yet been presented to the jury. The factual situation on this issue in the *MacLean* case is similar to ours in the present instance. Though assembled, the panel was dismissed after the application for re-election was made, but before it heard any evidence. Thus, in these circumstances, a re-election would have validly been permitted if the requirement of consent by the prosecution had been met.

[31] Consent of the prosecution to a second re-election by the accused provides a measure of control against judge shopping and abusive re-elections, contributes to the orderly and efficient administration of criminal justice and serves the overall interest of justice while providing, at any time, flexibility in appropriate and deserving cases or unexpected situations. In *R. v. Ng* (2003), 18 Alta. L.R. (4^{th}) 77, at paragraphs 121 and 122, the learned Chief Justice of the Alberta Court of Appeal wrote:

> 121. This historical review reflects Parliament's efforts to balance competing interests – the interests of the accused on the one hand and the interests of society, including those of victims and witnesses, on the other – in order to preserve a fair

> and impartial criminal justice system. Where s. 469 offences are concerned, Parliament has determined that the public interest in such crimes does not warrant leaving the decision as to mode of trial in the hands of the accused alone, based solely on the accused's assessment of what is in his or her self-interest. As explained by the Supreme Court of Canada in *R. v. Turpin*, *supra*, at 1309-1310:
>
> > The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community standards to trial verdicts … In both its study paper (The Jury in Criminal Trials (1980), at pp. 5-17) and in its report to Parliament (The Jury (1982), at p. 5) the Law Reform Commission of Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles.
>
> 122. However, Parliament has also recognized that, subject to the Attorney General's right to compel a jury trial under s. 568, it is appropriate, for electable offences, to allow the accused alone the ability to select the mode of trial. But even so, Parliament has imposed time limits on an accused's 'as of right' election or re-election in order to avoid its being used as a vehicle for judge shopping as well as to provide procedural certainty in the scheduling of criminal cases. On this latter point, see *R. v. Jerome*, [1997] N.W.T.J. No. 40 (N.W.T. S.C.).
>
> [Emphasis added.]

[32] In conclusion, I am of the view that the judge should have applied section 165.193, especially subsection (5), to the determination of the respondent's right to re-elect his mode of trial. He would have had to conclude that consent of the prosecution was necessary in the circumstances.

[33] I agree with counsel for the appellant that in granting the respondent, as he did, a right to re-elect as of right, the judge rendered meaningless section 165.193 and Parliament's attempt to regulate in the interest of justice the election and re-election process. Moreover, if subsection 165.193(5) is to be given a meaning as I think it should, then the judge's conclusion leads to a result

inconsistent with, if not contrary to, the intended legislative scheme. Let me explain these two statements.

[34] Subsection 165.193(5) imposes as a condition for a second re-election the consent of the prosecution. The judge's conclusion that the respondent's re-election can be made without the consent of the prosecution, in effect, amends the subsection and renders it meaningless in its present form.

[35] If, however, subsection 165.193(5) really means something, it can only mean in the judge's interpretation of the scheme that the respondent's right to a second re-election is subject to the consent of the prosecution, but only for the period of 30 days which precedes the date set for the commencement of the trial. Thereafter, once the trial has commenced, the consent of the prosecution is no longer required.

[36] This is an undesirable result, first because it runs contrary to the text of the subsection as well as subsection (4) which states that there is only one re-election as of right. It is also undesirable because it eliminates the requirement of the prosecution's consent at the time when it is most needed to prevent judge shopping and ensure the fairness of the trial for both the accused and the prosecution which represents the public interest. In other words, the consequence of the judge's decision is that consent of the prosecution would be required for the 30-day period before the trial commences, but not after the trial has started. As counsel for the appellant rightly puts it, court martial proceedings would then be interlocutory up to and until an accused decides to re-elect as of

right, be it at the beginning or in the middle of his trial. This cannot be what Parliament intended and this is not what section 165.193 provides for.

[37] I previously alluded to the fact that the judge grounded his conclusion on the decision of our Court in the *Trépanier* case. I do not think, however, that the decision in *Trépanier* supports the judge's conclusion.

[38] The *Trépanier* case sought to determine who of the accused or the prosecutor is the incumbent of the right to elect when the charges are in relation to electable offences. Our Court ruled that this right was constitutionally required to be given to the accused, not the prosecution, because "the choice of mode of trial partakes of a benefit, an element of strategy or a tactical advantage associated with the right of an accused to present full answer and defence and control the conduct of his or her defence": see *Trépanier*, *supra*, at paragraph 78.

[39] The issue of re-election did not arise in the *Trépanier* case and, therefore, our Court made no pronouncement in that respect. Nor did our Court put in question or in doubt Parliament's right within the confines of the Charter to regulate the conditions governing the exercise of election and re-election rights in the interests of the litigants and justice: see *R. v. Ng*, *supra*, at paragraphs 108 to 135. The *Trépanier* case does not stand for the proposition that an accused possesses a right to re-elect his mode of trial without the prosecution's consent after his trial has begun.

[40] To sum up, the factual situation in the present instance was governed by section 165.193, especially subsection (5). No re-election is to be permitted without the consent of the Director of Military Prosecutions. I will now address the respondent's allegation that the prosecution consented to the re-election and is estopped from pursuing its appeal.

Whether the prosecution consented to a trial by a Standing Court Martial and is, therefore, estopped from pursuing the present appeal

[41] Subsection 165.193(5) requires for a consent to re-election to be effective that it be given in writing. There is no substitute for a written consent. The same issue arose in the *R. v. Ng* case, *supra*, in the same circumstances as those in our instance. I endorse the following statements made by Wittmann J.A. at paragraphs 69 to 71 of his reasons for judgment on the issue of the Crown's ability to appeal the trial's judge ruling on the re-election issue. They are apposite in our case and dispositive of the issue.

> 69. Before discussing the appropriate remedy, it is necessary to address the Crown's ability to pursue this appeal. The respondent argued that because the Crown proceeded with the trial by judge alone and did not formally state an objection on the record, the Crown has waived its ability to dispute the judge's ruling on the re-election issue. This proposition is untenable.
>
> 70. First, the Crown's objection to re-election was made sufficiently clear by its refusal to consent, its refusal to provide reasons, and its argument on the issue before the trial judge prior to the commencement of the trial.
>
> 71. Second, the parties are aware that interlocutory appeals are rarely entertained in criminal cases. The Crown had no choice other than to proceed with the trial. The respondent suggested the Crown should have elected to call no evidence, argued its appeal, and then proceeded with a new trial. This suggestion is sufficiently answered by L'Heureux-Dubé J. in *Power* where she stated at 12:

> It may well be that a Court of Appeal might find abuse of process in a case where the Crown refuses to continue a trial, despite sufficient evidence to found a verdict, for the sole purpose of obtaining an interlocutory appeal on an adverse ruling. Such an appeal would not be available to the accused in the parallel situation, and the accused would be forced to undergo an unnecessary second trial. As such, a case might be made that the Crown's conduct constitutes an unfair and abusive exercise of the prosecutorial discretion conferred upon it.

Whether the judge erred in law in terminating the proceedings before the General Court Martial and continuing to try the charges as a Standing Court Martial

[42] Although called a Standing Court Martial, the said Court has no standing since, like the General Court Martial, it does not exist as a permanent court. It functions on an *ad hoc* basis. Every time charges are laid, the court has to be convened, and the Presiding judge sworn in, to address these specific charges: see *Canada (Director of Military Prosecution) v. Canada (Court Martial Administrator)*, 2007 FCA 390.

[43] Notwithstanding proposals to reform the courts martial organization with a view to creating permanent courts, the *ad hoc* system still prevails and is reflected in section 165.192 and subsections 165.191(1) and 165.193(7) of the Act.

[44] Subsection 165.193(7) is relevant to our case as it imposes a duty on the Court Martial Administrator to convene either a General Court Martial or a Standing Court Martial in accordance with the accused's choice of mode of trial. Thus had the prosecution consented to the second re-election sought by the respondent, notice in writing of the new choice would have been sent to the

Court Martial Administrator pursuant to subsection 165.193(5). As required by subsection 165.193(7), the Court Martial Administrator would then have had to convene a court martial accordingly.

[45] We understand that the judge was trying to improve the efficiency of the process. However, in view of the existing legislative scheme, he could neither assume the function of the Court Martial Administrator nor dispense with the need to convene, according to law, an otherwise non-existent Standing Court Martial.

[46] As a result of the process followed before the court martial, the lack of consent to that process and the absence of a convening order duly issued by the Court Martial Administrator to establish a Standing Court Martial, proceedings held before the judge sitting as a Standing Court Martial were conducted without jurisdiction and, therefore, a nullity. Consent of both parties would not have remedied this jurisdictional defect since it is a well established legal principle that litigants cannot by consent confer upon a court or a judge a jurisdiction that it or he does not possess at law. The actual structure of the military courts still appears overly formalistic and perhaps not as efficient as it could be if the two courts were permanent. However, this is the structure in place and, unless it is changed or struck down, the provisions governing that structure have to be followed.

Whether this Court should issue a stay of the proceedings before the court martial

[47] At paragraph 60 of his memorandum of fact and law, counsel for the appellant suggested that "all proceedings against John MacLellan [be] stayed, with costs throughout". However, this question of a stay was not framed as an issue on appeal in Part II of the respondent's memorandum entitled ISSUES: see paragraph 40 of the respondent's memorandum of fact and law. Nor was a stay solicited as a relief in Part IV entitled RELIEF SOUGHT. Indeed, paragraphs 103 of Part IV and 41 of Part II were consistent in seeking solely as relief that the appeal be dismissed with costs.

[48] Counsel for the respondent expressed to us in no uncertain way his unhappiness with the manner in which the process unfolded before the court martial, especially the prosecution's refusal to consent to a re-election and the prosecution's challenges of the judge's decision to permit re-election. He also complained of the fact that he was deprived of the benefit of a preliminary inquiry. The short answer to this complaint is that the charges are of a purely disciplinary nature. If his client was facing these charges before a civilian disciplinary board or tribunal, there would be no preliminary inquiry either. Moreover, the charges are straightforward and of limited complexity, involving only two persons having a heated exchange. His complaint in this respect is a red herring.

[49] In assessing respondent's counsel's contentions that the process was inefficient and unfair and therefore abusive, it should not be lost sight of the fact that the whole sequence of events originated from his client. First, the respondent when duly invited to make an election as to his

mode of trial failed to do so. According to law, he was deemed to have elected the best mode of trial, i.e. a General Court Martial.

[50] Later on, during a teleconference held on January 6, 2011, the respondent acknowledged that he failed to communicate his choice as he had been invited to do, but recognized that he wanted to be tried by a General Court Martial.

[51] From then on, up to 30 days before the date set for the commencement of the trial which was eventually postponed to April 4, 2011, the respondent could make a new choice as of right pursuant to subsection 165.193(4) of the Act. He did not avail himself of the benefit of that subsection. Of course, after that time-frame he needed the consent of the prosecution.

[52] Until he applied for a re-election which he was erroneously granted, the proceedings unfolded before the court of his choice with the usual risks associated with his choice of mode of trial. It is hard to see up to this point any abuse of the process by the prosecution regarding the election as to the mode of trial, especially since the election process was conducted according to law.

[53] It would therefore seem that the abuse of process claimed by the respondent is, in effect, rooted in the prosecution's refusal to consent to a re-election and to provide reasons for such refusal. The prosecution is given under subsection 165.193(5) of the Act a discretionary power to consent

which, like other discretionary powers, cannot be used capriciously or arbitrarily. We have not been referred to any evidence in the record which would sustain an allegation of the above nature.

[54] The prosecution's answer to the respondent's allegation is that the respondent engaged in judge shopping as evidenced by his making his re-election conditional on the trial being presided by the same judge with whom he was now comfortable. It finds support for its contention on a number of statements made by counsel for the respondent with regard to the conditional re-election sought, particularly the following one found at pages 2096 and 2097 of the transcript, appeal book, vol. XII:

> … based on the fact that Captain MacLellan now has a better sense of what he's facing, and based on the fact that he has seen Your Honour deal with matters fairly, both in relation to the Crown and to himself, and, therefore, he has confidence that he would be comfortable in proceeding as a Standing Court Martial in front of Your Honour.
>
> So for those reasons, in my respectful submission, given all those circumstances and given that that's in the best interest of everybody to have a just, speedy, and inexpensive determination of this issue, it would be appropriate for you to exercise your jurisdiction and to provide an order that will allow Captain MacLellan to re-elect.
>
> I want to make it clear though in the sake of fairness and openness that his decision to re-elect is largely driven by the context that we're in. In other words, if Your Honour was to fall ill and we had to have another judge preside, his decision to re-elect, it may be affected by that. In other words, he is comfortable where he is presently and is prepared to re-elect, but I want to make it clear that what he's asking for is, the right to re-elect, and if circumstances change, if Your Honour for some reason falls ill and we're in front of another justice, he may not exercise that right. Because it has to be informed by the circumstances that he has in front of him.
>
> [Emphasis added.]

[55] I see no prosecutorial abuse in the election and re-election process as it unfolded. As for the respondent's allegation that it is the whole process so far in the court martial which amounts to an abuse of process, it does not belong to us to make an initial determination of this issue, especially in view of the fact that the judge has already dismissed an abuse of process application made by the respondent which is not before us in this appeal.

Amendment to the style of cause

[56] The respondent has now left the Armed Forces and requests that the style of cause be amended to reflect that fact by adding the word (retired) after the word Captain. The appellant has no objection and the reasons for judgment as well as the formal judgment will reflect the requested change.

Conclusion

[57] For these reasons, I would allow the appeal, set aside the decision of the judge permitting the respondent to re-elect trial by Standing Court Martial and, without prejudice to the prosecution's right to consent to a re-election for trial by a Standing Court Martial, order that the trial shall resume before a General Court Martial in accordance with the Convening Order issued by the Court Martial Administrator on March 1, 2011.

[58] I would order that the style of cause of these reasons, the formal judgment and any subsequent proceedings be amended so as to read:

CAPTAIN (retired) J.C. MACLELLAN

Respondent

"Gilles Létourneau"
J.A.

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

"I agree
Eleanor R. Dawson J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-546
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CAPTAIN (retired) J.C. MACLELLAN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 21, 2011
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	PELLETIER J.A. DAWSON J.A.
DATED:	October 28, 2011

APPEARANCES:

Lieutenant-Colonel J.A.M. Léveillée Commander Martin Pelletier	FOR THE APPELLANT
Kevin A. Macdonald	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecution Service Ottawa, Ontario	FOR THE APPELLANT
Crowe Dillon Robinson Halifax, Nova Scotia	FOR THE RESPONDENT