Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20121214

Docket: CMAC-556

Citation: 2012 CMAC 5

Present: Chief Justice Blanchard

BETWEEN:

ORDINARY SEAMAN O'TOOLE, K.

Appellant/Applicant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on November 5, 2012.

Order delivered at Ottawa, Ontario, on November 6, 2012.

Reasons for Order delivered at Ottawa, Ontario, on December 14, 2012

REASONS FOR ORDER BY: CHIEF JUSTICE BLANCHARD

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REASONS FOR ORDER

BLANCHARD C.J.

[1] Following his arrest by military police on October 18, 2012, Ordinary Seaman K.G. O'Toole has been held in custody in the detention barracks at Canadian Forces Base Esquimalt. A Military Judge directed that Ordinary Seaman O'Toole was to be retained in custody pending his Standing Court Martial.

[2] Ordinary Seaman O'Toole (O.S. O'Toole), the applicant, seeks an order pursuant to section 159.9 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the NDA) for his release from custody with an undertaking until his Standing Court Martial on November 14, 2012. Section 159.9 of the NDA

permits a person in custody or the Canadian Forces to apply to a judge of the Court Martial Appeal Court to review any direction of a military judge under Division 3 of the NDA to retain the person in custody or to release the person from custody with or without an undertaking. The respondent, the Canadian Forces, opposes the application.

Facts

[3] There is no dispute between the parties on the facts as set out below.

[4] O.S. O'Toole is a cook at the Canadian Forces Base (CFB) in Esquimalt, British Columbia.

[5] On April 13, 2012, O.S. O'Toole was arrested during an altercation with a bank manager in Victoria, and injectable medications he had stolen from the base clinic at CFB Esquimalt were found on his person. The next day, he was released from custody but fled to Winnipeg in violation of his conditions of release, which required him to remain on the base. He was arrested in Winnipeg on April 17, 2012, on the authority of an arrest warrant pursuant to article 105.06 of the *Queen's Regulations and Orders*. After being escorted back to CFB Esquimalt, O.S. O'Toole was charged with stealing and failing to comply with a condition of his release. He was released for a second time on April 20, 2012. Between April 17, 2012 and June 19, 2012, he completed a program at the Edgewood residential addiction treatment facility in Nanaimo, British Columbia.

[6] O.S. O'Toole did not have any difficulties working when he was re-released on June 19, 2012, and he attended his court martial on September 10, 2012. He was sentenced to a reprimand and fined $1,200.00 for stealing and failing to comply with a condition of release.

[7] On September 29, 2012, O.S. O'Toole was arrested for an alleged assault on a civilian male, Eric Knoblauch, who was in his barracks room. He was released for a third time on conditions, which required him to report to work and to the Chief Petty Officer, but he was instructed to live off base in his civilian accommodations. O.S. O'Toole failed to report for work or to the Chief Petty Officer on October 1, 2012. He surrendered himself to military police around midday on October 2, 2012. He was released for a fourth time on more stringent reporting conditions.

[8] Although he was granted sick leave from October 3, 2012 to October 7, 2012, there was a medical notation to the effect that O.S. O'Toole could continue to meet his reporting requirements. On October 4, 2012, he failed to report to the duty officer in accordance with his conditions. He later arranged to be picked up at a location in Victoria, where he was despite a condition of release requiring him to remain on the base.

[9] O.S. O'Toole was reminded of the conditions of his release, but on October 8, 2012, he failed to report and was not in his room when it was checked in the morning. He claimed to have been in the hospital. On October 9, 2012, he was given an additional five days of sick leave. His conditions of release were amended on October 12, 2012, to allow him to attend evening appointments.

[10] On October 17, 2012, O.S. O'Toole failed to report for work, the fifth violation of his conditions of release this year. He turned himself in to military police in the afternoon of October 18, 2012. He was then arrested on a warrant of the Commanding Officer pursuant to

article 105.06 of the *Queen's Regulations and Orders*.

[11] As of October 18, 2012, O.S. O'Toole has remained in custody in the detention barracks of CFB Esquimalt. The parties dispute his living conditions in detention.

[12] At the time of his custody review hearing before a military judge on October 25, 2012, and October 26, 2012, O.S. O'Toole faced nine charges: assault, two counts of conduct to the prejudice of good order and discipline, four counts of failing to comply with conditions of release from custody, and two counts of being absent without leave.

[13] On October 26, 2012, Military Judge P.J. Lamont orally directed that O.S. O'Toole remain in custody pursuant to section 159.1 of the NDA.

[14] O.S. O'Toole's Standing Court Martial was scheduled for November 14, 2012, on the following charges:

FIRST CHARGE Section 129 *NDA*	CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPL1NE Particulars: In that he, on or about 29 September 2012, at Canadian Forces Base Esquimalt, British Columbia, had a guest in his single quarters room outside of visiting hours, contrary to Canadian Forces Base Esquimalt Single Quarters Standing Orders.
SECOND CHARGE Section 101.1 *NDA*	FAILED TO COMPLY WITH A CONDITION IMPOSED UNDER DIVISION 3

Particulars: In that he, on or about 1 October 2012, at or near Canadian Forces Base Esquimalt, British Columbia, without lawful excuse failed to report to Chief Petty Officer First Class Ferguson, a condition of release imposed upon him under Division 3 of the Code of Service Discipline.

THIRD CHARGE
Section 90 *NDA*

ABSENTED HIMSELF WITHOUT LEAVE

Particulars: In that he, at 1030 hours, 1 October 2012, without authority was absent from his place of duty at Canadian Forces Base Esquimalt, and remained absent until approximately 1257 hours, 2 October 2012.

FOURTH CHARGE
Section 129 *NDA*

NEGLECT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE

Particulars: In that he, on or about 1 October 2012, at Canadian Forces Base Esquimalt, British Columbia, failed to maintain his single quarters room in a clean and orderly manner, contrary to Canadian Forces Base Esquimalt Single Quarters Standing Orders.

FIFTH CHARGE
Section 101.1 *NDA*

FAILED TO COMPLY WITH A CONDITION IMPOSED UNDER DIVISION 3

Particulars: In that he, on 8 October 2012, at or near Canadian Forces Base Esquimalt, British Columbia, without lawful excuse failed to report to the Base Duty Officer, a condition of release imposed upon him under Division 3 of the Code of Service Discipline.

SIXTH CHARGE
Section 90 *NDA*

ABSENTED HIMSELF WITHOUT LEAVE

Particulars: In that he, at 0500 hours, 17 October 2012, without authority was absent from his place of duty at Canadian Forces Base Esquimalt, and remained absent until approximately 1740 hours, 18 October 2012.

[15] The parties informed the Court that O.S. O'Toole intended to plead guilty to all of the above charges and that they would make joint submissions on sentencing at the Standing Court Martial.

The Applicable Legislation

[16] When a custody review officer does not direct the release of a person from custody under section 158.6 of the NDA, sections 159.1 to 159.7 govern the review proceeding before a military judge. Pursuant to section 159.1, the onus is on the prosecution to show cause why the continued detention of the person in custody is justified:

159.1 When the person retained in custody is taken before a military judge, the military judge shall direct that the person be released from custody unless counsel for the Canadian Forces, or in the absence of counsel a person appointed by the custody review officer, shows cause why the continued retention of the person in custody is justified or why any other direction under this Division should be made.	159.1 Le juge militaire devant qui est conduite la personne détenue ordonne sa mise en liberté, sauf si l'avocat des Forces canadiennes ou, en l'absence d'un avocat, la personne désignée par l'officier réviseur lui fait valoir des motifs justifiant son maintien sous garde.

[17] However, pursuant to subsection 159.3(1) of the NDA, the onus shifts to the detained person, who then must show cause why the continued detention is not justified where that person is charged with a "designated offence":

159.3 (1) Notwithstanding section 159.1, if the person in custody is charged with having committed a designated offence, the military judge shall direct that the person be retained in custody until dealt with according to law, unless the person shows cause why the person's retention in custody is	159.3 (1) Malgré l'article 159.1, le juge militaire ordonne le maintien en détention lorsque la personne est accusée d'avoir commis une infraction désignée, et ce jusqu'à ce qu'elle soit traitée selon la loi, à moins qu'elle ne lui fasse valoir l'absence de fondement de cette mesure.

not justified.

[18] Section 153 of the NDA defines "designated offences" as follows:

(*a*) an offence that is punishable under section 130 that is	*a*) Toute infraction punissable aux termes de l'article 130 :
(i) listed in section 469 of the *Criminal Code*,	(i) soit mentionnée à l'article 469 du *Code criminel*,
(ii) an offence punishable by imprisonment for life under subsection 5(3), 6(3) or 7(2) of the *Controlled Drugs and Substances Act*, or	(ii) soit punie de l'emprisonnement à perpétuité aux termes des paragraphes 5(3), 6(3) ou 7(2) de la *Loi réglementant certaines drogues et autres substances*,
(iii) an offence of conspiring to commit an offence under any subsection referred to in subparagraph (ii);	(iii) soit tout acte de complot visant à commettre l'une des infractions mentionnées au sous-alinéa (ii);
(*b*) an offence under this Act where the minimum punishment is imprisonment for life;	*b*) toute infraction à la présente loi comportant comme peine minimale l'emprisonnement à perpétuité;
(*c*) an offence under this Act for which a punishment higher in the scale of punishments than imprisonment for less than two years may be awarded that is alleged to have been committed while at large after having been released in respect of another offence pursuant to the provisions of this Division or Division 10;	*c*) toute infraction à la présente loi passible d'une peine supérieure dans l'échelle des peines à l'emprisonnement de moins de deux ans qui est présumée avoir été commise alors que la personne était en liberté après avoir été libérée relativement à une autre infraction en vertu des dispositions de la présente section ou de la section 10;
(*d*) an offence under this Act that is a criminal organization offence; or	*d*) tout acte de gangstérisme punissable aux termes de la présente loi;

(*e*) an offence under this Act that is a terrorism offence.	*e*) une infraction prévue par la présente loi qui est une infraction de terrorisme.

[19] Upon identifying the applicable onus, the Military Judge must examine the evidence in light of the criteria set out in section 159.2 of the NDA to determine whether retention of the person in custody is justified.

159.2 For the purposes of sections 159.1 and 159.3, the retention of a person in custody is only justified when one or more of the following grounds have been established to the satisfaction of the military judge:	159.2 Pour l'application des articles 159.1 et 159.3, la détention préventive d'une personne n'est justifiée que si le juge militaire est convaincu, selon le cas :
(*a*) custody is necessary to ensure the person's attendance before a service tribunal or a civil court to be dealt with according to law;	*a*) qu'elle est nécessaire pour assurer sa comparution devant le tribunal militaire ou civil pour qu'elle y soit jugée selon la loi;
(*b*) custody is necessary for the protection or the safety of the public, having regard to all the circumstances including any substantial likelihood that the person will, if released from custody, commit an offence or interfere with the administration of justice; and	*b*) qu'elle est nécessaire pour assurer la protection ou la sécurité du public, eu égard aux circonstances, y compris toute probabilité marquée que la personne, si elle est mise en liberté, commettra une infraction ou nuira à l'administration de la justice;
(*c*) any other just cause has been shown, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of	*c*) d'une autre juste cause, eu égard aux circonstances, notamment le fait que l'accusation paraît fondée, la gravité de l'infraction, les circonstances entourant sa perpétration et le fait que la personne encourt, en cas de condamnation, une longue

imprisonment.	peine d'emprisonnement.

[20] The Military Judge then directs that the person be released from custody, with or without an undertaking, or that the person be retained in custody.

[21] On the application of either party, this Court is to review the direction of the Military Judge under section 159.9 of the NDA, which provides as follows:

159.9 (1) At any time before the commencement of a person's trial, a judge of the Court Martial Appeal Court may, on application, review any direction of a military judge under this Division to release the person from custody with or without an undertaking or to retain the person in custody.	159.9 (1) Sur demande, un juge de la Cour d'appel de la cour martiale peut, à tout moment avant le début du procès, réviser la décision du juge militaire de mettre l'accusé en liberté — inconditionnelle ou sous condition — ou en détention préventive, selon le cas.
(2) The provisions of this Division apply, with any modifications that the circumstances require, to any review under this section.	(2) Les dispositions de la présente section s'appliquent, avec les adaptations nécessaires, à la révision effectuée en vertu du présent article.

[22] As indicated in subsection (2) of this provision, this Court is to be guided by the provisions of Division 3 of the NDA insofar as the circumstances permit.

The Military Judge's Direction

[23] Military Judge Lamont's reasons and oral direction to retain O.S. O'Toole in custody, delivered at the custody review hearing on October 26, 2012, are found in the transcripts of the Custody Review Hearing, at page 50, line 43 to page 55, line 11.

[24] On consent of the parties, the Military Judge determined, pursuant to section 159.3 of the NDA, that "the burden is upon the accused in this case to demonstrate why his continued retention in custody is not justified."

[25] Applying this onus, the Military Judge bases his decision on three grounds:

a. He is not persuaded that the continued retention in custody of O.S. O'Toole is not required to ensure his attendance before a service tribunal because he "has demonstrated a persistent pattern of failing to adhere to the requirements of his superiors in the chain of command, and even of adhering to the ordinary discipline of showing up for work on time.";

b. He finds that "there is more than a substantial likelihood that the accused will re-offend if he is released from custody, at least until such time as he can come to grips with the problem of substance abuse" and assesses the "odds of his re-offending under these circumstances as bordering on the inevitable" and

c. He finds that O.S. O'Toole "continues to have difficulty with substance abuse to the point that he is presently incapable of complying with reasonable terms intended to secure his good behaviour."

[26] For the first and second grounds, the Military Judge relies on paragraphs 159.2(*a*) and 159.2(*b*) of the NDA. He refuses to comment on paragraph 159.2(*c*) because the parties did not argue paragraph (*c*) before him, and he expresses doubts about the provision's constitutionality. Further, he rejects the respondent's submission that "confidence in the administration of military justice is a proper factor to be considered" in a custody review under the NDA.

[27] To come to his conclusion on the third ground, the Military Judge assesses the conditions of release proposed by O.S. O'Toole and finds them to be "manifestly insufficient. The accused has been under simple reporting conditions in the recent past and has consistently failed to comply with them". He concludes: "I cannot conceive of any set of conditions that would be sufficient to allay my concerns that Ordinary Seaman O'Toole will not appear before a service tribunal on these charges and that if released he will continue to re-offend".

The applicable test

[28] There is currently no jurisprudence by this Court to guide the conduct of a review, pursuant to section 159.9 of the NDA, of a Military Judge's direction pursuant to section 159.1 of the NDA. It is therefore useful, at the outset, to determine the nature of the review contemplated by section 159.9 of the NDA.

[29] The parties have adopted the position that the applicable approach to a section 159.9 review under the NDA ought to be the same as that applicable to the review of a bail decision under the *Criminal Code*, R.S.C. 1985, c. C-46.

[30] Both sections 520 and 521 of the *Criminal Code* and section 159.9 of the NDA provide for a review of the order contemplated therein to be conducted at any time before the commencement of a trial to release the person in custody, with or without conditions, or to retain the person in custody. The only substantive element that the NDA provision does not expressly provide for which is found in the *Criminal Code* is the list of items the reviewing judge "may" consider in conducting the review, including the transcript of the proceedings which led to the initial order. See: subsections 520(7) and 521(8) of the *Criminal Code*. In essence, the respective provisions contemplate reviews that are essentially the same.

[31] Subsection 159.9(2) provides that the provisions of Division 3 apply to any review under this section, "with any modifications as the circumstances require". The provisions of Division 3 of the NDA deal with prior detention reviews including the Military Judge's review and the factors to be considered by the Military Judge (subsection 159.6(2)). The NDA therefore incorporates in a review by this Court, in the appropriate circumstances and as required, the same factors considered by the Military judge in rendering his or her decision. This lends support to the proposition that section 159.9 ought to be interpreted as providing wide discretion to the reviewing court in terms of the nature of the review to be conducted. In my view, this would include, in the appropriate cases, conducting a *de novo* review and rendering the appropriate decision where an error is made in the initial order. Such an approach would allow detention reviews to be conducted expeditiously and efficiently without the necessity of having the matter referred back for re-consideration. Further, such an approach is consistent with the approach adopted by the civilian criminal courts. This aspect will be further discussed below.

[32] In enacting the current provisions governing the military justice system, Parliament intended to bring the military justice system into alignment with the civilian justice system. Upon introducing Bill C-25 to the House of Commons, the Bill that would bring the current provisions into being, the Honourable Defence Minister Arthur C. Eggleton commented that:

[Translation]

> The proposed amendments contained in Bill C-25 are the most extensive in the history of the act. They will provide a more modern and effective statutory framework for the operations of the department and the Forces. They will more closely align military justice processes with judicial processes applicable to other Canadians…

[English]

> …all these changes are to bring about a legal system that is in accordance with modern day legal practices, akin to what is happening in civilian courts and takes into account the *Charter*.
>
> (Canada. *House of Commons Debates*, vol. 135, 1st Sess., 36th Parl., March 19, 1998 at 1635, 1640).

The Honourable Bill Rompkey opened the second reading of Bill C-25 in the Senate on a similar note:

> They [the amendments in Bill C-25] will provide a more modern and effective statutory framework for the operations of the department and the forces. They will more closely align military justice processes applicable to other Canadians. They will, however, continue to meet the military requirements for portability, speed, and the involvement of the chain of command in times of peace and conflict wherever the Canadian Forces operate.
>
> Canada. *Debates of the Senate*, vol. 137, 1st Sess., 36th Parl., June 16, 1998 at 1850.

The military justice system should therefore resemble the civilian justice system insofar as there is no military rationale for adopting a different approach. Given the similarities of the legislative provisions at issue under the *Criminal Code* and the NDA, guidance in interpreting the applicable provisions in the NDA is found in the jurisprudence of the criminal courts.

[33] There is significant jurisprudence in the criminal courts on whether a "review" is a process that contemplates a new hearing where the reviewing judge decides the proper order to be made or simply an appeal where the existing order stands unless an error is established.

[34] The revision process is often described as a proceeding of a hybrid nature. In *Attorney General of Canada v. Bradley and Bickerdike*, [1978] 1 C.R. (3d) 28, at page 33, Justice Greenberg rules that a Superior Court Judge in revision should not substitute his own discretion for that of the magistrate unless convincing new evidence is received at the hearing which was not heard by the magistrate or "he comes to the conclusion that the magistrate either exceeded his jurisdiction or made an error in law or a serious error in his appreciation of the facts."

[35] In *R. v. Adiwal*, 2003 BCSC 740, Justice Romilly of the British Columbia Supreme Court surveys the jurisprudence on the question of whether a bail review is a *de novo* hearing or an appeal. He concludes at paragraph 27 that "it is a blend of the two". He refers to *R. v. Carrier* (1980), 51 C.C.C. (2d) 307 (Man. C.A.) at 313, [1979] M.J. No. 93 (C.A.) (QL) at paragraph 19, for the proposition that "Parliament intended the review to be conducted with due consideration for the initial order but, depending on the circumstances, with an independent discretion to be exercised by the review court."

[36] *Adiwal* follows one of the leading case that establishes the test that a reviewing court is to apply on a detention review: *R. v. DiMatteo*, (1981), 60 C.C.C. (2d) 262 (B.C. C.A.), [1981] B.C.J. No. 648 (QL). In *DiMatteo*, at page 266 of the decision, Justice Craig indicates that the reviewing judge "may have the power to substitute his assessment of the application for that of the justice" who made the initial order, but that the reviewing judge should only do so when he or she "felt that the justice had erred in principle or that he was clearly wrong or that it would be unjust not to order the release of the applicant."

[37] This test has been re-stated in recent decisions, but its basic elements have not changed. In *R. v. Yakimishyn*, 2008 ABQB 188, Justice Veit explains at paragraph 18 that "[a] bail review hearing has, potentially, two steps: the first is to determine if there is an error of law or a material change of circumstance, and, if one is found, the second is to grant a *de novo* bail hearing." The *DiMatteo* test is also adopted by other Superior Courts of criminal jurisdiction (see e.g.: *R. v. Kalashnikoff* (2003), 60 W.C.B. (2d) 143, [2004] O.J. No. 113 (S.C.J.) (QL) at paragraph 5; *R. v. Longman*, 2011 SKQB 325 at paragraph 13; *Esmond c. R.*, [2004] J.Q. No. 8701 (C.S.) (QL) at paragraph 13; and *R. v. Casford*, 2003 PESCTD 44 at paragraph 16).

[38] In my view, the *DiMatteo* test appropriately sets out the considerations for a review by a Military Judge under section 159.9 of the NDA. This approach will ensure an effective and expeditious process for disposing of bail issues in the Military Justice System. Re-stated for our purposes, the applicable considerations are the following:

a. Whether the Military Judge committed an error in law or principle, or was clearly wrong, thereby requiring the Court Martial Appeal Court to substitute its assessment of the application for that of the military judge, and

b. Whether there has been a material change in circumstances since the Military Judge made his or her direction rendering the continued detention of the person unjust.

[39] In this instance, the onus is on the applicant to establish either of the above grounds of review.

Issues

[40] O.S. O'Toole submits that both grounds of review are applicable to the Military Judge's decision. He submits that:

a. The Military Judge erred in concluding that:

i. O.S. O'Toole's "retention in custody is necessary for the protection of the public… [because] there is more than a substantial likelihood that the accused will re-offend if he is released from custody…". The applicant argues that the likelihood of re-offending is not a stand-alone ground for detention under paragraph 159.2(*b*) of the NDA; there must also be a danger to public safety.

ii. "On 10 September [2012] he [O.S. O'Toole] was found guilty at court martial on the charges of stealing and failing to comply with a condition of release…" O.S. O'Toole argues that this finding was in error. O.S. O'Toole was not found guilty, but pleaded guilty to these charges and thus accepted responsibility for his actions.

iii. O.S. O'Toole "continues to have difficulty with substance abuse to the point that he is presently incapable of complying with reasonable terms intended to secure his good behaviour." O.S. O'Toole concedes that there was evidence of his alcohol abuse before the Military Judge. However, O.S. O'Toole points to the evidence that he completed a treatment program for his alcohol abuse and the lack of evidence that he was intoxicated when committing the alleged offences to support his argument that the Military Judge's conclusion is unreasonable.

b. Three circumstances have arisen since the Military Judge made his direction to retain O.S. O'Toole in custody, to wit:

i. The charges against the applicant have been proffered, and he is no longer charged with assault.

ii. O.S. O'Toole had already been detained for 21 days as of the hearing before this Court on November 5, 2012. Given the charges against him, the

anticipated sentence is likely to be less than his anticipated pre-trial detention.

iii. O.S. O'Toole's conditions of detention in the detention barracks of CFB Esquimalt are unduly harsh for a detainee in custody awaiting trial. According to O.S. O'Toole's uncontested evidence, he is given no set program to occupy him; he has no access to a library or a kitchen; he is exposed to no outside light or ventilation; he is mostly alone, and he is permitted no interaction when other detainees are present.

[41] In my view the following issues arise in this application:

a. Did the Military Judge commit a reviewable error of law or principle in directing that O.S. O'Toole be retained in custody?

b. Have circumstances arisen since the Military Judge's direction that renders O.S. O'Toole's continued detention unjust?

Analysis

[42] The above issues will be considered in turn.

1. Did the Military Judge commit a reviewable error of law or principle in directing that O.S. O'Toole be retained in custody?

[43] In the circumstances of this case, there is no dispute that one of the charges at issue is a "designated offence" as defined in section 153 of the NDA. Consequently, pursuant to section 159.3 of the NDA the onus is on O.S. O'Toole to establish that his continued detention is not justified.

[44] In determining that O.S. O'Toole be retained in custody, the Military Judge considered the grounds set out in paragraphs 159.2(*a*) and (*b*) of the NDA.

[45] As with section 159.9 of the NDA, there is a dearth of jurisprudence interpreting section 159.2 of the NDA. For the same reasons that civilian criminal jurisprudence informs the interpretation of section 159.9, it may also inform the interpretation of section 159.2. Section 159.2 has parallel wording to the judicial interim release provisions of the *Criminal Code*, namely subsection 515(10).

*(a) Is continued detention of the applicant justified pursuant to paragraph 159.2(*a*) of the NDA?*

[46] Paragraph 515(10)(*a*) of the *Criminal Code* and paragraph 159.2(*a*) of the NDA both require a case-by-case factual analysis of the likelihood that the person in custody will fail to attend his or her trial. The criminal courts have highlighted a number of relevant factors to consider in conducting the analysis.

[47] Among the relevant factors are the gravity of the alleged offences and the anticipated length of incarceration. Jurisprudence has indicated that there is a presumption that the more serious the alleged offence and the longer the anticipated sentence, the more likely it is that the accused will fail to attend (see e.g. *R. v. Massey*, 2005 BCCA 174 at paragraph 8; *R. v. Sanchez* (1999), 172 N.S.R. (2d) 318 (N.S. C.A.) at paragraphs 17-18, [1998] N.S.J. No. 415 (C.A.) (QL) at paragraphs 32-33). The Court is also to consider the circumstances of the accused's release or any conditions that might be imposed on the accused's release to mitigate the risk of flight (see e.g. *Cretu v. Romania*, 2012 SKCA 69 at paragraph 28; *R. v. Sanderson*, (1999), 138 Man. R. (2d) 125 (C.A.) at paragraph 3, [1999] M.J. No. 305 (C.A.) (QL) at paragraph 3).

[48] In addition, the court should take into account the accused's attitude towards the administration of justice, in particular any attempts to flee justice, failures to attend court or failures to comply with court orders in the past (see e.g. *R. v. Brotherston*, 2009 BCCA 431; *Boily. c. États-Unis Mexicains*, 2005 QCCA 599 at paragraphs 22-23; *R. v. D.P.F.* (1999), 173 Nfld. & P.E.I.R. 197 (Nfld. C.A.) at paragraphs 12-13, [1999] N.J. No. 99 (QL) at paragraphs 12-13; *R. v. Sharif*, [1994] O.J. No. 1155 (C.A.) (QL) at paragraphs 4-5; *R. v. Benn* (1993), 141 A.R. 293 (C.A.)).

[49] On the evidence before the Military Judge, O.S. O'Toole faced numerous charges. They were not among the gravest, nor were they expected to carry heavy sentences. Both parties took the position that the alleged assault, the charge with the potential for the longest sentence in custody, was on the milder end of the spectrum of assaults. These factors favour the applicant.

[50] The Military Judge explicitly considered the applicant's conduct relating to compliance and his failures to comply with orders. The evidence before him led him to conclude that O.S. O'Toole's history of failing to comply with orders to report to was at the more serious end of the spectrum. Four of the offences with which he is charged relate directly to these failures, and he was previously convicted on one such charge at his September 10, 2012 court martial. On the record of offences before him it was open to the Military Judge to conclude that the applicant "has demonstrated a persistent pattern of failing to adhere to the requirements of his superior in the chain of command, and even of adhering to the ordinary discipline of showing up for work on time".

[51] In certain instances, failure to comply with conditions of release or failure to report pursuant to paragraph 515(10)(*a*) of the *Criminal Code* and by analogy paragraph 159.2(*a*) of the NDA is insufficient on its own to justify detention (see e.g. *Brotherston*). O.S. O'Toole contends that he did not fail to attend his previous court martial. Nevertheless, in this instance, the applicant has been released on conditions many times and has repeatedly failed to comply with his conditions of his release, violating them on five occasions. While O.S. O'Toole appeared for his previous court martial, and has no record of previous offences of failing to appear before a service tribunal, it was open to the Military Judge to find, on all the evidence, that O.S. O'Toole had not satisfied his onus of establishing that "continued retention in custody is not required" to ensure his attendance before his Standing Court Martial.

[52] The applicant argues that the Military Judge's conclusion that he "continues to have difficulty with substance abuse to the point that he is presently incapable of complying with reasonable terms intended to secure his good behaviour" is unreasonable. I disagree. As the Military

Judge mentions, O.S. O'Toole has a record of two drunkenness offences in 2010 and of recent treatment at the Edgewood facility. Each of the four charges O.S. O'Toole faces for failing to report or being absent without leave relate to incidents that occurred after he completed addiction treatment at the Edgewood facility. It was open to the Military Judge to infer that the applicant's recent treatment for substance abuse did not solve his problem.

[53] Although alcohol abuse alone might constitute insufficient grounds to justify the Military Judge's conclusion that O.S. O'Toole is "incapable of complying with reasonable terms intended to secure his good behaviour" it is not the only basis relied upon by the Military Judge. He also found that the applicant "has been under straightforward simple reporting conditions in the recent past and has consistently failed to comply with them." Given O.S. O'Toole's propensity to violate conditions of release and to disobey orders to report, it was open to the Military Judge to conclude as he did: "I cannot conceive of any set of conditions that would be sufficient to allay my concerns that Ordinary Seaman O'Toole will not appear before a service tribunal on these charges."

[54] Consequently, I conclude that it was open to the Military judge to find that O.S. O'Toole's continued detention was required to ensure his attendance at his Standing Court Martial. I am satisfied that the Military Judge committed no reviewable error in his assessment of the applicable factors relating to subsection 159.2(*a*). Since the test provided for in section 159.2 is not conjunctive, my finding under paragraph (*a*) is dispositive of the application unless a material change in circumstances renders the continued detention unjust.

(b) Is continued detention of O.S. O'Toole justified pursuant to paragraph 159.2(b) of the NDA?

[55] Subject to any material change in circumstances, to be discussed below, my above finding is dispositive of the application. I will nevertheless address the interpretation given by the Military Judge of paragraph 159.2(*b*) of the NDA. The leading authority interpreting paragraph 515(10)(*b*) of the *Criminal Code*, and therefore by analogy paragraph 159.2(*b*) of the NDA, is *R. v. Morales,* [1992] 3 S.C.R. 711. At page 736 of the decision, Chief Justice Lamer describes "for the protection or safety of the public" as the "public safety component" of the provision.

[56] The criminal courts, in following *Morales* and its companion case *R. v. Pearson,* [1992] 3 S.C.R. 665, have often interpreted the provision having regard to the risk that the accused will, while released, commit a violent crime or engage in criminal activity that is directly related to violence (see e.g. *R. v. Skeard*, 2002 NSSC 177 at paragraph 15, [2002] N.S.J. No. 480 (S.C.) (QL) at paragraph 15; *R. v. Fike*, 2011 BCPC 65 at paragraph 31). In determining the accused's substantial likelihood of re-offending, certain courts employ a test for the accused's "probability of dangerousness" which focuses on the connection with violence (*R. c. Rondeau*, [1996] R.J.Q. 1155 (C.A.) at 1158, see e.g.; *R. c. Bégin*, [2000] J.Q. No. 4673 (C.S.) (QL) at paragraphs 14-15; *R. c. Auger*, [2002] J.Q. No. 2612 (C.S.) (QL) at paragraph 97; *Cleary c. R.*, [2005] J.Q. No. 337 (C.S.) (QL) at paragraph 46; *R. v. Taylor*, 2006 ABQB 480 at paragraph 12). Guided by the above jurisprudence, I am satisfied that, if the offence that the accused is likely to commit relates to violence, this would weigh heavily in favour of retaining the accused in custody to ensure the protection or safety of the public.

[57] In *Morales*, Chief Justice Lamer explains that apart from violence or activities related to violence, other circumstances including activities involving a substantial likelihood of tampering with the administration of justice may also justify retaining an accused in custody pursuant to section 515(10)(*b*) of the *Criminal Code*. At page 737 of the decision, the learned Chief Justice states that, in such circumstances, detention is necessary in order to protect the administration of justice and to ensure the proper functioning of the bail system.

[58] Chief Justice Lamer further states at page 738 of the decision that in his view:

> …the bail system also does not function properly if individuals commit crimes while on bail. One objective of the entire system of criminal justice is to stop criminal behaviour. The bail system releases individuals who have been accused but not convicted of criminal conduct, but in order to achieve the objective of stopping criminal behaviour, such release must be on condition that the accused will not engage in criminal activity pending trial.

The learned Chief Justice does not limit section 515(10)(*b*) to the risk of violence or criminal activity related to violence.

[59] Paragraph 515(10)(*b*) of the Criminal *Code* and paragraph 159.2(*b*) of the NDA provide a basis for the detention of an accused where there is a substantial likelihood that he or she will engage in criminal activity that impacts on the protection and safety of the public. Based on Chief Justice Lamer's broad interpretation, the provision is not restricted to violent offences or offences connected to violence as argued by O.S. O'Toole. In my view, the criminal activity must either be violent, be connected to violence, be of such a nature that it interferes with the administration of justice, or in some other way impact the protection or safety of the public.

[60] Chief Justice Lamer explains in *R. v. Généreux*, [1992] 1 S.C.R. 259 at 293 that "[t]he safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security." The learned Chief Justice further remarks that the military justice system must enforce discipline effectively and efficiently, and that many civilian offences may take on a more serious connotation in the military context. This is the main reason that military justice is administered separately from civilian justice. It follows that, in the military context, the application of paragraph 159.2(*b*) of the NDA may involve consideration of additional factors such as the substantial likelihood that the accused will, if not retained in custody, commit an offence that will impact the discipline, efficiency, or morale of the military to an extent that could affect the operational readiness of the Canadian Forces. In such exceptional cases, the impact of such an offence on military discipline is an appropriate consideration in deciding whether detention is warranted under paragraph 159.2(*b*) of the NDA.

[61] While the Military Judge considered whether O.S. O'Toole was likely to re-offend, he did not consider the nature of the offences that O.S. O'Toole was "substantially likely" to commit. The Military judge found only that "… continued retention in custody is necessary for the protection of the public." An analysis of the nature of the offences likely to be committed would have been necessary in order to assess whether any of them would have an impact on the protection or safety of the public. The offences at issue relate essentially to the applicant's failure to report as ordered by his superiors, and do not directly relate to violence, undermine the functioning of the justice system, or impact the protection and safety of the public in any way. Nor does the evidence support any indication that the offences, if committed, would have any impact on military operational readiness.

[62] In conclusion, there is no evidence to indicate that there is a substantial likelihood that O.S. O'Toole will commit an offence that would impact on the protection or safety of the public. In the circumstances of this case, I am of the view that the evidence does not support a finding that O.S. O'Toole's retention in custody is required for the protection and safety of the public under paragraph 159.2(*b*) of the NDA.

[63] Paragraph 159.2(*c*) was not raised before this Court on the application. In the absence of argument, I will not comment on this provision.

2. Have circumstances arisen since the Military Judge's direction that render O.S. O'Toole's continued detention unjust?

[64] O.S. O'Toole submits that there are three material changes in his circumstances since the direction of the military judge that render his continued detention unjust. I shall deal with each alleged material change in circumstances in turn.

a. The Canadian Forces have not proffered the assault charge for the Standing Court Martial

[65] O.S. O'Toole argues that the decision of the respondent not to proceed with the assault charge is a material change in circumstances since the Military Judge's October 26, 2012 decision to retain him in custody.

[66] The disposition of charges has been considered a material change in circumstances, but it may not necessarily be determinative of the review application (*R. v. Hill*, [1973] 5 W.W.R. 382

(B.C. S.C.) at 382-383). In *R. v. Jacque*, 2008 NLTD 184, the disposition of several charges against the accused coupled with a long pre-trial delay constituted a material change in circumstances justifying release of the accused pending trial (at paragraphs 5 and 19). However, in other cases such a change may not be sufficient to warrant releasing the accused. It will depend on the circumstances of the case. In *Skeard* at paragraph 15, the Court denied bail on the basis of the accused's extensive criminal record and his disregard of court orders notwithstanding the change in the nature of the charges against him.

[67] In the case before me, I do not find the withdrawal of the assault charge to be a material change in circumstances warranting this Court's intervention. In my view, the change does not impact the Military Judge's basis for ordering that O.S. O'Toole remain in custody. The Military Judge decided that custody was required to ensure that O.S. O'Toole would attend his Standing Court Martial on the basis of his extensive history of failing to report when ordered to do so and breaching his conditions of release. Disposition of the assault charge does not change these circumstances.

b. O.S. O'Toole's pre-trial detention is likely to exceed the length of his sentence

[68] O.S. O'Toole submits that his continued detention would likely result in a situation where his pre-trial custody exceeds the length of his sentence. In *R. v. Abdel-Rahman*, 2010 BCSC 189 at paragraph 49, Justice Halfyard explains that a delay in the trial for "such a long period that he [the accused] might serve as much or more time in pre-trial custody than the length of any sentence that

could be imposed upon him if convicted" constitutes a circumstance rendering continued detention unjust.

[69] After the Military Judge's direction, O.S. O'Toole's Standing Court Martial was scheduled for November 14, 2012. As a result, his pre-trial custody was to last for a total of 27 days from his initial arrest on October 18, 2012. At the hearing before this Court, neither party made submissions on a likely length of the sentence to be imposed. The applicant faces multiple charges, a number of which carry penalties that can possibly exceed 27 days of detention. In the circumstances of this case, I have not been persuaded that the length of the pre-trial detention is unjust.

c. O.S. O'Toole's living conditions in the detention barracks of CFB Esquimalt are unduly harsh and render his continued detention unjust

[70] O.S. O'Toole submits that the conditions of his pre-trial detention are not acceptable and render his continued detention unjust. The affidavit evidence before me includes conflicting evidence and evidence that is not disputed. I will first deal with the conflicting evidence.

[71] Among the contested allegations, O.S. O'Toole alleges that his exercise facilities are inadequate. He attests at paragraph 14 of his affidavit that: "[t]he only exercise equipment is a broken bowflex and stationary bike" which he has not been given time to use. At paragraph 15, he explains that "[o]ccasionally, but on no schedule and not daily I have been let out into an outside area about 12 x 15 feet for a short period of time."

[72] Warrant Officer Menard's responding affidavit contradicts this evidence. The affidavit explains at paragraph 9 that "[a]n exercise yard is immediately adjacent to the detention barracks, and Ordinary Seaman O'Toole has been advised by detention barrack guards that he can go outside whenever he wants to during the day, for whatever duration he wishes, within reason. He must be accompanied by a detention barrack guard…" According to the affidavit, O.S. O'Toole has repeatedly declined opportunities to go outside. At paragraph 10, it mentions that "Ordinary Seaman O'Toole has unlimited access to the fitness room within the detention barrack during the day", which contains a number of items of fitness equipment. These items were inspected on November 2, 2012, and "all are functional."

[73] In relation to the above contested allegations and for the other contested allegations, it is not possible on an application of this nature to assess and weigh the conflicting evidence without the opportunity to hear the affiants and evaluate their credibility. Consequently, the disputed evidence will not form a basis for my decision. I am left to consider the undisputed evidence.

[74] According to O.S. O'Toole's uncontested evidence, while detained, he is given no set program to occupy him; he has no access to a library or a kitchen; he is exposed to no outside light or ventilation; he is mostly alone, and he is permitted no interaction when other detainees are present.

[75] While the Respondent has provided evidence that the Applicant was supplied with reading materials, the above allegations are otherwise essentially not disputed. Although I am mindful of the hardships alleged by the accused that have not been contradicted by the Crown, given the duration

of his pre-trial detention, I am satisfied, in the circumstances, that the conditions under which O.S. O'Toole is being detained at CFB Esquimalt are not unjust.

[76] I note, however, that, in the circumstances of a prolonged pre-trial detention, the conditions for pre-trial detention at CFB Esquimalt as alleged by the applicant may well fall short of acceptable conditions of pre-trial custody as outlined in articles 105.31 to 105.40 of the *Queen's Regulations and Orders*. Suffice it to say that the pre-trial detention conditions may be considered by the military judge on sentencing. Further, in cases where the conditions of detention are particularly onerous, a reviewing court may consider enhanced credit for the time spent in pre-trial custody. See: *R. v. Downes* (2006), 205 C.C.C. (3d) 488 at para. 25 (Ont. C.A.).

Conclusion

[77] O.S. O'Toole has not satisfied me that the Military Judge was clearly wrong or committed an error in law or principle requiring this Court to re-assess the direction of the Military Judge retaining O.S. O'Toole in custody. While the Military Judge erred in his paragraph 159.2(*b*) analysis by failing to assess the nature of the offences that the applicant had a substantial likelihood of committing when released, I find no error in his analysis of paragraph 159.2(*a*). Since the Military Judge's direction can stand on paragraph 159.2(*a*) alone, there is no basis for this Court to intervene.

[78] Upon review of the evidence, I also find that there has been no material change in circumstances since the Military Judge's direction rendering it unjust to retain O.S. O'Toole in

custody prior to his Standing Court Martial. There is therefore no need to disturb the direction of the Military Judge.

[79] For the above reasons, the application is dismissed.

"Edmond P. Blanchard"
Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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