COURT MARTIAL

Citation: *R. v. Beaudry*, 2016 CM 4009

Date: 20160711
Docket: 201523

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Corporal R.P. Beaudry, accused

Before: Commander J.B.M. Pelletier, M.J.

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DECISION RELATING TO A PLEA IN BAR OF TRIAL

(Orally)

INTRODUCTION

[1] On September 23, 2015, two charges under section 130 of the *National Defence Act* (*NDA*) were preferred against Corporal Beaudry. The first count alleges sexual assault causing bodily harm contrary to section 272 of the *Criminal Code* and the second count alleges overcoming resistance to commission of an offence contrary to section 246(*a*) of the *Criminal Code*. The Court Martial Administrator (CMA) issued a convening order on March 10, 2016, ordering the accused to appear before a Standing Court Martial at Canadian Forces Base Wainwright on 11 July 2016.

THE APPLICATION

[2] By notice of application received by the CMA on 29 June 2016, counsel for Corporal Beaudry has indicated his intention to challenge the constitutionality of paragraph 130(1)(*a*) of the *NDA* alleging that this provision deprives an accused, facing a court martial, of his or her right to a jury trial, guaranteed under section 11(*f*) of the *Canadian Charter of Rights and Freedoms*, and should, therefore, be declared of no force or effect under Section 52 of the *Constitution Act, 1982*. This application was presented orally on the morning of July 11, 2016, at the beginning of court martial proceedings. Although it is not specified in the notice, an application such as this one is considered a Plea in Bar of Trial under article 112.24 of the *Queen's Regulations and Orders for the Canadian Forces*, as recognized by the Court Martial Appeal Court (CMAC) in *R. v. Larouche*, 2014 CMAC 6 at paragraph 6.

ANALYSIS AND DISPOSITION

[3] In his notice of application and orally, the applicant admits that his application is submitted solely to preserve the rights of the accused, considering that the issue submitted was specifically analyzed and answered by the CMAC in its decision of 3 June 2016 in *R. v. Royes*, 2016 CMAC 1. The CMAC, in reasons by Justice Trudel, concluded unequivocally that paragraph 130(1)(*a*) of the *NDA* does not violate the right to a jury trial guaranteed by section 11(*f*) of the *Charter*. I am informed that this decision is currently the subject of an application for leave to appeal to the Supreme Court of Canada. However, to the extent that the question before me is indistinguishable from the question answered by our Court of Appeal, I am bound by the interpretation of the latter.

[4] I am of the opinion that the *Royes* decision fully answers the question raised by this application. I am bound by this decision, to which, moreover, I subscribe entirely. The CMAC noted quite appropriately the context of its previous decisions on this issue, specifically the silent differences between the approach taken in *R. v. Moriarity*, 2014 CMAC 1, concluding the absence of a *Charter* violation due to the requirement of a military nexus, and the approach taken a few months later in *Larouche* and *R. v. Arsenault*, 2014 CMAC 8, concluding the presence of a *Charter* violation that is remedied by the requirement of a military nexus. The *Royes* decision recognizes the subsequent rejection of the military nexus requirement by the Supreme Court of Canada in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 SCR 485 and concludes, convincingly, to the absurdity of accepting that paragraph 130(1)(*a*) of the *NDA* may be constitutional under section 7 of the *Charter* but unconstitutional under section 11(*f*), while relying essentially on the same overbreadth analysis.

[5] I believe that the most important contribution made by the CMAC in the *Royes* decision is to question the idea that the jurisprudence of the last 30 years of the CMAC has consistently accepted the need for a military nexus in the determination of the constitutionality of an exercise of jurisdiction by military authorities. Indeed, between the time the decision *R. v. Reddick*, [1996] CMAC-393 was made in December 1996 and the *Moriarity* decision in January 2014, practitioners of military law had concluded

that the military nexus test was no longer relevant, even with respect to the question of the exception to the right to a jury trial guaranteed by section 11(*f*) of the *Charter*. This conclusion arose from Chief Justice Strayer's reasons in *Reddick*, the extracts of which reproduced in *Royes* being, in my opinion, convincing on this point. During this period, the CMAC itself had come to note, on a number of occasions, that the military nexus test had become a distraction since *Reddick*, starting with ***R. v. Levesque***, [1999] C.M.A.C. No 7 at paragraphs 12 and 13. The *Reddick* decision provides a clear analysis of what is described as the "so-called nexus issue" by Chief Justice Strayer, himself one of the main architects of the *Charter*. This decision was not overruled by the CMAC in *Moriarity*.

[6] In my opinion, the codification of the right to jury trials operated by the very words of section 11(*f*) of the *Charter*, ensures that the right to a jury trial crystallizes only when a person is charged with an offence punishable by imprisonment for five years or more that is not an offence under military law tried before a military tribunal. A person charged by a military prosecutor is in a situation where the right to a jury trial has not crystallized for him or her. It is, therefore, not entirely accurate to state that those prosecuted before military tribunals "lose the right to trial by jury." These people cannot lose what they never really had. At most, these persons have lost the opportunity to choose a jury trial in the event that a civilian prosecutor would have made the decision to bring charges against them making them liable to imprisonment for five years or more.

[7] In these circumstances, the Court must follow the direction provided by the CMAC in the *Royes* decision. It is hoped that the CMAC, regardless of the composition of the panels considering appeals, will build military law on the foundations clarified by this decision, not only to allow military tribunals to dispose of cases involving section 130 without concern, but especially for the benefit of persons subject to the Code of Service Discipline, who enjoy advantageous access to justice compared to that which they would have access to if the charges against them under the *Criminal Code* were to be tried before civilian courts.

FOR THESE REASONS, THE COURT REJECTS THE APPLICATION.

Counsel:

The Director of Military Prosecutions, as represented by Lieutenant-Commander S.C. Leonard and Major P. Rawal

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