COURT MARTIAL

Citation: *Canadian Broadcasting Corp. v R*, 2014 CM 3014

Date: 20140828
Docket: 200710

Hearing before a Military Judge

Asticou Centre
Gatineau, Quebec, Canada

Between:

Canadian Broadcasting Corporation, Applicant

- and -

The Court Martial Administrator, Her Majesty the Queen and Warrant Officer L.E. Underhill, Respondents

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR DECISION

(Orally)

[1] The Canadian Broadcasting Corporation (CBC) made an application pursuant to article 101.07 of the *Queen's Regulations and Orders for the Canadian Forces* (*QR&O*) before a military judge to make an order that the Court Martial Administrator (CMA) provides to the applicant an unredacted copy of the transcript of the record of the proceedings or the audio recording of the hearing that took place in August 2007 and the decision of the Court Martial of Sergeant L.E. Underhill, including any publication ban issued by that court.

[2] The material considered by me is composed of documents, such as the notice of application, the written submissions of the applicant, including a reply, and the written arguments of the respondent Her Majesty the Queen, and exhibits such as the affidavit of Rachel Houlihan with exhibits A, B and C. The other respondents declined the opportunity to submit any written submissions.

[3] In the course of her investigation on charges of sexual assaults by the Canadian military justice system, Mrs Rachel Houlihan, a journalist from CBC, requested access in August 2013 to court files in cases of sexual assault or cases involving allegations similar to sexual assault since the year 2000.

[4] Mrs Houlihan received a reply by email from a Public Affair Officer (PAFFO) for the Canadian Forces to the effect that these decisions were subject to a publication ban and would require severance in accordance with the publication ban order issued at the court martial and the *Privacy Act*, R.S.C., 1985, c. P-21. It was suggested to her that she completes and submits a request under the *Access to Information Act*, R.S.C., 1985, c. A-1, to get what she wanted. The reply also specified that since 2010, the military judges write there respective decisions involving the issuance of a publication ban for such matters in a format allowing court decisions to be published on the Chief Military Judge's website.

[5] In December 2013, Mrs Houlihan asked for court martial's decisions concerning 14 different cases decided in 2004 involving allegations of sexual assault or allegations similar to sexual assault. At the end of the month of March 2014, she received the copy of the 14 decisions with significant redactions. As an example of what she received, the applicant submitted the copy of the decision of military judge Dutil concerning the finding in the matter of *R* c *Kavanaugh*, 2004 CM 2001, dated 22 January 2004.

[6] On 25 April 2014, the CMA received the notice of application relevant to this matter. The applicant selected the court martial of Sergeant Underhill that was held in the year 2007, considering that it is a matter involving a sexual assault charge, in order to get from the court an authorization allowing CBC a full access to the decisions, the recordings and transcripts of the court martial on this matter. The respondent also takes the position that if such a decision is issued, than it would apply to similar court martial cases involving allegations of sexual assault or allegations similar to sexual assault between 2000 and 2010. The case of Sergeant Underhill was not listed in those 14 cases initially requested by the applicant in December 2013.

[7] On 12 May 2014, I held a pre-hearing conference concerning this matter and I requested written submissions specifically on the issue of jurisdiction for me to hear this matter, topic that I raised on my own motion.

[8] On 6 June 2014, a second pre-hearing conference was held and a hearing date was set for 10 July 2014. Meanwhile, the representative for Her Majesty the Queen and the applicant in reply, submitted written submissions.

[9] The hearing took place on 10 July 2014. The applicant and two of the respondents were represented by counsel. The Court Martial Administration Legal Advisor attended the hearing but made no representations. Sergeant Underhill's counsel also declined to make any representation during the hearing.

[10] At the end of the hearing, I learned from Her Majesty the Queen's counsel that he got a redacted copy of the decision concerning the matter of Sergeant Underhill, while nobody else, including the applicant, had received one. He was under the impression that the applicant received such thing and he was surprised that it was not the case. I told parties to sort out this issue for the next step, considering that the

existence of or non-existence of such written decision would have no impact on the matter of jurisdiction I have to decide first.

[11] The applicant takes the position that I have jurisdiction to hear this matter and that the open court principle should provide CBC access to court martial records. In addition, the applicant submits that the CMA is not bound by the *Privacy Act* and that CBC does not have to fill a request pursuant to the *Access to Information Act* in order to get any court martial's record.

[12] Her Majesty the Queen's counsel suggests that a military judge has no statutory authority to exercise a judicial review of the CMA's decision and that the present matter should be brought before the Federal Court.

[13] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces (see *R v Généreux* [1992] 1 SCR 259 at 293).

[14] At the same page, the Supreme Court of Canada said:

> Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

[15] As expressed by the Federal Court of Appeal in the matter of *Canada (Military Prosecutions) v Canada (Chief Military Judge)*, 2007 FCA 390, at paragraph 5:

> The military justice system is a two-tiered tribunal structure that includes a summary trial system and, the more formal court martial system. There is no permanent court martial. Rather, it functions through an *ad hoc* court martial that is constituted as and when it is convened to address specific charges. A court martial can sit within or outside of Canada wherever it can conveniently be convened.

[16] This interpretation of the provisions of the *National Defence Act* was confirmed by the Court Martial Appeal Court in *R v MacLellan*, 2011 CMAC 5 at paragraph 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.

[17] The only thing that has changed concerning this affirmation, is that a recent modification to section 165.21 of the *National Defence Act* resulted in the fact that the Presiding judge does not have to sworn in anymore prior to each court martial, considering that he or she has to take an oath before commencing the duties of office once appointed by the Governor in Council.

[18] Then, a court martial is a trial court convened to deal with a service offence committed by a person subject to the Code of Service Discipline. It takes its legal existence once it is convened and ceases to be when it terminates its proceedings. As mentioned by Military Judge Perron in its decision of *R v Wilks*, 2013 CM 4017, at paragraph 11, the court martial is then *functus officio*, meaning that the court is done with the matter and cannot reopen.

[19] According to the *National Defence Act*, a military judge may be involved in proceedings prior to the court martial such as the matter concerning arrest and pretrial custody (sections 159 to 159.7), preliminary matters before the commencement of the trial (section 187) and before an accused enter a plea on a charge (article 112.05(5)(e) of the *QR&O*).

[20] Concerning post-trial matters, a decision or order made by a court may be usually varied in circumstances such as;

a. if an application is made to a military judge (application to cancel the direction that authorized the person to be released pending appeal, section 248.81; application for variance of order authorizing the taking of bodily substances for DNA analysis, subsection 196.25(4)); or

b. a new court martial is convened to consider the issuance or variation of an order (application for exemption or termination order to comply with the *Sex Offender Information Registry Act*, S.C. 2004, c. 10, sections 227.11 and 227.12 of the *NDA*).

[21] In some instances, such as in *Wilks*, if proceedings of a court martial are terminated, a military judge may, on application, reconsider and vary in some instances an order he made during the court martial he presided, if such topic is not specifically covered by any provision of the *National Defence Act*. He would then use the common law power of the court martial if the circumstances that were present at the time the order was made have materially changed.

[22] The CMA shall convene courts martial and perform any other duties specified by the *National Defence Act* or by regulation (section 165.19 of the *National Defence Act* and article 101.17 of the *QR&O*).

[23] Among those duties, he or she manages the Office of the Chief Military Judge and supervises personnel, other than military judges, within that Office; maintains a file in respect of each court martial or other hearing before a military judge; and retains the recording and minutes of proceedings of each court martial and other hearing before a military judge. Pursuant to his or her authority to manage the office, maintain a file and retain minutes of proceedings, he or she handles the Chief Military Judge's web site on which military judges decisions are published.

[24] Considering the authority provided in the regulation to the CMA concerning court's files and transcripts, the decision to provide access and copy of documents found in a court martial file, including access and copy of the transcript of such a court once it is terminated, is an administrative decision that belongs solely and exclusively to the CMA. According to the *National Defence Act* and to regulation, it is my conclusion that responsibility to handle and provide access to court martial's files and transcripts is of the CMA's duties.

[25] By statute, a court martial is not a permanent court, as expressed earlier and despite having control over is own process, once the court is terminated, it does not exist anymore and cannot exercise control over the access to records it generated, such as the administrative file and the transcripts of its minutes. This authority has been clearly given to the CMA because of the very nature of the court. Consequently, the application made by CBC did not legally revive the court martial of Sergeant Underhill, nor it did not convene or reconvene it. Then, I do not preside at such court martial. I do act as a military judge presiding at a hearing, nothing more, and nothing less.

[26] As a matter of logic, such decision has nothing to do with variation of an order or an order to be considered in relation with the conduct, the finding or the sentence of the court. The question of access to and issuance of a court martial's decision and its minutes once a court martial is terminated is purely administrative and it belongs clearly to the CMA to make any administrative decision in relation to that topic.

[27] As a military judge, I have been assigned to exercise a judicial duty to hear the application before this court. I do not exercise any of the power, duty or function of the Chief Military Judge. My assignation by the Chief Military Judge was made in order for me to make a judicial determination about this matter and not in any way administratively. It is my conclusion that I cannot and do not exercise any of the Chief Military Judge's administrative power, duty or function by sitting judicially for dealing with the application before me.

[28] Considering that the proceedings of the court martial in respect of Sergeant Underhill are terminated;

[29] Considering that I consequently am not presiding at a court martial but at a hearing before a military judge;

[30] Considering that the applicant does not request a military judge to vary or consider any order made by the presiding military judge at the court martial of Sergeant Underhill pursuant to a provision of the *NDA* or to common law power once a court martial is terminated;

[31] Considering that the decision of the CMA to provide access to or to provide a copy of a court martial's document or transcripts of the minutes is an administrative one;

[32] Considering that I am not exercising any of the Chief Military Judge's administrative power, duty or function;

[33] Considering that as a military judge assigned to preside at this hearing, I am acting judicially; and

[34] Considering that the review of such CMA's decision by a military judge is not considered by any provision in the *National Defence Act* or related regulation.

FOR THESE REASONS, I THEN

[35] **CONCLUDE** that I do not have jurisdiction in order to deal with the matter raised by the applicant in its written notice.

AND

[36] **DISMISS** the application.