COURT MARTIAL

Citation: *R. v. Booth*, 2014 CM 4017

Date: 20141218
Docket: 201402

General Court Martial

Gagetown Courtroom
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Private B.R. Booth, Applicant

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

REASONS ON PLEA IN BAR OF TRIAL

(Orally)

INTRODUCTION

[1] The accused, Private Booth is charged with four offences under the Code of Service Discipline arising out of events in August 2013, while serving at Oromocto, New Brunswick, at or near 5th Canadian Division Support Base Gagetown. He is to be tried before a General Court Martial. Before the date scheduled for the trial, Private Booth's counsel submitted an application for a plea in bar of trial under article 112.24 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), asking the Military Judge presiding the General Court Martial to find that the second and third charges on the charge sheet do not disclose a service offence, as the prohibition of harassment and racist conduct respectively is invalid.

[2] Both impugned charges, alternative to each other, allege conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act* (*NDA*), the particulars reading as follows:

> Second Charge: "In that he, between 5 and 31 August 2013, inclusively, at or near Oromocto, New Brunswick, did harass Private West, contrary to DAOD 5012-0."
>
> Third Charge: "In that he, between 5 and 31 August 2013, inclusively, at or near Oromocto, New Brunswick, did display a racist attitude towards Private West, contrary to CFAO 19-43."

POSITION OF THE PARTIES

[3] The applicant submits that the prohibitions on harassment in DAOD 5012-0 and on racist conduct in CFAO 19-43 are both unlawful as *ultra vires* of the Chief Military Personnel (CMP) and the Chief of the Defence Staff (CDS) respectively. The applicant alleges that issuing blanket prohibitions over certain types of conduct is a disciplinary function that can only be performed by regulations made by the Governor in Council or the Minister of National Defence as provided at section 12 of the *NDA*.

[4] In reply, the prosecution submits that DAOD 5012-0 and CFAO 19-43 are two orders issued in furtherance of the CDS authority, as provided at QR&O 1.23, to issue orders and instructions in the discharge of his duties under the *NDA* which, as provided in section 18 of the *NDA*, include (a) control and administration of the Canadian Forces subject to regulations and under direction of the Minister and (b) issuance of all orders and instructions to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister. These orders, and the prohibitions contained therein, are entirely valid and it can be a service offence under subsection 129(2) of the *NDA* to contravene them.

ISSUE

[5] The written arguments pertaining to the application noted the different authorities involved with issuing CFAO 19-43 and DAOD 5012-0, the former issued by the CDS and the latter by the CMP, pursuant to delegations allowing the CMP to issue DAODs on behalf of the CDS. During oral arguments, it was agreed by both parties that if the CDS has the authority to issue DAOD 5012-0, then his authority was lawfully delegated to the CMP.

[6] The only issue in this application, therefore, is whether it is within the power of the CDS to issue the prohibitions on harassment and racist conduct found in DAOD 5012-0 and CFAO 19-43 respectively or whether that power belongs to the Governor in Council or the Minister.

THE LEGISLATIVE AND REGULATORY FRAMEWORK

[7] In order to analyse the power to issue these prohibitions, it is necessary to outline the legislative and regulatory framework which governs powers of the various actors involved in matters governed by the *NDA*.

[8] The relevant provisions of the *NDA* providing general regulations-making powers to the Governor in Council, the Minister of National Defence and the Treasury Board (TB) are found at sections 12 and 13. The relevant portions read as follows:

> **12.** (1) The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.
>
> (2) Subject to section 13 and any regulations made by the Governor in Council, the Minister may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.
>
> (3) The Treasury Board may make regulations
>
> *(a)* prescribing the rates and conditions of issue of pay of military judges, the Director of Military Prosecutions and the Director of Defence Counsel Services;
>
> *(b)* prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and
>
> *(c)* providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.
>
> ...
>
> **13.** Where in any section of this Act, other than section 12, there is express reference to regulations made or prescribed by the Governor in Council or the Treasury Board in respect of any matter, the Minister does not have power to make regulations pertaining to that matter.

[9] The authority of the CDS to make rules or issue prohibitions is found at article 1.23 of the QR&O, a Governor-in-Council regulation, which reads as follows:

> **1.23 – AUTHORITY OF THE CHIEF OF THE DEFENCE STAFF TO ISSUE ORDERS AND INSTRUCTIONS**
>
> (1) Subject to paragraph (2), the Chief of the Defence Staff may issue orders and instructions not inconsistent with the *National Defence Act* or with any regulations made by the Governor in Council, the Treasury Board or the Minister:
>
> *(a)* in the discharge of his duties under the *National Defence Act*; or
>
> *(b)* in explanation or implementation of regulations.

[10] The duties of the CDS under the *NDA* are found at section 18:

> **18.** (1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall,

> subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.
>
> (2) Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff.

ANALYSIS

a. Introduction

[11] The applicant argues that in imposing to Canadian Forces personnel, through orders, prohibitions on harassment and racist conduct, the CDS has encroached on a matter of discipline, reserved by section 12 of the *NDA* to the Governor in Council (G in C) or the Minister of National Defence (MND).

[12] To accept this argument, I would have to find that the list of matters at section 12 of the *NDA* over which the G in C or the MND can make regulations excludes the authority of the CDS to issue orders and instructions encroaching on those matters, even in the proper exercise of his powers of control and administration of the Canadian Forces or in giving effect or carrying out the directions of the Government of Canada or the MND.

[13] With respect, I cannot find that the list of matters at section 12 of the *NDA* is exclusive of the G in C or MND. The prohibitions on harassment and racist conduct, respectively, are within the purview of the CDS duties under the *NDA*.

b. The matters at section 12 of the *NDA* are not exclusive to the G in C or MND.

i. Finding exclusive powers to the G in C and MND would significantly weaken the functions attributed to the CDS in the *NDA*.

[14] Section 12 of the *NDA* provides power to both the G in C and the MND to make regulations for a number of matters, listed as follows: the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of the *NDA* into effect.

[15] This is a very broad and open-ended list. It includes administration, a matter expressly under the charge of the CDS by the words of section 18 of the *NDA*. To conclude as requested by the applicant that any matter on the list at section 12 of the *NDA* is off limits to the CDS would evacuate any meaning to the notion of "control and administration". It would leave the CDS appointed by G in C powerless to act on many matters, for as long as the G in C or the MND does not act to make regulations over these matters. It would be so even if, as the list in section 12 suggests, these matters may be essential to the success of any military organization. That requirement would oblige the G in C or the MND to micromanage every aspect of the Canadian Forces

through regulations, day in and day out, and empty the function of CDS of most of its substance. This cannot be the intent of this provision.

ii. The exclusivity argument does not conform to the scheme of the *NDA*.

[16] The argument of the applicant requires seeing the various actors in the *NDA* as having precisely defined separate lanes of powers and authorities, in mutual exclusivity. With respect, this approach is flawed.

[17] The spheres of authority of various actors within the *NDA* have not been designed as separate lanes. The authority framework outlined above is made up of many overlapping levels with very similar areas of authorities, the most obvious being the G in C and the MND who have exactly the same list of matters over which they can make regulations. This scheme, for sure, creates a potential for encroachment, a situation that Parliament addressed by a simple yet complete mechanism based on a combination of factors such as the express assignment of a matter in the *NDA* or the existence of a regulation passed by a superior authority.

[18] Indeed, section 12 of the *NDA* suggests that the preferred method of intervention of the G in C, the MND and the TB in matters of national defence is through regulations. The TB is granted powers to deal with financial matters such as pay and allowances, but the list of matters over which the G in C and the MND may respectively make regulations is the same for both. This overlap required the establishment of a hierarchy by virtue of sections 12 and 13 of the *NDA* to the effect that the MND's power to make regulations is subordinate to the regulations made by the G in C and to the express power of the G in C and the TB to make regulations in specific matters assigned to them in the *NDA*.

[19] The overlap also applies to the CDS, even if the power granted to that office by G in C is not to make *regulations* but rather to issue *orders and instructions*. Contrary to the method employed at section 12 of the *NDA* for regulations by G in C, MND or TB, QR&O 1.23 does not include a list of matters over which the CDS can issue orders or instructions: he can do so in explanation or implementation of regulations or in furtherance of his duties under the *NDA* which include control and administration of the Canadian Forces and the exclusive authority to issue orders and instructions to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister. This is wide and open-ended, much more so than the MND's power to make regulations, which is limited to spheres not assigned to or occupied by the G in C or the TB. The only limitation to the CDS power to issue orders and instructions is found in subsection 18(1) of the *NDA* which provides that the power of the CDS to issue orders and instructions in furtherance of his control and administration duties is subordinate to regulations made by G in C, TB and the MND as well as the direction of the Minister. This restriction, however, is limited to incompatible orders and instructions: the CDS has the specific authority in QR&O 1.23 to issue orders in explanation or implementation of regulations and has done so on many occasions through DAODs and CFAOs whose expressed purpose is to supplement and amplify higher level authorities such as the QR&O.

[20] Therefore, the authority of the CDS to issue orders such as those prohibiting harassment and racist conduct is not limited by the fact that a superior authority could occupy that field, but can only be limited by the actual occupation of that field by an existing regulation or direction by the MND on the matter and then, would only prevent the CDS to issue an order incompatible with those regulations.

[21] The decision to make regulations in a given field is a matter for the G in C or the MND. To illustrate, I can use the examples raised by the applicant in written argument. The fact that the G in C has made the regulations pertaining to the CF Drug Control Program in Chapter 20 of QR&O or that the MND has made some of the regulations pertaining to Dress and Appearance in Chapter 17 of the QR&O is not indicative of an exclusive power by these authorities over those matters. The existence of a regulation by a superior authority precludes the CDS to issue an inconsistent order, but does not prevent the CDS to issue orders amplifying the regulation. The CDS has done so with DAOD 5019-3 on the CF Drug Control Program, which supplements and amplifies Chapter 20 of QR&O and with the Canadian Forces Dress Instructions which supplement and amplify Chapter 17 of QR&O.

[22] The consequence of this conclusion is that even if the G in C or the MND had passed regulations in the exercise of their powers under section 12 of the *NDA*, it would not even preclude the CDS to issue orders and instructions not incompatible with those regulations. This shows that the exclusivity argument advanced by the applicant is flawed.

iii. No provisions in *NDA* or QR&O refer to power to deal with harassment or racist conduct.

[23] There are no provisions in the *NDA* or its regulations which make express reference to the power of any authority to make regulations or issue orders or instructions relating to matters of harassment or racist conduct. In addition, no regulations or orders were made by the G in C or MND under section 12 of the *NDA* or any other authority, dealing with matters of harassment or racist conduct. The fact that the TB Secretariat has made a Policy on Harassment Prevention and Resolution does not constitute an occupation of that field as that policy is not a regulation made under the *NDA* and, in any event, is not applicable to the Canadian Forces.

[24] Consequently, the field was and still is unoccupied by a superior authority. It was, therefore, entirely open to the CDS to issue, without any restriction, orders and instructions governing and prohibiting harassment and racist conduct.

c. **DAOD 5012-0 and CFAO 19-43 have been issued in the discharge of the CDS duties under the *NDA*.**

[25] DAOD 5012-0 and CFAO 19-43 are orders, issued under the direct or delegated authority of the CDS. Yet, they are valid only if the CDS had authority to issue them under QR&O 1.23, that is, in the discharge of his duties under the *NDA*. In

circumstances such as these, where there is no explanation or implementation of regulations involved, the CDS duties include either one of two functions: first, control and administration of the Canadian Forces subject to regulations and under direction of the MND; or, second, issuance of orders and instructions to give effect to the decisions and to carry out the directions of the G of C or the MND.

[26] At paragraphs 17 and 18 of his written submissions, the applicant alleges that the prohibitions on harassment and racist conduct relate to establishing a particular standard of behaviour within the Canadian Forces, a function disciplinary in nature, which cannot be defined by the CDS under the control and administration powers granted to that office by section 18 of the *NDA*. In reply, the respondent submits that not only are DAOD 5012-0 and CFAO 19-43 dealing with harassment and racist conduct respectively issued entirely within the control and administration functions of the CDS, but also that these orders were required to give effect to the decisions and to carry out the directions of the Government of Canada.

[27] The applicant has not established that the impugned orders are not within the authority of the CDS. The applicant has focussed extensively and exclusively on the prohibition found in each order to argue that their purpose is disciplinary. Yet, those orders are made up of a lot more than a prohibition. DAOD 5012-0 is a policy order. The purpose of this type of order, as stated in DAOD 1000-0, is to explain the over-arching DND and CF position on a specific topic, establish the bounds within which an organization will operate, clearly articulate the goals which should be attained and provide guidance for related management decisions and actions.

[28] It is worth reproducing here the policy provisions which frame the prohibitions found in both DAOD 5012-0 and CFAO 19-43.

> **DAOD 5012-0 Harassment Prevention and Resolution (Extracts)**
>
> **Policy Direction**
>
> **Context**
> The CF and DND affirm that a work environment that fosters teamwork and encourages individuals to contribute their best effort in order to achieve Canada's defence objectives is essential. Mutual trust, support and respect for the dignity and rights of every person are essential characteristics of this environment. Not only is harassment in certain forms against the law, but it erodes mutual confidence and respect for individuals and can lead to a poisoned work environment. As a result, operational effectiveness, productivity, team cohesion and morale are placed at risk.
>
> Detailed information is contained in the *Harassment Prevention and Resolution Guidelines*.
>
> **Policy Statement**

> The CF and DND are committed to providing a respectful workplace by promoting prevention and prompt resolution of harassment. All CF members and DND employees have the right to be treated fairly, respectfully and with dignity in a workplace free of harassment, and they have the responsibility to treat others in the same manner.
>
> Harassment in any form constitutes unacceptable conduct and will not be tolerated. No CF member or DND employee shall subject any person in the workplace to harassment. Any member or employee who subjects another person to harassment is liable to disciplinary and administrative action.
>
> **CFAO 19-43 RACIST CONDUCT (Extracts)**
>
> **POLICY**
> 4. The CF are committed to the principle of equality of all people, and the dignity and worth of every human being, without regard to, among other things, race, national or ethnic origin, colour or religion. CF members must always be guided by this principle in their relationship with each other, with members of the public, and with all those with whom they come in contact both within and outside Canada.
>
> 5. Racist attitudes are completely incompatible with the military ethos and effective military service, and any conduct that reflects such attitudes will not be tolerated. Racist conduct is therefore prohibited, and will result in administrative action, disciplinary action, or both, and may include release. An applicant for enrolment in the CF who is unable or unwilling to comply with the CF policy against racist conduct will not be enrolled.

These extracts speak for themselves. In light of the context for the prohibitions found in both of these orders, I am of the view that the pith and substance of these orders is the promotion of a healthy work environment, conducive to operational effectiveness in the Canadian Forces. This is a matter that is entirely within the authority of the CDS for the control and administration of the Canadian Forces.

[29] I disagree with the submissions of the applicant to the effect that the purpose of the orders is to create offences of harassment and racist conduct respectively. As it appears clearly from the wording of the two prohibitions, included in the extracts quoted above, neither the orders nor the specific prohibition are stated in the language used to create offences in legislation. These prohibitions are not offences. At most, they state that a violation of the prohibition <u>may</u> be the object of disciplinary action. The applicant concedes that the orders would remain valid absent the specific prohibitions. Respectfully, I believe that both orders are a whole and cannot be credible or efficient in promoting a healthy work environment conducive to operational effectiveness without prohibiting the very behaviour that the policy statements condemn.

[30] In oral arguments, counsel for the applicant submitted that the combined effect of the prohibitions coupled with the disciplinary consequences in section 129(2) of the *NDA* results in the CDS or other military officers having the power to create penal offences, a function that is usually the purview of Parliament. While it may be that persons subject to the Code of Service Discipline would face penal liability through disciplinary actions which have no equivalent for a person not subject to the Code, this is not a result of the authority to issue the order, which, at least for DAOD 5012-0, is the same for CF members as for DND employees. Any unwarranted penal consequences would be the result of deficiencies or unfairness in the offence provision itself or how it was applied by various authorities who investigated, laid or preferred charges under the Code of Service Discipline. No such deficiencies have been raised in evidence or in arguments.

CONCLUSION

[31] I conclude, therefore, that both DAOD 5012-0 and CFAO 19-43 have been validly issued in the discharge of the CDS duties under the *National Defence Act* for control and administration of the CF.

[32] This conclusion is sufficient to dispose of the question of the authority of the CDS to issue those orders. It is, therefore, not necessary to rule on the issue of whether the orders were issued to give effect to the decisions or to carry out the directions of the Government of Canada or the Minister. Although the prosecution was unable to provide direct evidence that it was the case, the mention of the *Canadian Human Rights Act* and of the Treasury Board "Policy on the Prevention and Resolution of Harassment in the Workplace" as source reference in DAOD 5012-0, as well as mentions of the prohibition of discrimination on the basis of race, national or ethnic origin, colour or religion, among other prohibited grounds from both the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act* in CFAO 19-43 provide strong indicia that those orders are at least consequential to and in line with broader Government of Canada objectives on the matter.

FOR THESE REASONS, THE COURT:

[33] **FINDS** that the second and third charges on the charge sheet, indeed, disclose a service offence. Consequently, the court does not allow the plea in bar of trial. The trial will proceed on all the charges on the charge sheet.

Counsel:

Lieutenant-Commander D. Reeves and Major D. Martin, Canadian Military Prosecution Service, Counsel for the Respondent

Major D. Hodson and Major E. Thomas, Director Defence Counsel Services, Counsel for the Applicant