COURT MARTIAL

Citation: *R. v. Machtmes*, 2021 CM 2002

Date: 20210215
Docket: 202035

General Court Martial

Bay Street Armoury
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Master Sailor R.D. Machtmes, Respondent

Before: Commander S.M. Sukstorf, M.J.

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the court orders that any information that could disclose the identity of the person described during these proceedings as the complainant, including the names of her family members, her address and any professional or nicknames she used, or a witness, shall not be published in any document or broadcast or transmitted in any way, except when disclosure of such information is necessary in the course of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community.

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

APPLICATION FOR VIDEO LINK TESTIMONY

(Orally)

Introduction

[1] The applicant requests the court to rely upon its discretionary powers set out at section 179 of the *NDA* to grant its application for the video link testimony of four witnesses residing in Australia.

[2] The background to this motion is well set out by the applicant in their written notice of application as follows:

> "8. The accused, Master Sailor Machtmes (MS Machtmes), is charged with one offence of luring a child pursuant to s 172.1(1)(b) of the *Criminal Code*, one offence of invitation to sexual touching pursuant to s 152 of the *Criminal Code* and one offence of disgraceful conduct pursuant to s 93 of the *National Defence Act*, RSC 1985, c N-5.
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> 9. On 24 August 2020, a list of seventeen witnesses the prosecution intends to call during the trial against MS Machtmes was provided to the previous defence counsel of MS Machtmes, Captain Melbourne. The list included four witnesses from Australia: A.L., F.L, Detective Senior Constable Ryan Anderson (DCS Anderson) and Constable Craig Byrne (Cst. Byrne).
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> 10. The charges are based on an allegation that between 12 September 2018 and 13 November 2018, MS Matchmes engaged in communications via Instagram with a person or persons utilizing the user name of 'XXXX'. It is alleged that MS Matchmes engaged in these conversations under the user name of 'randymanmax' (hereinafter these communications are referred to as the 'communications').
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> 11. In the course of the communications between 'XXXX' and 'randymanmax', the people behind the account 'XXXX' were A.L. and F.L. Both A.L. and F.L. live in Australia. At the time of the Communications A.L. identified herself/himself as "C" and was 15 years old.
>
> F.L. is the mother of A.L. It is expected that F.L. will testify that she had access to the account 'XXXX'. After viewing the communications between the accused and her daughter, she engaged in some exchanges with the accused using the 'XXXX' account. She then attended Parramatta Police Station where the New South Wales Police (hereinafter referred to as the 'NSW Police') have saved the communications."

[3] Due to the ongoing COVID-19 pandemic and the travel bans in effect, the attendance in court of the four witnesses living in Australia is problematic on a number of levels. Pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.65, the applicant sought the agreement of the respondent for the four witnesses located in Australia to testify via video link but consent was not provided.

Position of the parties

Applicant

[4] In his written submissions, the applicant made the following arguments:

(a) QR&O article 112.65 deals with the appearance of witnesses by video link, but it requires the consent of the accused, which was not granted;

(b) That this court martial has discretionary power pursuant to section 179 of the *NDA* to make the requested order;

(c) He asks the Court to rely upon subsection 714.2(1) of the *Criminal Code* for its authority. His arguments on this basis are as follows:

i. QR&O article 112.65 is merely one example of how a military judge may order the appearance of a witness by such means.

ii. As indicated in his notice of application at paragraph 25, "The use of the word 'may' in QR&O article 112.65 must be interpreted as permissive, not imperative, in concordance with QR&O 1.06. This wording recognizes the discretion of the military judge to allow or to refuse the appearance of a witness by video link even if there is agreement from the prosecutor and the accused person."

iii. The wording of QR&O article 112.65 is non-exhaustive and does not prohibit evidence taken by video link if the military judge determines that it is in the interest of justice to do so, despite the opposition of either of the parties. "If QR&O article 112.65 were meant to displace the authority of the military judge to make such authorization, it would include such prohibition."

(d) QR&O article 112.65 is not the only route permitting a military judge to order the appearance of a witness by video link, given that section 183.2 of the *National Defence Act (NDA)* was recently passed in Bill C-77[1], and as such, it is evidence of a statutory void in the *NDA* and of Parliament's intention to fill that void. He further argues that it demonstrates that the appearance of a witness by video link is not limited only to QR&O article 112.65; and

(e) The circumstances posed by the pandemic justify the use of remote testimony. Given the restrictions imposed by COVID-19, the four witnesses would have to travel internationally and self-quarantine for two weeks in Canada before the court, (assuming they would even be granted permission to enter Canada). Similarly, upon their return to Australia, they would have to self-quarantine for an additional two weeks.

Respondent

[1] *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, S.C. 2019, c. 15 Assented to 2019-06-21

[5] In objecting to the Court making the order sought in this application, written legal argument was presented on the following:

(a) That section 179 of the *NDA* does not provide the Court jurisdiction to make the order sought;

(b) That a military judge does not have inherent jurisdiction;

(c) There is no statutory void in relation to witnesses testifying by video;

(d) The existence of QR&O article 112.65 is the provision that must be followed by the Court;

(e) The future amendment to the *NDA*, expected to be a new section 183.2, is of no assistance on the order sought;

(f) The Court cannot rely upon section 714.2 of the *Criminal Code* to impose the order sought;

(g) That without jurisdiction, there is no need to assess the impact of the order sought on the fairness of the trial;

(h) That the pandemic does not create jurisdiction for the order sought; and

(i) That without jurisdiction, there is no need to assess the impact the order sought would have on the ability of Master Sailor Machtmes to make full answer and defence.

[6] In his oral submissions, the respondent submitted the following additional arguments:

(a) He reinforced that QR&O article 112.65 is clear and unambiguous and therefore precludes the Court from making a discretionary order;

(b) Relying upon the case of *Woods v. Ontario*, 2020 ONSC 6899, he argued that the existence of the pandemic itself does not provide the Court with jurisdiction nor authority not to follow QR&O article 112.65;

(c) Relying upon the case of *Regina v. Tsepel*, 2020 ONSC 8124, he argued that although there might have been jurisdiction in that case, the Court found it to be in the interests of justice that a fair and public hearing means an in-person hearing for that accused;

(d) He drew the Court's attention to section 8 of the *Military Rules of Evidence* (*MRE*), which requires oral testimony in court suggesting that testimony provided by video link does not fall within this category;

(e) Absent the accused's agreement for the witness testimony to be obtained via video link, the Court has no authority to order video link evidence, and to do so would infringe upon the role of Parliament. Pursuant to *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, the court martial is required to respect the constitutional roles in the exercise of the Court's powers.

Evidence

[7] The Court took judicial notice of the facts and matters covered by section 15 of the *MRE.*

[8] Although the applicant requested the Court to admit statutory declarations from the four witnesses located in Australia as evidence, the Court deferred until such time as the issue of jurisdiction was resolved. However, after a brief discussion with counsel, pursuant to section 16(2)(b) of the *MRE*, the Court did take judicial notice of the following facts:

(a) Existence of the ongoing worldwide COVID-19 pandemic; and

(b) Travel bans are currently in force for both Canada and Australia.

Summary Decision

[9] For the reasons that follow, I find that through the exercise of section 179 of the *NDA* and section 4 of the *MRE* a court martial may order the video link testimony of a witness located outside of Canada pursuant to section 714.2 of the *Criminal Code.*

Analysis

[10] In Canada, superior provincial courts exercise a jurisdiction that is referred to as "inherent" which is defined by I.H. Jacob in *The Inherent Jurisdiction of the Court*[2], *Current Legal Problems*, Volume 23, Issue 1, 1970, at page 51 as follows:

> [T]he reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[11] There are a number of historical and constitutional factors emanating from section 96 of the Constitution that underpin the notion of inherent jurisdiction in provincial superior courts. However, courts martial are not superior courts. They are statutory courts and do not have the power to exercise the range of powers that flow from the inherent jurisdiction of a provincial superior court which is a section 96 court.[3] As a statutory court, the powers of courts martial are conferred entirely by Parliament and are limited to the express power set out within its statutory provisions.

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[2]This article is considered a seminal article which has been subsequently referred to and relied upon by courts in England, Canada, and the United States.

[3] See *Windsor (City) v. Canadian Transit Co.,* 2016 SCC 54, [2016] 2 S.C.R. 617.

[12] Jurisprudence is mixed as to the full range of powers that fall within the inherent jurisdiction of a superior court and the jurisprudence is also mixed as to whether statutory courts have implied and incidental powers to function as a court of law and the power to control its own processes. However, under section 179 of the *NDA*, Parliament has expressly provided a statutory grant of some of the inherent powers that otherwise belong to a superior court. Section 179 of the *NDA* confers upon a court martial legislative authority to exercise the same powers vested in a superior court of criminal jurisdiction in exercising its own inherent jurisdiction. It reads as follows:

> **179 (1)** A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to
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> **(a)** the attendance, swearing and examination of witnesses;
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> **(b)** the production and inspection of documents;
>
> **(c)** the enforcement of its orders; and
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> **(d)** all other matters necessary or proper for the due exercise of its jurisdiction.
>
> [Emphasis added]

[13] In short, although a court martial does not have its own inherent jurisdiction, through the statutory grant of those powers vested in a superior court of criminal jurisdiction, specifically with respect to the attendance, swearing and examination of witnesses, a court martial can exercise those powers necessary or proper for the due exercise of its jurisdiction. As such, section 179 of the *NDA* requires military judges to go through the same analysis as superior courts do in the exercise of their powers of inherent jurisdiction.

[14] However, a court martial cannot rely upon the power set out at section 179 of the *NDA* if to do so would produce a conflict with clear legislative provisions. If the legislative intention in the *NDA* is clear and unambiguous, it cannot be overruled by the exercise of judicial discretion under section 179 of the *NDA*.

[15] In the case of *R. v. Barrieault*, 2019 CM 2013, the Court summarized the law with respect to the exercise of the Court's powers set out at section 179 as follows:

> [19] In short, when a court martial exercises powers set out in section 179, it must do so in a manner consistent with the exercise of the inherent jurisdiction of a superior court. Inherent jurisdiction is recognized by the courts as the power to "[enable the court] to fulfil itself as a court of law." (see *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 at paragraph 30)
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> [20] In the case of *Baxter Student Housing Ltd. et al. v. College Housing Cooperative Ltd. et al.* [1976] 2 S.C.R. 475, the Court quotes:
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> > In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will.

> [21] The exercise of inherent jurisdiction is a special and extraordinary power to be exercised only sparingly and in the clearest of cases and where it is required to maintain the authority and integrity of the court process. To put it simply, a military judge must exercise its power set out in section 179 in such a way that it does not contravene a statutory provision and the court cannot use section 179 as an end run around existing legislation.

[16] Further, in *R. v. Gobin*, 2018 CM 2006, at paragraph 3, the Court succinctly clarified the principle as follows:

> [T]he purpose of section 179 of the *NDA* was to provide the court martial with an inherent power to control its procedure in respect of residual matters that are not dealt with in the *NDA* or its regulations.

[17] As a common law concept, the exercise of inherent jurisdiction is subject to the principle of parliamentary sovereignty. Under the exercise of inherent jurisdiction, such a power may only be used if the relevant statute has not specifically excluded the use of this power. Master Jacob in his publication entitled, "The Inherent Jurisdiction of the Court", wrote at page 24:

> Moreover, the term "inherent jurisdiction of the court" is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.
> [Emphasis added]

[18] In *R. v. Keating* (1973), 11 C.C.C. (2d) 133 (Ont. C.A.) at pages 135 to 136, Kelly J.A. noted that the *Code*:

> [D]oes not restrict the inherent jurisdiction the Court possesses to control its own process and proceedings in any manner not contrary to the provisions of the *Criminal Code* or any other statute.
> [Emphasis added]

[19] Parliament can exclude the inherent jurisdiction by clear and precise statutory language indicating the contrary or it may provide some room for the court to control its own process in a manner that is not contrary to the provisions set out in the *NDA* or the QR&O[4]. This is normally done through the use of the worlds "shall" or with other clear and unambiguous language that suggests that a trial judge has no discretion.

[20] Relying upon the analysis of Master Jacob in "The Inherent Jurisdiction of the Court", a court martial can exercise its powers set out at section 179 of the *NDA* even regarding matters that are already regulated by the *NDA* or the QR&O provided it can do so without directly contravening the statutory provisions and the intentions of parliament (see Jacob at paragraph 24). This seems to be supported by Mason J., another commentator on inherent jurisdiction who writes:

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[4] The Supreme Court of Canada has observed that while "a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are 'closely meshed'". See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 at para. 35. See also *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 26.

> The mere fact that some statute or rule of court enables the court to deal with the particular problem in a particular way will not usually exclude inherent powers to deal with it [the same problem] in other ways.[5]

[21] Consequently, the Court must first assess whether the *NDA* and its subordinate legislation, the QR&O[6] have left military judges with any remaining discretionary power to grant an order for witnesses living outside the country to testify virtually.

Relevant *National Defence Act* and QR&O provisions

[22] The QR&O Volume II amplifies the Code of Service Discipline set out at Part III of the *NDA* and is considered the authoritative manual for military law in Canada. It has long been the trend within the Canadian Armed Forces to enact its policy through its regulations such as the QR&O instead of in the primary legislation of the *NDA.*

[23] If the QR&O are enacted with regard to a particular issue, the question becomes whether that area governed by the QR&O is such that it forecloses a court martial's exercise of its discretionary powers at section 179 in the same area. The jurisprudence suggests that they can both coexist in the absence of a direct conflict.

The *NDA*

[24] The *NDA* itself is silent on the use of video link for the testimony of witnesses who are outside of the country where the trial is occurring. The physical presence of a witness at trial is always considered the most desirable, but it has never been the only means of obtaining evidence for the purposes of a court martial. It is important to note that the *NDA* has specifically provided courts with the power to order the testimony of witnesses who are located outside of the country through commission evidence. The longstanding provisions of sections 184 and 185 of the *NDA* provide for the taking of evidence of a witness in certain circumstances outside the courtroom. These provisions are similar in substance to sections 709 and 712 of the *Criminal Code*. Sections 184 and 185 of the *NDA* read as follows:

> **Evidence on Commission**
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> **Appointment of commissioner to take evidence**
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> **184 (1)** The Chief Military Judge, or any military judge designated by the Chief Military Judge, may appoint any officer or other qualified person, in this section referred to as a "commissioner", to take, under oath, the evidence of any person required as a witness at a court martial
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> > **(a)** who is, by reason of physical disability arising out of illness, not likely to be able to attend at the time the trial is held;

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[5] See K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Aust. L.J. 449 at p. 449.

[6] Section 12 of the *NDA* provides the Governor in Council (i.e., the Governor-General acting on the advice of Cabinet) and the Minister of National Defence with the power to make regulations for the "organization, training, discipline, efficiency, administration and good government of the Canadian Forces." The QR&O must not be inconsistent with the *NDA*, common law principles of natural justice or the *Canadian Charter of Rights and Freedoms*. The QR&O are considered subordinate legislation.

> **(b)** who is absent from the country in which the trial is held; or
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> **(c)** whose attendance is not readily obtainable for a good and sufficient reason.
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> **Admissibility of commission evidence**
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> **(2)** The document containing the evidence of a witness, taken under subsection (1) and duly certified by the commissioner is admissible in evidence at a trial by court martial to the same extent and subject to the same objections as if the evidence were given by the witness in person at the trial.
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> **Power to require personal attendance of witness**
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> **(3)** If, in the opinion of a court martial, a witness whose evidence has been taken on commission should, in the interests of military justice, appear and give evidence before the court martial, and the witness is not too ill to attend the trial and is not outside the country in which the trial is held, the court martial may require the attendance of that witness.
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> **Representation, examination and cross-examination before commissioner**
>
> **(4)** At any proceedings before a commissioner, the accused person and the prosecutor are entitled to be represented and the persons representing them have the right to examine and cross-examine any witness.
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> **Copy to accused**
>
> **185** The accused person shall, at least twenty-four hours before it is admitted at the court martial, be furnished without charge with a copy of the document referred to in subsection 184(2).

[25] Upon review of section 184 of the *NDA*, it is notable that the taking of commission evidence by a witness located outside of the country does not require the agreement of the accused. However, prior to deciding whether a court martial should exercise its discretion to order the taking of commission evidence, a judicial analysis is required. Once commission evidence is presented to the Court and accepted by the military judge, it forms part of the trial record and is evidence that will be considered by the military panel.

[26] The applicant provided the Court with a judicial precedent decided prior to the enactment of the current section 714.2 provision of the *Criminal Code* whereby a superior court of jurisdiction, Alberta's Queen's Bench specifically relied upon its inherent jurisdiction to authorize a witness who was outside the country to testify by video link. In *R. v. Dix*, 1998 ABQB 370, notwithstanding the fact that sections 709 and 712 of the *Criminal Code* provided for the receipt of commission evidence, the Court granted a Crown application for that witness to provide video evidence based on its inherent jurisdiction:

> This Court has an inherent jurisdiction to control its procedures and must decide when and how to obtain evidence. That function can not be held hostage by a witness's personal reasons.

[27] It is clear that paragraph 179(1)(a) of the *NDA* provides a court martial with the ability to control its own processes with respect to the attendance, swearing and examination of witnesses. As such, an order permitting a witness to testify via video link is something that could fall within a court's powers to manage provided that there is no other provision that otherwise excludes the application of the court's judicial powers.

[28] It is particularly important to note that in general, now that video link testimony is readily available, courts have moved away from authorizing commission evidence in situations where a witness is outside of the country and unable to travel to the place where the testimony must be given. In *R. v. Stevenson*, 2012 BCSC 800, Romilly J., in responding to a Crown's request for commission evidence pursuant to sections 709 and 712 of the *Criminal Code* noted that since section 714.2 of the *Criminal Code* came into force that made the taking of video evidence mandatory for a witness located outside of the country of the trial, there has been little jurisprudence on commission evidence. He writes:

> [33] Quite a few of the authorities that were brought to my attention on this application are dated. This is likely because the video conferencing provision, s. 714.2, came into force in 1999. Since then, there has been little jurisprudence on the commission issue.
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> [34] As a result of s. 714.2, a witness who is out of the country is now able to testify live at trial much easier. And for various reasons, live video conferencing evidence at trial will be preferable to recorded commission evidence. It is notable that, unlike the commission evidence provisions, the video conferencing provision of the *Criminal Code* is written in mandatory language:
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> > (1) A court shall receive evidence given by a witness outside Canada by means of technology that permits the witness to testify in the virtual presence of the parties and the court unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.

[29] There will always remain a requirement for commission evidence in situations where video link is not practical or if a witness is critically ill and might not be available at the time of the trial. However, civilian courts have moved away from using this means as the receipt of testimony by video link has been found to more appropriately serve the interests of an accused.

[30] The QR&O provision in issue in this case is article 112.65 which reads as follows:

> **112.65 – APPEARANCE OF WITNESSES – VIDEO LINK**
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> (1) Where the prosecutor and the accused person agree and the judge so orders, the evidence of a witness may be taken at any time during court martial proceedings by any means that allow the witness to testify in a location other than the courtroom and to engage in simultaneous visual and oral communication with the court, the prosecutor and the accused person.
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> (2) The taking of evidence may include the examination of documents and filing of exhibits if suitable arrangements have been made with the judge for the receipt and filing of original documents or exhibits.
>
> [Emphasis added]

[31] The wording of the provision identifies a situation where the prosecutor and the accused person agree and the judge so orders, the evidence of a witness may be taken at any time during court martial proceedings. The respondent argued that the wording of QR&O article 112.65 limits the Court's discretionary powers with respect to the testimony of witnesses via video link and requires the consent of the accused in every case. Conversely, the applicant argues that the QR&O is not clear and is ambiguous and therefore does not limit the exercise of judicial discretion set out at paragraph 179(1)(a) of the *NDA*. Sections 714.1 and 714.2 of the *Criminal*

Code set out specific provisions that deal with the taking of video link evidence of witnesses depending on whether the witness is located in Canada or outside of Canada. Importantly, these two provisions are supported by section 714.8 which speaks to the similar agreement set out at QR&O 112.65. It reads:

> **Consent**
>
> **714.8** Nothing in sections 714.1 to 714.7 is to be construed as preventing a court from receiving evidence by audioconference or videoconference, if the parties so consent.

[32] It is clear that QR&O article 112.65 sets out a specific situation where the parties agree and the judge so orders, but by its construction it clearly does not preclude other situations.

[33] The respondent contends that since he does not agree, then QR&O article 112.65 precludes any witness from testifying by video link. He relies upon the recent *Woods* decision. In that case, Monahan J. found that section 672.5(13) of the *Criminal Code* used similar wording: "If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by close circuit television or videoconference for any part of the hearing" and found that the provision only permits the Ontario Review Board to hold a disposition review hearing by videoconference with the agreement of the non-criminally responsible accused. The Court found that the Ontario Review Board contravened the *Criminal Code* and exceeded its authority by dispensing with the accused's consent.

[34] Similarly, the respondent also relies upon the case of the *Tsepel* case. In that case, in response to the ongoing COVID-19 health crisis, Morawetz C.J. ordered that certain urgent matters affecting the liberty of the person be heard by Zoom. In *Tsepel*, the accused applied for an order vacating his trial date that was to unfold strictly on Zoom scheduled for 4 January 2021 and requested an adjournment of the trial to a later date when he could be provided with an in-person trial. He provided a number of personal reasons for the request including the inability to appropriately access his own proceedings virtually under his living conditions. Mr Tsepel was not in custody and agreed to waive his section 11(*b*) rights.

[35] In deciding in favour of the accused, at paragraph 21, Himel J. concluded:

> These are exceptional times. A decision whether or not to grant the adjournment of this trial must be consistent with the interests of justice. There is certainly a state interest in bringing accused persons to trial in a timely manner. Section 11(d) of the *Charter* provides that a person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. In this case, I conclude that it is in the interests of justice that a fair and public hearing means an in-person hearing for this applicant for the reasons outlined above.

[36] The applicant argued that the court in *Woods* found that the Ontario Review Board was bound by the mandatory provision of section 672.5 of the *Criminal Code* and did not have any of its own inherent jurisdiction or statutory authority similar to that provided to courts martial at section 179 of the *NDA.* At paragraph 30, the Court in *Woods* writes:

> In this case, it is clear that the ORB is a tribunal whose jurisdiction is defined and thus limited by the *Criminal Code*. Moreover, s. 672.5 is a mandatory provision which provides that Board hearings "shall be held in accordance with this section." Thus, if the Board has made a ruling

> contrary to s. 672.5, that would amount to a jurisdictional error reviewable by way of *certiorari*. Moreover, deciding to proceed with a disposition review hearing in the absence of the accused would appear to be a violation of the principles of natural justice, which is a further basis for *certiorari* review.
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> [Emphasis added]

[37] In the above citation from *Woods*, the language is clear and unambiguous that Board hearings "shall be held in accordance with this section." Subsection 672.5(13) falls squarely within the mandatory section, so although the wording might be similar to QR&O article 112.65, the interpretation of subsection 672.5(13) must be made in the context of the overall provision itself.

[38] The applicant sought to distinguish QR&O article 112.65 from subsection 672.5(13) of the *Criminal Code* by the fact that it does not fall within a mandatory section of the QR&O. As an example, he referred to QR&O article 112.05 that states "The procedure at a court martial shall be in the order set out in this article." However, QR&O article 112.65 is a standalone provision and is not limited in any way. It simply states "[w]here the prosecutor and accused person [so] agree" and it leaves open other possibilities.

[39] In his representations, the applicant argued that the case of *Woods* can easily be distinguished because it focusses on protecting the rights of the accused who had the right to appear in person. The Court notes that the decision of *Tsepel* also focusses strictly on an accused's rights. In both *Tsepel* and *Woods*, it is clear that the Courts were swayed by the duty to protect an accused's rights.

[40] However, in *Tsepel* at paragraph 16, the Court highlights that the Supreme Court of Canada (SCC) has found that an accused's 11(*d*) *Charter* rights are not infringed by the use of a screen or closed circuit television for use by a witness.

> In the past, the courts have considered the right to "a fair and public hearing" under s. 11(*d*) of the *Charter* and the "right to face one's accuser". For example, the Supreme Court of Canada held that the right to be present in court, to hear the case against him and to make full answer and defence is not violated by the use of a screen or closed circuit television for use by a complainant in a sexual assault case. These tools have been held not to restrict or impair an accused's ability to cross-examine the complainant: see *R. v. Levogiannis*, [1993] 4 S.C.R. 415; see also *R. v. J.Z.S.*, 2010 SCC 1, [2010] 1 S.C.R. 3, aff'g 2008 BCCA 401.

[41] In reviewing the *NDA* and the QR&O, it is fair to say that there is indeed a void in the statute and regulations in the consideration of video link evidence in special circumstances such as those set out in section 184 of the *NDA* which have always attracted authority for out-of-court testimony. Pursuant to section 184 of the *NDA*, the Chief Military Judge may order a commissioner to collect evidence in three specific situations where a witness:

> **(a)** who is, by reason of physical disability arising out of illness, not likely to be able to attend at the time the trial is held;
>
> **(b)** who is absent from the country in which the trial is held; or
>
> **(c)** whose attendance is not readily obtainable for a good and sufficient reason.

[42] In this court's view, Parliament provided authority for the Chief Military Judge to order out-of-court testimony in the three aforementioned cases, which includes a witness being absent from the country in which the trial is held. Since the inception of commission evidence into court practices, there have been significant technological improvements to video conferencing capability and civilian courts now regularly embrace testimony through video link, where appropriate, rather than through the traditional manner of sending a commissioner travelling off to gather the evidence. In *Dix*, the Court distinguished video link evidence from the procedure for taking commission evidence and importantly did not see the existence of commission evidence as a statutory bar to the court in exercising its discretion to authorize a witness who was outside the country to testify via video link. In *Dix*, at paragraphs 16 and 17 distinguished between a witness testifying via video evidence in comparison to the taking of commission evidence:

> [16] In my view, the videoconference procedure proposed in this case is not a procedure for taking commission evidence. It is a technological innovation which was developed since the commission evidence provisions were enacted. The commission evidence procedure usually authorizes counsel to travel to the witness armed with an order to compel the witness to give evidence which is recorded in the absence of the court and later entered in trial. The commission evidence procedure usually does not allow the judge to participate in the process of obtaining the evidence.
>
> [17] The videoconference procedure, on the other hand, allows the witness to be brought electronically into the Court where the Court has the opportunity to hear and see the evidence as it is given and to control the evidentiary process while it is taking place. The witness is live before the Court and the Court is live before the witness.

[43] Since the inception of section 714.2 of the *Criminal Code*, civilian courts have found live videoconferencing evidence at trial to be preferable to recorded commission evidence for a number of reasons. In fact, it has been suggested that in considering an application for commission evidence, the court ought to first consider whether it is possible to engage the "new" videoconferencing provisions due to the "obvious advantages" (see *Stevenson*, at page 66).

[44] The use of witness testimony via video link provides both the accused and his counsel the ability to observe the direct examination, engage in cross-examination and manage any of the issues as they arise. The rights of an accused person are better served by the receipt of a witness's testimony by video link rather than that gathered through commission evidence.

[45] Further, testimony via video link will undoubtedly assist a panel more than simply reading the transcript of commission evidence. Panel members can have a close-up view of the witnesses such that they can see the full face of the witness, which is not always the case in court testimony. The process permits the trier of fact to observe the witness's demeanour and assess whether the testimony survives the cross-examination by the accused's counsel. Further, because video link testimony can be taped, it is incorporated directly into the audio record and with the other evidence, the audio can be replayed by a trier of fact if and when required, such as when the panel are considering their ultimate verdict.

[46] It is recognized that QR&O article 112.65 was intended to supplement rather than to replace the established procedure of witnesses giving evidence from the witness stand, but courts

martial should not be hesitant in relying upon the use of video link testimony for other exceptional situations. In light of the clear trend away from the use of commission evidence towards obtaining in the three identified situations, witness evidence via video link is something that the Court cannot ignore.

[47] It is important to keep in mind that as long as there is no statutory rule precluding it, then the powers flowing from section 179 of the *NDA* can serve as a supplemental function to the existing QR&O. As Master Jacob writes at page 25 of "The Inherent Jurisdiction of the Court":

> The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

[48] In summary, it is clear that Parliament intended to permit courts martial to obtain the evidence from outside the courtroom of a witness who is absent from the country in which the trial is held. Further, the Court found that due to the language used within QR&O article 112.65 there is no bar to the Court exercising its discretionary powers under section 179 of the *NDA.*

Does section 8 of the *MRE* preclude video link testimony?

[49] The respondent brought section 8 of the *MRE* to the Court's attention suggesting that testimony by video link conflicts with section 8 of the *MRE,* which requires the Court to consider evidence of a fact, through oral testimony. He acknowledges that the *MRE* was not likely amended after QR&O 112.65 was implemented but that section 8 of the *MRE* does impose a limitation that must be considered.

[50] Section 8 of the *MRE* reads as follows:

> **Necessity for Evidence**
>
> **8** Except for those facts of which it has taken judicial notice under Division III, the court shall not consider a fact unless evidence of that fact has been adduced in one of the following ways:
>
> **(a)** by the oral testimony of a witness in court pursuant to Parts III and IV;
>
> **(b)** by the production and reading or inspection of documents in court pursuant to Parts III and IV;
>
> **(c)** by the inspection or viewing by the court of real evidence pursuant to Part IV;
>
> **(d)** by the admission by the prosecutor during the course of the trial of the existence of a fact, for the purpose of dispensing with proof thereof, the effect of which is to narrow the area of facts to be proved by the defence; and
>
> **(e)** by a judicial confession pursuant to section 37.

[51] It is true that the presentation of evidence in court is essential to the truth seeking function of a court martial. However, currently in the QR&O, there are already a few exceptions to the requirement for a witness to be physically present in court. QR&O articles 112.33 and 112.65 are such exceptions within the military justice system. The evidence by video link provided in court, which is subject to the examination and cross-examination before the trier of fact is oral evidence brought into the court room. In their testimony, witnesses present their evidence orally. The use of video link in that oral process is not a deviation from the general principle of a witness providing his or her "oral testimony" but rather, it is simply another means to do it. The evidence of the witness is projected into the court and is physically before the court. The panel will be in a position to witness the oath or affirmation of each witness before the witness gives their evidence orally. The important aspect of oral testimony is the ability for the trier of fact and the parties to observe the testimony itself by observing the visual and verbal cues of the witness. For this reason, the testimony provided through video link meets this requirement. Aside from the ability to record the video, the oral evidence is also captured into the record as is done for other in-court testimony. Based on the above, it is clear that evidence provided through video link forms part of oral testimony for the purposes of section 8 of the *MRE* which explains why QR&O article 112.65 was successfully implemented without having to amend the *MRE*.

[52] Relying upon the SCC decision in *Criminal Lawyers' Association of Ontario*, the respondent raised concerns that the Court heed the direction provided therein. At paragraph 5, the SCC stated that:

> The scope of a superior court's inherent power, or of powers possessed by statutory courts by necessary implication, must respect the constitutional roles and institutional capacities of the legislature, the executive and the judiciary.

[53] At paragraph 26, the SCC wrote that:

> [T]he inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner — subject to any statutory provisions.

[54] Upon a review, it is apparent that the request before the Court falls squarely within the administration of justice and section 179 of the *NDA* and does not impose on the institutional capacities or jurisdiction of the executive or the legislature. Further, after a review of section 184, it's clear that Parliament provided authority for special circumstances to gather the evidence of a witness who is outside the country. Consequently, it is clear that the pursuit of video link evidence in this particular situation does not run contrary to the intention of Parliament.

[55] For the above reasons, the Court finds that it has the necessary power pursuant to section 179 of the *NDA* to order that the testimony of the four witnesses located in Australia be conducted via video link.

[56] Having decided that the Court may order the witness testimony of a witness via video link, the issue then becomes whether the Court should and if so, how it should be exercised. As explained above, the *NDA* and the QR&O are both silent on the use of video link for witnesses outside of Canada. A court's reliance upon section 179 of the *NDA* must be employed within a

framework of principles relevant to the matters in issue. The exercise of judicial discretion involves an analysis whereby the judge takes into consideration all relevant circumstances and excludes all irrelevant considerations from the determination of whether to exercise inherent jurisdiction and take action or not.

[57] Each request to testify via video link must necessarily turn on its own facts and circumstances. In the current case, the witnesses reside outside of the country and the video link technology is available. Consequently, a court should be reluctant to close the door to its use simply because the accused does not agree. The Court is particularly mindful of the fact that the attendance in court of the four witnesses cannot be compelled because of their residence outside Canada. The charges before the Court relate to allegations of misconduct that the accused engaged in while alongside in Australia. The alleged victim lives in Australia.

[58] Compounding this are the significant hurdles that would exist should the witnesses be asked to travel to Canada to appear in person. We are in the throes of a worldwide pandemic where travel bans are currently in place in both Canada and in Australia. Consequently, the Court cannot be assured that the witnesses would be allowed to board a plane in either direction. In addition to this, they would each be required to quarantine for up to two weeks in each direction. More particularly, there is no guarantee that any of them will even be permitted entry into Canada when they arrive at the Canadian border. The totality of these conditions are unprecedented in current times. Further, should the Court consider the appointment of a commissioner under section 184 of the *NDA*, then such an approach may also be unduly complicated by the ongoing pandemic. Counsel for the respondent confirmed that neither he nor the accused are in a position to travel to Australia to participate in the witness testimony. As the SCC stated at paragraph 13 in *R. v. Levogiannis*, [1993] 4 S.C.R. 475, "The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth."

[59] Although the court could resort to an order for commissioned evidence under section 184 of the *NDA*, based on the facts of this particular case, the rights and interests of the accused are better served by the court permitting the witnesses to testify via video link where their testimony is live and received into the courtroom and both the accused and his counsel can ensure that the appropriate cross examination is conducted to test the credibility of the witnesses. In this case, the determination of the credibility of the witnesses are pivotal. Further at pages 807 and 808 of *R.* v. *Khelawon*, [2006] 2 S.C.R. 787, the SCC emphasized the superiority of oral evidence:

> Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence.

[60] The exercise of section 179 is primarily procedural in nature to facilitate the court in the exercise of its jurisdiction, but the consideration of whether to authorize witness testimony also attracts evidentiary concerns. Consequently, the court must look to the *MRE* for any guidance. With respect to testimony for witnesses outside of Canada, the *MRE* are also silent on the use or prohibition of video link testimony in court. However section 4 of the *MRE* provides some assistance.

[61] Section 4 of the MRE reads as follows:

> **Cases Not Provided For**
>
> **4** Where, in any trial, a question respecting the law of evidence arises that is not provided for in these Rules, that question shall be determined by the law of evidence, in so far as it is not inconsistent with these Rules, that would apply in respect of the same question before a civil court sitting in Ottawa.

[62] Section 4 directs that where a question respecting the law of evidence is not provided for in the rules, the court should apply the same rules that apply before a civilian criminal court sitting in Ottawa. Consistent with this principle and given that there are two *Criminal Code* offences before the Court, it is important to look to the *Criminal Code* to determine whether it provides the necessary assistance to fill this gap. It has been well accepted in courts martial and court martial appeal jurisprudence that when trying *Criminal Code* offences, courts martial may apply the ancillary *Criminal Code* provisions to the extent that they are not incompatible with the schemes set out within the *NDA*, the QR&O and the *MRE* which I have concluded there are no impediments (see *Gobin*).

[63] Subsection 714.2 of the *Criminal Code* reads as follows:

> **Videoconference - witness outside Canada**
>
> **714.2 (1)** A court shall receive evidence given by a witness outside Canada by videoconference, unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.
>
> **Notice**
>
> **(2)** A party who wishes to call a witness to give evidence under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than 10 days before the witness is scheduled to testify.
>
> [Emphasis added]

[64] Upon a review of subsection 714.2(1) of the *Criminal Code* and considering that there are two *Criminal Code* offences that allegedly occurred in Australia, the Court is of the view that there is no reason to deviate from the well thought out comprehensive regime set out within the *Criminal Code* which was specifically designed to work in harmony with the two *Criminal Code* offences. Further, section 714.2 is accompanied by several ancillary provisions that provide support. Section 714.5 requires the video link evidence to be given under oath or affirmation either according to Canadian law, the law of the place where the witness is situated, or in any other manner demonstrating that the witness understands the duty to tell the truth. Section 714.6 of the *Criminal Code* confirms that when a witness who is outside of Canada gives evidence under section 714.6, "the evidence is deemed to be given in Canada and given under oath or affirmation in accordance with Canadian law, for the purposes of the laws relating to evidence, procedure, perjury and contempt of court."

[65] In summary, a court's decision on whether or not to rely upon the discretion provided at section 179 of the *NDA* will necessarily turn on the specific facts of the case before the court. Based on the particular circumstances of this case, the Court was principally persuaded by the

fact that the four witnesses are civilian, they do not reside in Canada and the court has no means upon which to compel their testimony. Further, receiving video link evidence in court is considered superior to the receipt of commissioned evidence which was the other alternative and the court exercised its discretion in favour of the means that best serves the accused's interests.

[66] As noted by the prosecution, subsection 714.2(1) states that courts shall receive evidence given by a witness outside Canada by videoconference, unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice. This means that now that the prosecution has made the application, the onus is on the respondent to satisfy the Court that obtaining the witness testimony by video link would be contrary to the principles of fundamental justice. Absent those submissions, the Court is prepared to accept the witness testimony by video link provided the applicant can satisfy the Court with sufficient assurance of the integrity of the process for the video link testimony and that all the necessary detail when it has been arranged.

FOR THESE REASONS THE COURT

[67] **GRANTS** the applicant's motion.

Counsel:

The Director of Military Prosecutions as represented by Major M.D. Ferron, Counsel for the Applicant

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Sailor R.D. Machtmes, Counsel for the Respondent