COURT MARTIAL

Citation: *R. v. Buist*, 2021 CM 2020

Date: 20211103
Docket: 202055

General Court Martial

Her Majesty's Canadian Ship *Carleton*
Ottawa, Ontario, Canada

Between:

Her Majesty the Queen

Prosecution
and
Responding Party

- and -

Sergeant D.C. Buist

Accused
and
Moving Party

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

Restriction on publication: 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these proceedings as the victim or complainant, including the person referred to in the charge sheet as "X.Y.", shall not be published in any document or broadcast or transmitted in any way, except when disclosure of such information is necessary in the course of the administration of justice,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.

DECISION ON PROSECUTION'S MOTION TO SUMMARILY DISMISS THE ACCUSED'S APPLICATION CHALLENGING THE CONSTITUTIONALITY OF ARTICLES 112.14(7) TO 112.14(14) OF THE *QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES*

(Orally)

Introduction

[1] On 1 December 2020, the Director of Military Prosecutions preferred one charge for an offence contrary to section 130 of the *National Defence Act* (*NDA*); that is, sexual assault, contrary to section 271 of the *Criminal Code* against the applicant.

[2] On 26 April 2021, the Court Martial Administrator (CMA) convened the General Court Martial (GCM) for the trial of the accused, the moving party in this application, to be held from 1 until 12 November in Ottawa, Ontario. It was to be held in the Asticou Courtroom and presided over by my colleague, Military Judge Pelletier.

[3] On 22 June 2021, after a change in presiding judges and the requirement to change the location for the court, the CMA re-convened a GCM for the trial of the accused for the same dates and counsel.

[4] On 1 October, 2021, Sergeant Buist filed an application seeking a declaration of constitutional invalidity as it pertains to *Queen's Regulations & Orders for the Canadian Forces* (QR&O) 112.14(7) to 112.14(14) as a violation of paragraph 11(d) of the *Canadian Charter of Rights and Freedoms.* In addition, he sought to challenge myself as the assigned judge and all prospective members of the court martial panel, based on his submission that there is a realistic potential for bias and impartiality towards homosexual/bisexual members of the military.

[5] Sergeant Buist did not originally file a notice of constitutional question challenging the constitutional validity and applicability of above reference articles of the QR&Os, however, at the Court's request, he did so on 22 October 2021.

[6] On 15 October 2021, as the responding party, the prosecution filed its own notice of motion seeking that this Court summarily dismiss the accused's application.

Issue

[7] The Court must decide whether to allow evidence and argument on Sergeant Buist's notice of application seeking a declaration that articles QR&O 112.14(7) to 112.14(14) are of no force or effect because they violate Sergeant Buist's *Charter* rights as guaranteed by paragraph 11(d) of the *Charter* and/or any other relief this Court sees fit.

Positions of the parties

Prosecution

[8] The prosecution requests this Court summarily dismiss the accused's application. He argues that the accused's notice has no reasonable prospect of success.

[9] In order to establish a reasonable prospect of success, the accused must provide sufficient detail of the nature of the application in addition to the documentary, affidavit or other evidence to be relied upon at the hearing.

[10] With respect to the paragraph 11(d) of the *Charter* challenge, the prosecution argued that the proposed evidence when viewed in its most favourable light does not have a reasonable prospect of establishing a breach of paragraph 11(d) of the *Charter*. He argues that the existing regulatory scheme is sufficient to address any concerns that the accused may have regarding the partiality of the panel.

[11] The prosecution submits that Sergeant Buist has not produced any legal precedent or argument to support the fact that the constitution of military panels are inconsistent with paragraph 11(d) of the *Charter*. Further, he argued that Sergeant Buist has failed to offer any judicial authority which would bring the already well-established legal precedent with respect to military panels into serious debate.

[12] In summary, the prosecution submitted that the only evidence that Sergeant Buist relies upon to support his assertion that the military panel system is not constitutionally compliant is the difference between the processes that exist for military panels in comparison with the modalities that exist in the civilian jury system, which were brought into effect by Bill C-75.

[13] With respect to the challenge for cause argument, the prosecution contends that the proposed evidence will not be admissible in establishing judicial notice of any facts that would provide an evidentiary foundation in support of Sergeant Buist's application. He submits that in order to establish a realistic possibility of a widespread anti-gay bias in the military community, some form of independent or expert evidence is required.

Sergeant Buist

[14] The applicant seeks a declaration of invalidity, as it pertains to QR&O articles 112.14(7) to 112.47(14) as a violation of the *Charter*. He argues that the aforementioned QR&Os violate paragraph 11(d) of the *Charter* as they do not provide an objective framework for identifying bias and impartiality.

[15] Secondly, he argued that in light of a paragraph 11(d) *Charter* violation, he challenges all prospective members of the court martial panel due to the realistic potential of bias/impartiality towards homosexual and bisexual members of the military. He originally challenged myself as the assigned judge, but later abandoned that argument prior to oral submissions.

[16] The essence of Sergeant Buist's argument is entrenched in the historical policies of the Canadian military which previously maintained both homophobic policies and official discrimination. As a result, he argued that there is a realistic potential for partiality amongst the entire court martial panel. More specifically, he argued that panel members who enrolled prior to 1992 have been members of an organization which actively discriminated against homosexuals, and therefore there is an appearance of bias.

[17] Further, he argued that even if members of the military joined after 1992 when homosexuality was permitted, there arguably remains a sub-culture, particularly amongst the "fighting men of the army – that is homophobic". He seeks to challenge each member of the panel individually.

[18] Further, he argued that all members of the court martial panel are soldiers and subject to Operation HONOUR, which currently remains the Canadian Armed Forces' (CAF) highest institutional priority and is at odds with the presumption of innocence and proof beyond a reasonable doubt.

[19] In support of the above two-prong arguments, the accused has submitted the following evidence:

(a) notice of intent for Sergeant Buist to give *viva voce* evidence on this application;

(b) written statements of personal experiences of Sergeant Buist;

(c) police interviews of Sergeant Buist and that of the complainant, X.Y.;

(d) letter from the Office of the Chief Military Judge, dated 22 June 2021 assigning the presiding military judge;

(e) military judge profiles of both Commanders Sukstorf and Pelletier;

(f) the third independent review of the *NDA* (30 April 2021) by the Honourable Morris J. Fish, C.C, Q.C;

(g) Operation HONOUR information page from the Government of Canada; and

(h) the following articles:

i. New York Times article – "I thought I Could Serve as an Openly Gay Man in the Army. Then Came the Death Threats" (10 April 2019);

ii. United States Military Times News article – "LGBT service members are allowed to be out and proud, but a fear of repercussions persists (15 June 2020);

iii. Canadian Labour Congress – "Canada's unions call for urgent action to address hate crime against 2SLGBTQI people" (17 May 2021);

iv. Mahmoud Rachini – "Far-right infiltration of Canada's military poses a serious threat, says Winnipeg reporter, Canadian Broadcasting Corporation (18 September 2020);

v. Olivia Chandler – A battle we've won: LGBTQ military members get personal apologies (25 November 2019)

vi. Rob Levy, "Canada's Cold War Purge of LGBTQ from the Military (24 June 2020);

vii. Konskie Minsky, "Canadian Armed Forces Victims of Discrimination Based on Sexual Orientation in the Military (Undated); and

viii. Statistics Canada – "A statistical portrait of Canada's diverse LGBTQ2+ communities" (15 June 2021).

[20] His written application submits that there are two important issues which must be addressed in order to ensure that Sergeant Buist receives a fair and impartial trial:

(a) is there a realistic potential for bias in the military against homosexuals, which would justify a challenge for cause of the entire court martial panel?; and

(b) is the method for challenging the whole court martial panel capable of establishing an independent and impartial tribunal as guaranteed by paragraph 11(d) of the *Charter*?

Assessment of the application for summary dismissal

The applicable law

Reasonable prospect of success

[21] In considering the prosecution's motion for the Court to summarily dismiss Sergeant Buist's application, Sergeant Buist bears the onus of advancing the evidentiary foundation for his application. Although the burden on the accused is actually quite low, it does require the accused to present a sufficient factual foundation and legal argument to show that his application has a reasonable prospect of success.

Analysis

[22] There are two different arguments proposed by Sergeant Buist. In the first argument, he contends that there is a realistic potential for bias in the military against homosexuals, which justifies a challenge for cause of the entire court martial panel system. Secondly, the court martial panel is not capable of establishing an independent and impartial tribunal as guaranteed by paragraph 11(d) of the *Charter*.

[23] In his oral submissions, the accused requests that the court deal with the challenge for cause first and then when that is established, he seeks to have the current panel system struck down. Conversely, the prosecution seeks the court to dismiss summarily the paragraph 11(d)

constitutional challenge for lack of a sufficient foundation and permit the accused to challenge the partiality issue separately in conformance with the current court martial protocol.

[24] In responding to the prosecution's motion to summarily dismiss the accused's application, the Court will deal firstly, with the challenge to the court martial panel as an independent and impartial tribunal as required under paragraph 11(d) of the *Charter*.

Law

[25] In determining whether the accused's application has a reasonable prospect of success, the Court must view the evidence proposed in the most favourable light.

[26] Like judges, panel members are entitled to the presumption that they are capable of setting aside their views and biases in favour of impartiality between the prosecution and an accused, and that they will carry out their panel duties in compliance with the military judge's instructions. That is, unless there is evidence that "beliefs and attitudes may affect the panel's behaviour in an unfair manner" (see *R v Find*, 2001 SCC 32 at paragraph 100).

Paragraph 11(d) challenge

[27] Sergeant Buist's written submissions allege that the current process set out in QR&O articles 112.14(7) to 112.47(14) regarding objections to the Constitution of the Court martial violate his rights under paragraph 11(d) of the *Charter*.

[28] In short, from a practical perspective, he argues that if he challenges one of the panel members regarding their impartiality, then under the QR&O process, a decision on whether that member is impartial must be made by the other members of the panel. He argues that this is unconstitutional as the bias against homosexuals is so pervasive in the CAF, that the decision making powers of those panel members will undoubtedly be tainted as they are all biased as well. He requests the court strike down those provisions and substitute its own decision making powers in responding to the challenges of the panel members.

[29] In order to support his argument that his rights are adversely affected, he relies primarily upon the recently implemented amendments to the challenge for cause process brought about by Bill C-75.

[30] Prior to the implementation of Bill C-75, a challenge for cause (found at section 638 of the *Criminal Code*) occurred where either the Crown or defence counsel sought to exclude a potential juror on the basis of one or more of the following grounds:

(a) the name of the juror does not appear on the panel;

(b) the juror is biased;

(c) the juror has been convicted and sentenced to more than twelve months imprisonment;

(d) the juror is an “alien” (i.e., not a Canadian citizen);

(e) the juror is physically unable to perform the duties of a a juror; and

(f) the juror does not speak the official language of the trial.

[31] Under the prior procedures that existed for civilian jury selection, with the exception of a person’s name not appearing on the panel, which was a matter to be determined by the trial judge, all other challenges for cause were decided by two lay persons that were on the jury who were referred to as “triers” and were not trained in law. This process could involve the same two triers or different “rotating” triers. The process routinely led to confusion and resulted in delay in jury trials, which was an important concern that needed to be remedied after the Supreme Court of Canada (SCC) decisions in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659 and *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Essentially, in order to improve its efficiency and effectiveness of the process, Bill C-75 shifted the responsibility for deciding such challenges for cause from the “triers” to the trial judge, who is appropriately trained.

[32] Under the court martial system, given the needs of military service, the majority of similar challenges for cause are specifically dealt with prior to the appointment of a military panel. This is important distinction as panel members are drawn from the CAF at large and there is often significant cost required for them to travel in order to be potential panel members. The law and regulations governing the court martial panel selection and composition process is established at *NDA*, section 167 (composition), *NDA*, section 168 (ineligibility to serve as panel member) and article QR&O 111.03 (procedure for appointment of members of a court martial panel).

[33] Safeguards in the panel selection process are set out at article QR&O 111.03(1) – random methodology, alternate members, language chosen by accused while article QR&O 111.03(3) sets out the exclusions of those persons who cannot be appointed to the panel;

[34] Pursuant to QR&O 111.03, it is the CMA who shall select, using random methodology, sufficient eligible officers and, where applicable, non-commissioned members capable of performing the duties of members and alternate members of the panel of a GCM, in the language of trial chosen by the accused.

[35] The evidence indicates that the process for the selection of members is based on past practices and self-generated policies by the CMA or her predecessors. She then uses her discretion and judgment when she follows the procedure expressly provided in QR&O article 111.03 (procedure for appointment of members of a court martial panel).

[36] Pursuant to the same QR&O, the pre-screening process is as follows:

> (3) The Court Martial Administrator shall not appoint an officer or non-commissioned member selected pursuant to paragraph (1) where the officer or non-commissioned member:
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> (*a*) is a person referred to in section 168 of the *National Defence Act*;

(*b*) is currently serving, was serving at the time of the alleged commission of the offence or will be serving during the period the court martial is expected to take place, in the unit of the accused;

(*c*) is the immediate subordinate of another officer or non-commissioned member who has been selected as a member of the court martial panel;

(*d*) will be on the Medical Patient Holding List or retirement leave during the period the court martial is expected to take place; or

(*e*) has been convicted of a service offence or of an indictable offence under the *Criminal Code* or any other Act of Parliament, unless a clemency measure is in effect in respect of that offence.

(4) The Court Martial Administrator may excuse from performing court martial duties an officer or non-commissioned member selected pursuant to paragraph (1) where the Court Martial Administrator is satisfied that:

(*a*) the officer or non-commissioned member will be required, during the period the court martial is expected to take place, for duties sufficiently urgent and important to warrant the officer or non-commissioned member not being appointed;

(*b*) the officer or non-commissioned member is scheduled during the period the court martial is expected to take place, to attend a course for which the officer or non-commissioned member is placed on the Advanced Training List or a similar course that is important for the officer or non-commissioned member's professional development or career progression;

(*c*) the officer or non-commissioned member has served as a member of a court martial panel within the preceding 24 months;

(*d*) the officer or non-commissioned member is unfit to perform court martial duties as a result of illness or injury;

(*e*) the officer or non-commissioned member has compassionate reasons for not being appointed to perform court martial duties, such as serious illness, injury or death in the officer's or non-commissioned member's family; or

(*f*) appointment of the officer or non-commissioned member to perform court martial duties may cause serious hardship or loss to the officer or non-commissioned member or others.

(5) Where an officer or non-commissioned member selected pursuant to paragraph (1) is not appointed to perform court martial duties for a reason set out in paragraph (3) or (4), the Court Martial Administrator shall record the reason and select a replacement in accordance with this article.

(6) The Court Martial Administrator shall, at the request of the presiding military judge, appoint a replacement for any member of a court martial panel if no alternate remains to replace the member.

(7) The Court Martial Administrator shall maintain for each General Court Martial a record indicating

(*a*) the name of each officer and non-commissioned member selected pursuant to paragraph (1); and

> (*b*) the name of any officer or non-commissioned member who is not appointed pursuant to paragraph (3) or who is excused pursuant to paragraph (4) and the reasons therefor.
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> (8) The record referred to in paragraph (7) shall be open to examination on request by the accused or the prosecutor of a court martial.
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> (9) The Chief Military Judge may issue such instructions and directions to the Court Martial Administrator as the Chief Military Judge considers necessary for the proper administration of the selection and appointment of the members of courts martial panels.

[37] At paragraph 51 of *R. v. Master Seaman R.J. Middlemiss*, 2009 CM 1001, the Court described the practicality of the process as follows:

> 51 The Court Martial Administrator explained the process that she uses to make her original selection and how she would contact the persons selected and conduct a telephone interview to determine if such person shall not be appointed for one or more reasons listed in paragraph 111.03(3) of the QR&O or could be excused for one or more reasons listed in paragraph 111.(04). This paragraph, unlike the previous one, explicitly provides the Court Martial Administrator with significant discretionary authority when she decides to excuse a person that had been randomly selected. She explained how she conducted her interviews with the selected persons and her use of individual selection criteria worksheet. The first page of the worksheet outlines 13 circumstances to mandatorily exclude a selected member, as well as the reference or authority to do so by listing the applicable provision in the *National Defence Act* or in the QR&O. It also tells the user — and the user being the Court Martial Administrator — the means available to verify the exclusion, i.e., through the random electronic selection method or the telephone interview or both. In this case, the Court Martial Administrator wrote on each worksheet the result of her verification. The second page of the worksheet sets out six additional reasons for which a potential member may be excused from performing court martial duties if the Court Martial Administrator is so satisfied. There again, the Court Martial Administrator recorded the result of her interview on the worksheet, and finally indicated her decision as to whether the individual was accepted or excluded. The records indicating the name of the persons selected, as well as the name and the reasons of persons that were not selected, were available to counsel on request. The applicant submitted that the Court Martial Administrator acted improperly when she excluded, at her own initiative, the first person on her list of selected officers, Colonel O'Rourke. The fact that the Court Martial Administrator did not contact personally Colonel O'Rourke, because she knew he had served as a panel member at a court martial in the previous 24 months, falls also squarely within her regulatory discretion under QR&O subparagraph 111.03(4)(*c*). She did not have to call him to exercise her discretionary authority. [Footnotes omitted.]

[38] Lamer, C.J. set out an accurate portrait of the essence of the composition of a panel for a GCM and the role played by the CMA, at page 39 of his report entitled, "T*he first independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, an Act to amend the National Defence Act and to make consequential amendments to other acts, as required under section 96 of Statutes of Canada 1998, c.35*. (Ottawa: National Defence, 3 September 2003). (*Lamer Report*):

> "A civilian jury is composed of 12 individuals that are chosen from a roster and subject to challenge by either the prosecution or defence. In the case of a military panel, the panel is composed of either three or five members and there is no right to challenge. Rather the Court Martial Administrator obtains a computer-generated list of all those who would qualify to sit on a panel and it is the Court Martial Administrator who excludes people based on either mandatory or discretionary exclusions. A civilian jury is intended to be representative of peers of the accused.

> In the case of a panel, the composition of the panel is dictated by the legislation (albeit with some flexibility). While I do not intend to catalogue an exhaustive list of differences between military panels and civilian juries, suffice it to say that a military panel is quite plainly not the equivalent of a civilian jury."

[39] Chief Military Judge (CMJ) Dutil also examined the selection and appointment process of GCM panels in *R. v. Penner*, 2013 CM 1005. At paragraphs 14-15, the Dutil, C.M.J. wrote:

> 14 As General Courts Martial are *sui generis*, the principles and rules that apply to the selection and appointment of persons at a civilian jury trial are not all applicable. In the criminal process, the process for the selection of jurors does not rest on one person. In addition, the manner to challenge the suitability of a potential juror is done in open court. In *R. v. Find*, [2001] 1 S.C.R. 863, 154 C.C.C. (3d) 97 (S.C.C.), McLachlin C.J.C., for the Supreme Court of Canada, provided an overview of the process followed in the Canadian criminal courts and its rationale, at paragraphs 18-24:
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> …
>
> 15 Evidently this civilian process does not resemble the court martial panel selection process, but both have the common goal of ensuring that the triers of fact discharge their duties with impartiality. The important distinction to be made between the two distinct processes resides is the purpose behind the procedures. In the case of the criminal justice system, these procedures furnish, so far as possible, a representative jury pool, whereas the selection and appointment process to serve as members of a court martial panel is rather to select the statutorily imposed members and alternates based on a specific rank who will fulfill a specific military duty as members of a court martial panel. Challenge for cause of those officers and non-commissioned members appointed to serve as members of a court martial panel is always available under article 112.14 of the *QR&O*.

[40] Aside from improving the efficiency and effectiveness of the process, there is no evidence filed with the court that this change in the civilian jury system that was brought about under Bill C-75 was precipitated by its failure to meet constitutional compliance.

[41] Just over four years ago (19 May 2017), in *R. v. Déry*, 2017 CMAC 2, while Cournoyer and Gleason J.J.A. decided solely on the constitutional challenge to paragraph 130(1)*(a)* of the *NDA*, they did discuss the distinctive yet random methodology in the panel selection process (paragraph 10), as opposed to the civilian system, noting that the *NDA* provided for variation in the composition of the panel based on rank of the accused. Panel members' sensibilities are neither addressed by the appellate judges nor the *NDA*, where they state that, even in the civilian system, "accused persons do not get to 'pick' their jury" (see paragraph 10) and their role in jury selection is limited.

[42] The SCC in *R. v. Stillman*, 2019 SCC 40 clearly stated at paragraph 68 that a military panel is not a jury there being:

> [S]ound reasons why the military justice system has opted for a unique military panel model, rather than a jury model. For example, the concept of "members tried by members fosters morale within the military. Further, Canada's military justice system operates extraterritorially, and service tribunals may have to be convened on short notice in a different part of the world. . . . [B]e held outside Canada, it would be highly impractical, if not impossible, to cobble together a jury of Canadian civilians and transport them to the place of trial.

[43] Adding at paragraph 71 that:

> The military justice system has thus developed an alternative, portable, and efficient solution that can be implemented whenever and wherever needed. This in turn contributes to discipline, efficiency, and morale in the military.

[44] And, more recently, on 25 June 2021, the SCC in *R. v. Chouhan*, 2021 SCC 26 reiterated the importance of the specificity/uniqueness of the military panel model for addressing the unique military needs. In *Chouhan*, the SCC wrote:

> [278] This is not a novel idea. This Court has already recognized the importance of having jurors who share the experiences of the accused. In *Stillman*, a majority of this Court recognized the importance of a separate military justice system, not only for military-specific offences, but even where the underlying offence is an ordinary civil offence contained in the *Criminal Code*. Trial by a panel of five other military members — rather than a jury of twelve civilians—fosters morale by ensuring that the accused's guilt "will be assessed by those whose familiarity with the challenges and circumstances of military life is the product of personal experience" (para. 70, citing J. Walker, "A Farewell Salute to the Military Nexus Doctrine" (1993), 2 *N.J.C.L.* 366, at p. 372).
>
> [279] Just as the members of military panels bring military experience and the values of the military community to their decisions, jurors bring their own life experience and community values to their decisions. Only accused persons know what evidence they will call and what experiences may be necessary to fully appreciate that evidence. Peremptory challenges are the only tool available to accused persons to address these issues of competence.

[45] The fundamental argument of the accused seems to arise from a discomfort that the selection and appointment of the panel members does not conform to the same process that currently exists under the *Criminal Code* for the civilian jury system. As Dutil C.M.J., in *Penner* at paragraph 14, "As General Courts Martial are *sui generis*, the principles and rules that apply to the selection and appointment of persons at a civilian jury trial are not all applicable." In the criminal process, the process for the selection of jurors does not rest on one person.

[46] In *R. v. Master Seaman R.J. Middlemiss*, 2009 CM 1001, Dutil, C.M.J. found that the composition of military panels does not violate an accused's right to an independent and impartial tribunal and declared *inter alia* that while the panel appointment process can be improved, it is dissimilar in nature from civil trials and, notwithstanding these dissimilarities, the panel selection process does not "affect the fairness and impartiality of the trial in the context of a court martial" (see *Middlemiss*, paragraph 52). Dutil C.M.J. also referenced numerous Court Martial Appeal Court decisions where it was decided that GCMs are not "jury trials" (see paragraphs 38, 40, 42, and 50) emphasizing that the content of guarantee was different in a military context and that GCM were not intended to be tantamount to civil jury trials (see paragraph 38).

[47] In *Chouhan*, the SCC held that paragraph 11(d) does not entitle the accused to any particular procedure:

> In determining whether s. (d) is breached, the question is not whether a new process chosen by Parliament is less advantageous to the accused, but rather whether a reasonable person, fully informed of the circumstances, would consider that the new jury selection process gives rise to a reasonable apprehension of bias so as to deprive accused persons of a fair trial before an independent

> and impartial tribunal. The constitutionality of the jury selection process must be considered as a whole.

[48] Courts martial aim to provide a fair trial to every accused person but it should not be confused with providing a perfect trial, or the most advantageous trial possible. The practical limits of the system of justice and the lawful interest of others in the process demand not perfect justice, but "fundamentally fair justice". (see paragraph 28 of *Find*).

Challenges for cause

[49] Essentially, in order to challenge for cause in the civilian system of criminal justice, sections 638 to 640 of the *Criminal Code* apply. Paragraph 638(1)(*b*) as amended on 19 September, 2019, permits a party to challenge for cause on the grounds that "a juror is not impartial." It was noted by the applicant that in the civilian jury system, it is the trial judge who now makes this determination replacing the decision making that was previously done by rotating jurors.

[50] After the CMA has completed all of the required pre-vetting procedure and appointed the members and alternate members for the GCM, then any further objections to panel members or a replacement member are then addressed through QR&O article 112.14(7) to 112.14 (14). These provisions are triggered after the court martial has assembled.

> **112.14 – OBJECTIONS TO THE CONSTITUTION OF THE COURT MARTIAL**
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> (1) Section 186 of the *National Defence Act* provides:
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> > "186. (1) When a court martial is assembled, the names of the military judge and the members, if any, must be read to the accused person and the prosecutor, who shall then be asked if they object to the constitution of the court martial and, in the event of an objection, the decision as to whether to allow the objection is to be made in accordance with the procedure prescribed in regulations.
> >
> > (2) The procedure for the replacement of a person in respect of whom an objection has been allowed shall be as prescribed in regulations."
>
> (2) Where the accused person or prosecutor objects to the judge or any member of the court martial panel, witnesses may be called:
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> > (*a*) in support of the objection by the party making the objection;
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> > (*b*) in rebuttal of the objection by the other party; and
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> > (*c*) by the court if it desires to hear further evidence.
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> (3) After witnesses, if any, have been heard, addresses may be made to the court first by the party making the objection and then by the other party, and the party making the objection may reply to any address made by the other party.
>
> (4) An objection to the judge shall be heard and determined by the judge in the absence of the members of the court martial panel and prior to any objection to the members.

(5) When the judge has made a decision in respect of the objection, the judge shall announce the decision in the presence of the members of the court martial panel.

(6) Where the judge allows the objection, the proceedings shall be adjourned until a replacement is appointed.

(7) Where there is an objection with respect to a member of the court martial panel:

(*a*) the court shall hear any evidence and argument with respect to the objection;

(*b*) the judge shall address the members of the court martial panel with respect to the objection; and

(*c*) the court shall close for the other members of the court martial panel to make a decision in respect of the objection.

(8) The member, in respect of whom an objection has been made, shall not be present during the deliberations of the court martial panel.

(9) The decision in respect of the objection shall be made by the other members of the panel, on the basis of a majority vote, with the members voting orally in succession beginning with the member lowest in rank.

(10) In the case of an equality of votes, the senior member shall have a second or casting vote in respect of an objection to any of the other members, and the next senior member shall have a second or casting vote in respect of an objection to the senior member.

(11) When the decision in respect of the objection has been made, the court shall reopen and the senior member shall announce the decision.

(12) Where an objection is allowed in respect of the senior member, the proceedings shall be adjourned until a replacement is appointed (*see article 111.03 – Procedure for Appointment of Members of a Court Martial Panel*).

(13) Where an objection is allowed in respect of a member of the court martial panel other than the senior member:

(*a*) the judge shall designate an alternate to replace the member; and

(*b*) if there is no alternate to replace the member, the court shall adjourn until sufficient replacements are appointed (*see article 111.03*).

(14) The prosecutor and the accused person may object to any replacement appointed.

[51] QR&O article 112.14 provides a comprehensive process for the accused and/or prosecutor to object to a member, members or a replacement member of a panel which complements *NDA* section 186. It is at this stage, that a decision on the objection of a panel member is rendered by the other members of the panel on the basis of a majority vote with the members voting orally in succession beginning with the member lowest in rank.

[52] However, once the panel members have taken the oath or affirmation, the test applicable at this later stage becomes a question of law to be determined by the trial judge. (see *R v Semrau*, 2010 CM 4015).

[53] In essence, Sergeant Buist relies primarily upon the fact that the court martial panel system is not similar to the current jury process, as well as the fact that in the third independent review of the *NDA* (30 April 2021) by Honourable Morris J. Fish, C.C, Q.C a recommendation was made that trial judges be considered the decision maker on challenges for cause rather than the panel members. However, the constitutionality of the court martial system and its military panels have been subject to a great deal of jurisprudential review and there has not been any evidence submitted by the applicant that suggests that the above recommendation was raised based on the current process being constitutionally suspect.

[54] After a review of the above case law as well as considering the applicant's submissions on the constitutional challenge, I find that Sergeant Buist's application provides no meaningful legal argument, jurisprudence, or independent study to displace the case law upon which this Court is bound and to provide him a reasonable opportunity of success in the *Charter* challenge. Nonetheless, I will review his argument based on his suggestions that there is such widespread bias against homosexuals and bi-sexual members that it is impossible for the current construct to provide impartial panel members which consequently renders constitutionally unsafe the entire QR&O process.

Challenge of panel members based on realistic potential of bias/impartiality

[55] In the civilian system, the test to establish a realistic potential for jury partiality is set out in *Find.* McLachlin C.J.C., writing for the SCC, provided an overview of the process followed in the Canadian criminal courts and its rationale.

> Establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.

At paragraph 36 of *Find*, the SCC carefully explained the concept of prejudice and bias applicable to the aforementioned test.

> [N]ot every emotional or stereotypical attitude constitutes bias. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large, but in the context of the specific case. What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioural effect of the bias.

[56] Even if bias is shown, the next question to be asked is whether it is "widespread":

> Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool… If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow. [*Find*, at para 39]

[57] Further, even if widespread bias is shown, the analysis does not end there. When it is established that a bias or prejudice exists, that by itself is not sufficient to disqualify the juror. Instead a further inquiry must be made which is referred to as the "behavioural component." That

is, whether that bias or prejudice would affect the juror's impartiality and the court must assess whether the prospective juror is unable to set aside their bias?

[58] The Court in *Find* said this, at paragraphs 41 to 44:

> 41 Trial procedure has evolved over the centuries to counter biases. The jurors swear to discharge their functions impartially. The opening addresses of the judge and the lawyers impress upon jurors the gravity of their task, and enjoin them to be objective. The rules of process and evidence underline the fact that the verdict depends not on this or that person's views, but on the evidence and the law. At the end of the day, the jurors are objectively instructed on the facts and the law by the judge, and sent out to deliberate in accordance with those instructions. They are asked not to decide on the basis of their personal, individual views of the evidence and law, but to listen to each other's views and evaluate their own inclinations in light of those views and the trial judge's instructions. Finally, they are told that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt and that they must be unanimous.
>
> 42 It is difficult to conceive stronger antidotes than these to emotion, preconception and prejudice. It is against the backdrop of these safeguards that the law presumes that the trial process will cleanse the biases jurors may bring with them, and allows challenges for cause only where a realistic potential exists that some jurors may not be able to function impartially, despite the rigours of the trial process.
>
> 43 It follows from what has been said that "impartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community: *Sherratt*, *supra*, at pp. 523-24. As Doherty J.A. observed in *Parks*, *supra*, at p. 364, "[a] diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community".
>
> 44 To treat bias as permitting challenges for cause, in the absence of a link with partial juror behaviour, would exact a heavy price. It would erode the threshold for entitlement defined in *Sherratt* and *Williams*, and jeopardize the representativeness of the jury, excluding from jury service people who could bring valuable experience and insight to the process. Canadian law holds that "finding out what kind of juror the person called is likely to be – his personality, beliefs, prejudices, likes or dislikes" is not the purpose of challenges for cause: *Hubbert*, *supra*, at p. 289. The aim is not favourable jurors, but impartial jurors.

Is there sufficient evidence of widespread bias?

[59] As the challenging party, the accused has the onus of establishing the potential for partiality, and must rebut the presumption that the trial protocols that exist are sufficient to cleanse these biases. This evidentiary threshold may be met by calling evidence or asking a judge to take judicial notice of facts.

[60] In assessing the evidence, the Court should consider the nature of the evidence and the circumstances of the case and whether it would allow the Court to conclude there is a realistic potential for partiality.

[61] The majority of the evidence filed with the application related to newspaper articles regarding the United States Armed Forces and a range of other articles that do not relate to the community from which the military panel is drawn.

[62] In addition to the documents filed in his application, Sergeant Buist provided his own anecdotal evidence in writing to suggest that based on his own personal experiences, there still exists a stigma and concerning behaviour within the CAF. He listed a number of examples that unfolded over his career whereby serving CAF members either mocked or ridiculed homosexual tendencies.

[63] In contrast, the prosecution offered into evidence a Defence Research and Development Canada (DRDC) study into CAF members' perceptions of sexual orientation and gender identity in the Canadian military.

[64] A total of 4,215 regular force and 3,959 primary reserve members were contacted to complete the survey. Usable data was provided by 1,555 regular force respondents (a 36.9 per cent response rate) and 1,240 primary reserve respondents (a 31.3 per cent response rate), for an overall response rate of 34.2 per cent.

[65] The DRDC study followed on the heels of a different study that suggested the following:

> "According to a recent Statistics Canada report, 10% of CAF Regular Force respondents reported the presence of discriminatory behaviours (i.e., seeing, hearing, and experiencing discriminatory behaviour) based on sexual orientation or gender identity (Cotter, 2016). Qualitative accounts have demonstrated abuse and harassment for many gay and lesbian members of the CAF (e.g., Poulin, Gouliquer, & McCutcheon, 2018; Poulin, Gouliquer, & Moore, 2009)".

[66] In contrast to other studies, the results of the DRDC concluded the following:

> "The results demonstrate that the participants held mainly positive perceptions about people's sexual orientation and gender identity in the CAF. These results are in contrast to the accounts highlighted by Poulin et al, (2018) and Okros and Scott (2015). A key difference between these studies and the present study is that Poulin et al. and Okros and Scott are qualitative studies using a small sample of gay and lesbian or transgender participants who were describing their own personal accounts. Conversely, the current study is intended to gauge the attitudes of the majority of CAF members who are not gay or lesbian or transgender."

[67] The above comments suggest that similar to the submissions of Sergeant Buist, the very personal accounts described by a small sample of gay, lesbian or transgender members themselves are not necessarily reflective of the attitudes reported on by the majority of CAF members who are not gay, lesbian or transgender. It is not clear which statistic is more or less reliable, but there is an undeniable contrast and the question is whether the ten percent of the regular force members who reported discrimination based on sexual orientation and gender identity is sufficient to constitute widespread bias in the CAF as a whole?

[68] The requirement that the bias must be widespread requires the applicant to establish that the bias is so sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more of the panel members. What does that mean exactly? The SCC in *Find* found that if only a few members in the community hold an alleged bias, the chances of it tainting the process are negligible (see *Find* at paragraph 39):

> 39 The second concept, "widespread", relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality: *Williams*, *supra*, at para. 43). If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow.

[69] The Canadian Oxford English Dictionary defines the term "widespread" as "spread among a large number or over a large area." Consequently, although this Court is of the belief that the ten per cent of regular force CAF members reporting discriminatory behaviour is still unacceptable, by definition, it falls short of meeting the expectation of widespread or a large number.

[70] I note that defence relies upon a number of paragraphs in the recent SCC decision in *Chouhan* to support his position, all of which remain compatible with the current court martial system:

> [61] Accordingly, this case presents an opportunity to comment on the procedure for challenges for cause given our growing knowledge of the ways in which unconscious bias can affect the impartiality of a juror. This Court has "faced up to" the fact that racial prejudice and discrimination are present in society and must be directly addressed in the selection of jurors (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para.1). We therefore acknowledge that a wide range of characteristics — not just race — can create a risk of prejudice and discrimination, and are the proper subject of questioning on a challenge for cause.
>
> [62] While widespread bias cannot be presumed in all cases, the parties do not face an onerous burden for raising a challenge for cause. The accused person or the Crown must merely demonstrate a reasonable possibility that bias or prejudicial attitudes exist in the community, with respect to relevant characteristics of the accused or victim, and could taint the impartiality of the jurors. In most cases, expert evidence will not be necessary: challenges for cause must be available wherever the experience of the trial judge, in consultation with counsel, dictates that, in the case before them, a realistic potential for partiality arises. The trial judge necessarily enjoys significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced, and how far the parties may go in the questions that are asked on a challenge for cause (*Spence*, at para. 24; *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128, at para. 55; *Find*, at para. 45).
>
> [63] In our view, the challenge for cause procedure is itself a vehicle for promoting active self-consciousness and introspection that militate against unconscious biases. The prospective juror, who, when empanelled, steps into an adjudicative role must bring to bear a degree of impartiality similar to that of judges. Impartiality requires active and conscientious work. It is not a passive state or inherent personality trait. It requires jurors to be aware of their own personal beliefs and experiences, and to be "equally open to, and conside[r] the views of, all parties before them" (*R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 40). Given these principles, the

> questioning on a challenge for cause ought to be able to explore the juror's willingness to identify unconscious bias and strive to cast it aside when serving on the jury (*Find*, at para. 40).
>
> [64] Appropriate questions on a challenge for cause will ask prospective jurors for their opinion as it relates to salient aspects of the case. For instance, counsel may point to characteristics of the accused, complainant or victim, such as race, addiction, religion, occupation, sexual orientation or gender expression, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge's instructions, because they hold an opinion about such characteristics that on careful reflection, they do not believe they could put aside. Before posing that question to jurors, trial judges ought to call each individual juror's attention to the possibility of unconscious bias and impartiality. It should be stressed that the mischief is not in acknowledging a difficulty setting aside unconscious bias, but in failing to acknowledge such a difficulty where one exists.
> [My emphasis.]

[71] There are two practical pieces of guidance that flow from the above analysis in *Chouhan.* The first suggests that Sergeant Buist does not need to prove widespread bias in order to raise his challenge with respect to the individual panel members. Sergeant Buist must merely demonstrate that there is a reasonable possibility that bias or prejudicial attitudes exist with respect to his sexual orientation that could taint the partiality of the panel members. In *Chouhan*, the Court recognized that sexual orientation raises a risk of prejudice and discrimination and is the proper subject of questioning. However, the Court has not been provided with any jurisprudence or evidence to suggest that the entire GCM panel is unconstitutional based on the panel members being the decision makers in considering a challenge for cause. If it did, then all the juries that existed prior to the implementation of Bill C-75 with rotating jurors, would have been declared unconstitutional. This has never been the case.

[72] It is important to be clear that although this Court is of the view that the record is not supported by an evidence-based finding of widespread bias that prospective panel members will be unable to set aside, the military justice system still provides a mechanism to ensure that any concerns or individual challenges may be raised and addressed. As *Chouhan* suggests, the test to be met in this case is not an onerous burden and appears almost automatic when the personal characteristics of Sergeant Buist could possibly taint some of the panel members.

[73] The dismissal of this application challenging the constitutionality of the panel does not preclude Sergeant Buist's ability to challenge individual panel members for concerns related to impartiality. A trial judge enjoys significant discretion to determine how and under what circumstances the presumption of impartiality is displaced and what questions may be posed to panel members.

[74] It is not the purpose of the challenge for cause to find out what kind of juror the panel member is likely to be, and assess the juror's personality, beliefs, prejudices, likes or dislikes (see *Find* at paragraph 44). Panel members are presumed to be impartial. However, as the trial judge, I enjoy significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced and how far the parties may go with their questions.

Conclusion

[75] I find that the applicant has not provided sufficient evidence, precedent or legal argument to have a reasonable prospect of success in proving that the procedure contained in QR&O articles 112.14(7) to 112.14(14) violates the rights of Sergeant Buist under paragraph 11(d) of the *Charter*. Consequently, this Court grants the prosecution's motion to dismiss this constitutional argument.

[76] Notwithstanding this, Sergeant Buist is entitled to trigger individual challenges with respect to the panel as set out in the QR&O provisions. Further, there are additional means that can be used which are consistent with what the SCC asserted in *Chouhan*:

> Other opportunities remain for the parties in criminal trials to raise and address concerns about juror partiality and bias. Trial judges should consider crafting jury charges and mid-trial instructions that caution against the risk that bias will taint the jury's deliberations. Jurors legitimately bring their life experiences to their deliberations but this cannot interfere with their responsibility to approach the case with an open mind. Jury instructions can expose biases, prejudices, and stereotypes that lurk beneath the surface. General instructions on biases and stereotypes ought to highlight that jurors may be aware of some biases while being unaware of others and should exhort jurors to approach their task with self-consciousness and introspection. Instructions on specific biases and stereotypes that arise on the facts of the case should consider context and the harmful nature of stereotypical assumptions or myths, for example, the effects of colonization and systemic racism on Indigenous peoples or myth-based reasoning in sexual assault prosecutions.

[77] Historically, as a trial judge, I deliver tailored instructions to address explicit concerns regarding partiality and bias that are particular to the facts of the case before me. I also draw the panel members' attention to their own unconscious bias with the specific goal of exposing any potential vulnerability and to invite their personal reflection. Consequently, I invite both the prosecution and defence counsel to raise any concerns and to recommend specific instructions to be provided to the panel that will further this aim.

[78] It is appropriate to remind ourselves of our combined role in working together to ensure that we have a fair and impartial military panel. As officers of the court, all counsel have a responsibility to uphold Sergeant Buist's right as guaranteed by paragraph 11(d) of the *Charter*. Either counsel can challenge a panel member for cause, based on objective grounds. At the end of the day, we must collectively strive to obtain a military panel of members who are eligible, impartial, representative and competent. In short, I have heard no evidence to suggest that this aim is impeded by following our established processes as set out in QR&O articles 112.14(7) to 112.14(14).

FOR THESE REASONS, THE COURT:

[79] **GRANTS** the respondent's motion to quash.

Counsel:

The Director of Military Prosecutions as represented by Majors C. Walsh and L. Langlois, Prosecutors and Counsel for the Responding Party

Mr Michael Johnston, Shore Jonhston Hyslop Day LLP, 200 Elgin Street, Suite 800, Ottawa, Ontario, Counsel for Sergeant D.C. Buist, and Moving Party