COURT MARTIAL

Citation: *R. v. Levesque,* 2022 CM 2012

Date: 20220518
Docket: 202128

General Court Martial

Bay Street Armoury
Victoria, British Columbia, Canada

Between:

Petty Officer, 1st Class J.R. Levesque (retired), Applicant

-and-

Her Majesty the Queen, Respondent

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*, I order 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these proceedings as the victim or complainant, including the person referred to in the charge sheet as "C.H.", shall not be published in any document or broadcast or transmitted in any way, excepting when disclosure of such information is necessary in the court of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community.

DECISION ON WHETHER TO DISCHARGE A PANEL MEMBER

(Orally)

Introduction

[1] On 23 March 2021, the Director of Military Prosecutions (DMP) preferred three charges against Petty Officer, 1st Class Levesque (retired) for offences which allegedly occurred between 1 June and 31 July 2006 aboard Her Majesty's Canadian Ship (HMCS) *Oriole*, in the coastal waters of British Columbia. The first charge alleges sexual assault, the second charge alleges

assault, and the third charge alleges uttering a threat to cause bodily harm. All three charges relate to the same the complainant.

[2] On 17 May 2022, after a diligent canvassing of potential issues that could affect a panel member's impartiality, which included identifying the names of the witnesses, the panel members were sworn and affirmed. When the prosecution's case opened and the complainant began her testimony, one of the panel members (panel member number 5) immediately recognized the complainant and at the first opportunity alerted the Court that he had previously served in the same unit with the complainant and her husband.

[3] Upon learning of the self-declaration of panel member number 5, the issue was discussed with counsel, the note provided by the panel member was entered into evidence as an exhibit and in the absence of the other panel members, the Court heard submissions from counsel on how to address the problem.

[4] The prosecution suggested that there was no apparent bar to having the matter considered pursuant to the procedures set out at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.14 and they noted that there was still an alternate panel member present who could potentially replace the panel member, if deemed required.

[5] Conversely, defence counsel submitted that in his view there was a void or gap in the *National Defence Act* (*NDA*) and QR&O that deals specifically with how to resolve this sort of issue. He provided the Court with the case of *R. v. Semrau*, 2010 CM 4015 where the military judge had to examine a very similar issue.

[6] After some discussion, it was agreed that it was appropriate to seek additional information from panel member number 5. As the trial judge, I held an inquiry into the matter, which involved personally posing questions to panel member number 5. Upon completion of the inquiry, I heard submissions from counsel as to what I should do. The prosecution recommended that the panel member be retained, while defence counsel argued that the panel member should be discharged.

[7] The following are my reasons, explaining the process followed and the rationale for my decision, on whether panel member number 5 should be discharged or not.

Law

[8] Firstly, this Court had to determine the correct procedure that should be followed to resolve a situation where an issue is raised regarding the impartiality of a panel member after the panel members have taken their oath or affirmation and the prosecution's case had begun with testimonial evidence before the Court.

[9] Upon a review of the *NDA* as well as the supporting QR&O, I found that there is a noticeable void in procedure in how to address potential issues of impartiality that are raised after the panel members have been sworn in. QR&O article 112.14 sets out the procedures to be followed in responding to Objections to the Constitution of the Court Martial (where an accused

person or prosecutor objects to the judge or any member of the court martial panel) and it sets out how a panel member will be replaced by alternate panel members.

[10] However, upon a close reading of QR&O article 112.14, and when examined in the context of the other QR&O provisions, I find that once members have been sworn in, the applicability of the procedures for objection and replacement of panel members set out in QR&O 112.14 are no longer valid. In support of this position, QR&O paragraph 112.67(2) makes it clear that no officer or non-commissioned member may be added to a court martial panel after the court martial panel has been sworn. In reviewing the *NDA* and the QR&O, there is no procedure set out or described as to how a trial judge should deal with issues that arise after the panel is sworn or affirmed and the evidentiary portion of the trial has begun. Consequently, I find that there is indeed a void in both the statute and regulations in the consideration of such an issue.

[11] It is also a well-accepted principle that once panel members have been sworn or affirmed, they become and remain judges for the remainder of the court martial. Consequently, they are entitled to the same strong presumption of impartiality of judges and there is a heavy burden on a party who seeks to rebut this presumption. Panel members, like judges, are presumed to govern themselves by their oath or affirmation.

[12] 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.

[13] Under section 179 of the *NDA*, Parliament conferred 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;
>
> (b) the production and inspection of documents;
>
> (c) the enforcement of its orders; and
>
> (d) all other matters necessary or proper for the due exercise of its jurisdiction.
>
> [My emphasis.]

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

> The 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.

[15] Section 179 of the *NDA* provides a court martial with the capacity to control its procedures for all other matters necessary or proper for the exercise of its jurisdiction and consequently, I must decide how to apply this discretion for the situation before me.

[16] As explained above, the *NDA* and the QR&O are both silent on how to address an issue regarding the partiality of a panel member, after they have been sworn in and the evidentiary portion of the trial has begun. A court's reliance upon section 179 of the *NDA* must be employed within a framework of principles relevant to the matters in issue and consistent with the common law.

[17] With article 112.60 of QR&O, Parliament also provided discretion for a trial judge to procedurally hear matters that are not otherwise specifically provided for within the QR&O.

[18] Further, section 191 of the *NDA* provides that the military judge presiding at a General Court Martial (GCM) determines all questions of law, or, mixed law and fact, arising before or after the commencement of the trial. I find that the determination of this matter is one that falls within this scope.

[19] I am fortified in my analysis based on the reasoning set out in the case of *R. v. Semrau*, 2010 CM 4015, where Perron M.J. came to the same conclusion when examining the void in the law:

> [8] Courts martial must then seek guidance in the appropriate Canadian case law when the *National Defence Act* and the *Queen's Regulations and Orders* are silent on an issue and the civilian case law pertains to matters analogous to the one before the court martial. A proper analysis of the civilian case law by examining its legislative basis and its purpose in light of the *National Defence Act* and of the military justice system will thus ensure that an accused military member will be treated in a fashion similar to an accused person in a Canadian criminal court. This will in turn ensure a fair trial.

[20] Further, as I noted in *R. v. Machtmes*, 2021 CM 2002, Parliament has consistently provided direction on how courts martial should fill any gaps that might exist in the legislation as follows at paragraphs 61 and 62:

> [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.
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> [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*).

[21] In this case, it is notable that Petty Officer, 1st Class Levesque (retired) is facing three *Criminal Code* offences in this court martial.

[22] The Court Martial Appeal Court has found and repeatedly reinforced that "a trial before a GCM is not a jury trial although such Court may share some of the characteristics of a civilian jury trial" (see paragraph 19 in *R. v. Deneault*, (1994) 5 C.M.A.R. 182). It has been recognized that although a GCM is different in substance, however procedurally, similar protocols are followed.

[23] Upon a review of the *Criminal Code*, section 644 is applicable as it sets out both who should decide on whether to discharge a member of the jury as well as the necessary next steps. It reads:

> **Discharge of juror**
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> **644 (1)** Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.
>
> **Replacement of juror**
>
> **(1.1)** A judge may select another juror to take the place of a juror who by reason of illness or other reasonable cause cannot continue to act, if the jury has not yet begun to hear evidence, either by drawing a name from a panel of persons who were summoned to act as jurors and who are available at the court at the time of replacing the juror or by using the procedure referred to in section 642.
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> **Trial may continue**
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> **(2)** Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.
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> **Trial may continue without jury**
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> **(3)** If in the course of a trial the number of jurors is reduced below 10, the judge may, with the consent of the parties, discharge the jurors, continue the trial without a jury and render a verdict.
> [My emphasis.]

[24] Section 644 of the *Criminal Code* is consistent with the protocols set out within the *NDA* and the QR&O, but it provides additional direction in that it is the judge that is responsible for deciding whether he or she may discharge the panel member, further validating that this is such a matter to be addressed under section 191 of the *NDA*. Further, section 644 provides a minimum number of jurors that are required, similar to that set out in subsection 196.1(1) of the *NDA* that states that if two or more members of the panel die or for any reason are unable to continue to act, the court martial is dissolved. However, subsection 196.1(1) of the *NDA* provides no guidance on the procedures that need to be followed.

[25] Importantly, I note that although the *NDA* lacks explicit authority for a trial judge to decide whether or not to discharge a panel member, subsection 644(1) of the *Criminal Code* is also silent on the factors the trial judge must or may take into account, as well as on the procedure to be followed preliminary to the conclusion.

The standard to be applied

[26] The determination as to whether to discharge a panel member must begin from a presumption of impartiality. At this stage, the presumption is that all panel members will approach and discharge their duty impartially and in accordance with the judicial instructions provided to them.

[27] As such, the standard required to rebut the presumption of impartiality will depend on the issue to be decided. At the pre-vetting stage conducted by the Court Martial Administrator, or even at the objection stage of court martial, a "close connection" between a prospective panel member and a trial principal may be sufficient to excuse the prospective panel member from the selection process.

[28] However, the test applicable at this later stage required to rebut the presumption of impartiality is that of reasonable apprehension of bias (see *R. v. Dowholis*, 2016 ONCA 801, at paragraph 19).

[29] The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining the required information about it. The grounds for the apprehension must be substantial. The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through – conclude (see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paragraphs 31 and 109).

[30] Paragraphs 146 to 151 of the Ontario Court of Appeal (ONCA) in *R. v. Durant*, 2019 ONCA 74 set out the standard and principles to be applied in determining whether a juror should be discharged on the grounds of a lack of impartiality. The principles to be followed are summarized as follows:

(a) there is a presumption that a juror will act impartially;

(b) the standard that a party seeking to rebut the presumption will depend on the issue to be decided;

(c) there must be a realistic potential for partiality;

(d) the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons;

(e) the test is what would an informed person conclude, viewing the matter realistically and practically having thought the matter through; and

(f) a judge deciding a section 644 application should take into account the juror’s oath or affirmation, the presumption of impartiality, the contents of the instructions to the jury on fundamental legal principles like the need to keep an open mind, how to assess evidence, the relevance of extraneous considerations and the proper conduct of the deliberative process.

Analysis

[31] It is well established that every member of the court martial panel must be impartial, which means that every member must approach the trial with an open mind and without preconceived ideas. There is always a risk that a person who has or had a close connection with any witness in this case might not be able to approach the case with an open mind. It is for this reason that each of the panel members were specifically and individually asked whether they had a close connection with the named witnesses.

[32] Although panel member number 5 had been provided the full name of the complainant that was protected by an order prohibiting publication, it was not immediately apparent to that panel member that he had previously served with the complainant until he physically recognized her. The Court also noted that the complainant had changed her name at some point, when she married.

[33] Having decided that as the presiding military judge, I have the authority to decide the issue of whether or not the panel member number 5 should be discharged, as discussed above, a short inquiry was conducted into the suitability of panel member number 5 to continue to serve on the court martial panel. The procedure followed in this particular case was consistent with the guidance set out in *Durant*, by the ONCA.

[34] Panel member number 5 was brought into the courtroom, in the absence of the other panel members, but in the presence of all other trial participants. Panel member number 5 was not on trial but rather was asked a number of questions by myself as the trial judge in order to assess the nature of the relationship that he had with the complainant. He was already bound by his oath as a panel member and is already a fact-finding judge of the court martial panel. Consequently, he was not asked to take an oath or make a solemn affirmation on the inquiry.

[35] Upon the conclusion of the inquiry and hearing the submissions of counsel, it is now my task to consider the evidence adduced at the inquiry and make the findings of fact essential to decide the suitability of panel member number 5 to continue.

[36] I found that panel member number 5 answered all the questions in a forthright and candid manner. Not only did he self-identify, as all panel members were instructed to do if there are any concerns that surface, his honesty in coming forward to disclose the fact that he had previously served in the same unit with both the complainant and her husband was done at the first opportunity. However, it was also clear that his familiarity with the complainant would not affect his ability to impartially to try Petty Officer, 1st Class Levesque:

> "MILITARY JUDGE: So do you feel personally that you would not—that your impartiality is still completely intact?"
>
> PANEL MEMBER NUMBER 5: "I believe it to be completely intact. It was a surprise to see her here, I haven't seen her since, actually, my days in the Regiment, so. . ."

[37] It is imperative that I provide appropriate consideration to the importance of the appearance of fairness in deciding the suitability of panel member number 5 to continue. I note that the time they served together would have been as long as fourteen years ago. Panel member number 5 did not refer to any recent interaction with the complainant. By the sheer manner upon which he learned that she was the complainant, suggests that this was clearly the first he learned of her involvement with the charges before the Court. Since the time they would have served together, panel member number 5 has been promoted three different levels and based on the complainant's testimony neither are serving geographically close to the other. Panel member number 5 serves in a technical trade within the Army and in 2008, the complainant was serving within the Naval Reserve and has since transferred to another occupation. There is no reason to assume that there is any familiarity beyond that described.

[38] I must also consider the context of military service within the Canadian Armed Forces and the distinct possibility that throughout a long career, members' paths will often cross and they may have served together at some point. As long as there is no personal relationship or direct reporting relationship, or absent other indicators of concern, it is not reasonable to assume that interaction thirteen or fourteen years ago renders a member incapable of serving on a panel with respect to a member that they once served with. Practically, this would expand the test to be much broader than it is.

[39] During the inquiry, the Court also learned that the panel member served within the same unit as her husband. At that time, panel member number 5 was a junior non-commissioned member while the complainant and her husband were serving as junior officers. It was clear that the panel member did not have any personal or reporting relationship with either of the two officers. Panel member number 5 served within the unit in a role that focused on the serviceability of vehicles in preparation of the unit's multiple rotational deployments to Afghanistan. When asked if he had deployed or gone on courses with either of the officers, he confirmed that he had not, but that he had attended an annual conference in 2010 in Hawaii, which he believed the complainant's husband also attended.

[40] More specifically, when panel member number 5 was asked if he had gained any impression of the couple during his time serving within the unit, he described them as a couple who seemed to be doing well and were effective. His response implied that they were respected in their roles as junior officers. It was this degree of familiarity with the complainant and her reputation that caused defence counsel the greatest concern. In his submissions, defence counsel was frank in stating that given the nature of this case, a decision will likely turn on the credibility of the complainant. He viewed the panel member's response as confirmation that he had already developed a positive impression of the complainant. It was for this reason defence counsel asked that I discharge panel member number 5 on the basis of a reasonable apprehension of bias. His submissions effectively suggest that there is too great a risk that the panel member has an established positive impression of the complainant that might colour his overall assessment of her credibility.

[41] Although I viewed panel member number 5's response as relatively neutral, what is clear is that during their posting together within the same unit the panel member did have sufficient

opportunity to observe and develop an impression of both the complainant and her husband. I also noted that the time period when the complainant and the panel member served together would have been two years after the alleged incidents.

[42] This court martial involves charges related to sexual assault, where defence counsel argued there are few witnesses and it is a case where the finding will undoubtedly turn on credibility. Consequently, I must also consider the complainant in this assessment. Although defence counsel viewed panel member number 5 as having a potentially pre-determined positive view of the complainant, we have no information regarding the viewpoint of the complainant herself. In the few short minutes when she began to testify, she did not signal nor identify panel member number 5 as anyone she knew, nor did she raise any concerns. However, I also note that she would not have had any time or opportunity to do so.

[43] It is appropriate to refer back to my earlier decision regarding a *Charter* challenge based on the perceived loss of public confidence in the military justice system's ability to try the offence of sexual assault. In dismissing that application, I noted that most of the public concerns were focused on the rights of the victims and the fairness of their treatment within the court martial process. It was noted that there was an expressed need for the victims to be subjected to a system that was transparent and removed from any improper influence. Although I also concluded this concern for victims does not, on its own, provide any specific constitutional concerns regarding Petty Officer, 1st Class Levesque (retired), I am concerned about the dynamics arising from the very specific facts in this case which trigger concern for both the complainant and Petty Officer, 1st Class Levesque's (retired) rights.

[44] I must weigh the specific concern raised by defence counsel with respect to the factual basis of this case, the limited evidence available and defence counsel's submission that a finding will likely turn on the credibility of the witnesses. In addition, I must also consider the public scrutiny regarding the trying of sexual assault within the military justice system and concern for victims in appearing before a complete arm's length process. In light of this unique constellation of factors presented in this specific case, I find that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that there is a reasonable apprehension of bias.

[45] Consequently, I find that I must discharge panel member number 5 from his duties. This leaves us with a four-member panel, which is still properly constituted for all purposes of the trial, and the trial shall proceed.

FOR THESE REASONS, THE COURT:

[46] **DISCHARGES** panel member 5 from his duties.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, counsel for the Applicant, Petty Officer, 1st Class J.R. Levesque (retired)

The Director of Military Prosecutions as represented by Major C.R. Gallant and Major G.J. Moorehead, counsel for the Respondent