Citation: *R. v. Corporal T. LeBlanc,* 2009 CM 4021

Docket: 200963

GENERAL COURT MARTIAL
CANADA
ALBERTA
CANADIAN FORCES BASE EDMONTON

Date: 12 November 2009

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL T. LEBLANC
(Applicant)

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DECISION RESPECTING AN APPLICATION THAT THE COMPOSITION OF THE PANEL CONTRAVENES THE RIGHTS OF THE ACCUSED UNDER SECTION 11(*D*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered orally)

INTRODUCTION

[1] The applicant, Corporal LeBlanc, has made an application under subparagraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (the QR&Os) alleging that ss. 167 and 168 of the *National Defence Act* and article 111.03 of QR&Os breach s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

[2] The applicant is asking this court to declare null and void under s. 52 of the *Constitution Act* ss. 167 and 168 of the *National Defence Act* and article 111.03 of QR&Os.

[3] Much was said by counsel for the applicant about the *Middlemiss* decision. The Chief Military Judge, Colonel Dutil, presided that General Court Martial. He, too, was presented an application alleging that the selection process for the members of the General Court Martial and the composition of the panel contravenes the rights of the accused under ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Basically, counsel for the applicant totally disagrees with that decision.

[4] In that case, the *Middlemiss* case, the applicant made an application, being the following:

> ... [O]n the question of law that General Courts Martial created under ss. 166 to 168 of the *National Defence Act* and the process used by the Court Martial Administrator for the selection and appointment of the panel members to serve at a General Court Martial violate the rights of an accused charged with a military offence to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms* ... and that these violations cannot be demonstrably justified under s. 1.

THE EVIDENCE

[5] The evidence in this application, presented by the applicant, consists of the testimony of Mrs Morrissey, the Court Martial Administrator, and Chief Petty Officer 2nd Class Larivée from the Directorate of Human Resource Information Management (DHRIM) Output Products, and of the following documents:

M2-2: The *curriculum vitae* of Mrs Morrissey;

M2-3: The 22 September '09 request from Mrs Morrissey to DHRIM for an ad hoc report with a list of exclusions and inclusions;

M2-4 - A document dated 11 October '06, entitled, "Aide Memoire on Selection of Panel Members for General Courts Martial or Disciplinary Courts Martial," by M. Cotter, CMA;

M2-5 - Undated document entitled, "CMA Guidelines on Selection of Panel Members for General and Disciplinary Courts Martial," by S.J. Blythe, CMA;

M2-6 - A list of 41 individuals from a randomly generated list provided to the CMA by CPO2 Larivée;

M2-7 - A sample of the Excel spreadsheet prepared by Mrs Morrissey, which contains 27 names of NCMs;

M2-8 - The nine worksheets, being the Court Martial Selection Criteria Worksheet, prepared during the panel selection process for this General Court Martial;

M2-9 - A document entitled, "Court Martial Panel Selection Replacement Directive," dated 22 February 2008, by Colonel Dutil, C.M.J;

M2-10 - A 2 October '09 email from Chief Petty Officer 2nd Class Larivée to Mrs Morrissey answering her 22 September '09 request as found at Exhibit M2-3;

M2-11 - A Strength Summary Report, prepared on 20 September '09 by Chief Petty Officer 2nd Class Larivée at the request of counsel for the applicant;

A CD-ROM containing each provincial and territorial Jury Act was presented to the court but not marked as an exhibit; and

Another CD-ROM was presented to the court and not marked as an exhibit. This second CD-ROM contained numerous documents which will be mentioned later in this decision.

[6] The respondent did not present any evidence. The court took judicial notice of certain facts and matters under MRE 15.

[7] I have carefully reviewed the evidence presented by the applicant. I have compared the evidence presented in this case with the evidence presented in the *Middlemiss* application. I note that the following exhibits in the present case are identical to the exhibits in the *Middlemiss* application, specifically: M2-4 in the present case and M2-5 in the *Middlemiss* application; M2-5 in the present case and M2-4 in the *Middlemiss* application; a CD-ROM containing the provincial and territorial Jury Acts, which was M2-10 in the *Middlemiss* application. This CD also seems to have been presented at the *Wilcox* trial since it was written, "Wilcox Jury Acts," on the CD-ROM. Other documents found on the second CD-ROM were also present in the *Middlemiss* application. In *Middlemiss*, they were identified as M2-11, M2-12, M2-15, M2-16, M2-26, and M2-28.

[8] Exhibit M2-3, in this case, seems identical to Exhibit M2-6 in the *Middlemiss* matter, since they are both requests for an ad hoc report with a list of inclusions and exclusions. Exhibit M2-6, in the present case, seems quite similar to exhibit M2-7 in the *Middlemiss* matter, since they are both a list of randomly generated names of NCMs. Exhibit M2-11, in the present case, appears to be fundamentally the same type of

evidence as found in Exhibit M2-9 in the *Middlemiss* matter, since they are both a Strength Summary Report prepared by Chief Petty Officer 2nd Class Larivée, and the only difference would be the slight difference in the figures in each document since one was prepared in September 2008 for the *Middlemiss* case, and the one for this application was prepared in September 2009 by Chief Petty Officer 2nd Class Larivée.

[9] Mrs Morrissey and Chief Petty Officer 2nd Class Larivée testified in the *Middlemiss* application and in the present application. A comparison of the testimony of Mrs Morrissey and of the description of her evidence in paragraphs 3 and 4 of Colonel Dutil's decision indicates that Mrs Morrissey basically provided the same evidence in these two applications. A comparison of the testimony of Chief Petty Officer 2nd Class Larivée and of the description of his evidence in paragraph 5 of Colonel Dutil's decision indicates that Chief Petty Officer 2nd Class Larivée essentially provided the same evidence in these two applications, except that he was not questioned whether Class "A" reservists effectively paraded at their units and the possible impact of that answer to the figures he provided at Exhibit M2-11 in the present proceedings.

[10] Mrs Morrissey testified that she had received 17,619 names in October 2009, of which 6,673 were non-commissioned members of the rank of warrant officer to chief warrant officer, and 10,946 names were those of officers of the rank of captain and above. In the *Middlemiss* application she would have testified that she had received 15,208 names; 5,345 were non-commissioned members, warrant officers to chief warrant officers, and 9, 863 were officers, captain and above.

POSITION OF THE PARTIES

Introduction

[11] Now that I have reviewed the evidence, I will move to the positions of the parties. In the present case, written arguments were provided by both counsel to this court in the hope that oral submissions might be reduced to the main points. Unfortunately, this approach does not seem to have fully succeeded in this case. I have considered the written submissions and the lengthy oral submission of counsel for the applicant as well as the written submission and the exceedingly concise oral submission of counsel for the respondent.

The Applicant

[12] The applicant submits that his right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal as set out in s. 11(*d*) of the *Charter* has been violated by the method of panel selection employed by the Court Martial Administrator and required by the relevant provisions of

the *National Defence Act* and Queen's Regulations and Orders. I will summarize the position of the applicant.

[13] The applicant submits that the pool of potential eligible members is reduced in a manner that is unlawful and unjustified. He argues that no member of the Reserve Force should be excluded as is presently the case, since members on Class "A" Reserve Service, Rangers, and CIC officers are automatically excluded from the random list provided to the CMA by DHRIM. Also, he argues that CF members on postings or on deployed operations outside Canada should not be automatically excluded without recourse to QR&O article 111.03.

[14] Further, he submits that the Court Martial Administrator exceeds her statutory authority by applying policies and practices in a manner that overrides the regulatory framework. The applicant also submits that potential panel members are inappropriately excluded for minor service offences set out on their conduct sheets, and only members with service offences analogous to offences included in different Jury Acts should be excluded from panels, thus the potential analogy to jurors across Canada. He submits that persons having received Presiding Officer Training or officers who have presided at summary trials should be excluded because they are either judges in their own right or possess specialized knowledge inappropriate for panel members.

[15] The applicant argues that although a military panel is not a jury, its members now resemble jurors. He submits that the view of panel trials expressed by the Court Marital Appeal Court in *R. v. Lunn* (1993) 5 C.M.A.R. 145; and *R. v. Deneault* (1994) 5 C.M.A.R. 182; and *R. v. Brown* (1995) CMAC 372 are no longer relevant. He states that the criteria utilized in those cases to distinguish panels from juries have been overtaken by events.

[16] The applicant argues that the representativeness required in a jury is guaranteed, not from the composition of the twelve members of that jury, but from the pool from which they are drawn, thus the same principle would apply to court martial panel members.

[17] He submits that the trial cannot properly take place after potential members have been improperly excluded, such as members on Class "A" Reserve Service, because the necessary level of representativeness is not present and the pool has been deprived of the necessary level of randomness.

[18] A considerable portion of the applicant's submission focuses on the rank-based composition of the General Court Martial and the ineligibility of some persons to serve by reason of their rank. The applicant submits that since panel trials are now so similar to the jury trial, the same principles should apply. He reiterates that the criteria utilized in past CMAC decisions to distinguish panels from juries have been overtaken by events.

The applicant submits also that s. 167 of the *National Defence Act* and article 111.03 of QR&O are unconstitutional on the basis that officers below the rank of captain and non-commissioned members below the rank of warrant officer are excluded for reasons that have no military rationale in modern times, and that there is no logical or military rationale for changing the rank composition of the panel according to the rank of the accused.

[19] The applicant submits that panel members are now only triers of facts and that they do not perform any leadership function, as such, in that particular role. Their role is not to enforce discipline but render justice. He submits that as much as military judges have seen their role aligned more closely to that of civilian judges in superior courts of criminal jurisdiction, the accused now chooses the mode of trial and panels have become more like juries.

[20] The applicant also alleges a violation of the rights of the accused because the current process does not provide a mechanism or a procedure that would include the accused in the selection of a court marital panel. He submits that the powers granted to the Court Martial Administrator under article 111.03 of QR&O are unconstitutional because they are not exercised in the presence of the accused. He argues that the process of randomly selecting panel members is directly analogous to the process of randomly selecting potential jury members from the pool or array.

Position of the Respondent

[21] The respondent submits that ss. 167 and 168 of the *National Defence Act* do not violate s. 11(*d*) of the *Charter* since persons tried by military tribunals do not have the right to the benefit of a trial by jury. Court martial panels are not intended to be juries of one's peers; rather, the members of a panel are meant to be experienced officers and non-commissioned members who are responsible for the maintenance of discipline in the Canadian Forces, and whose training is designed to ensure that they are sensitive to the need for discipline, obedience and duty on the part of members of the military and to the requirement for military efficiency. Unlike Canadian society, rank-based divisions continue to play an important part in military culture and are inherent in the hierarchal structure of the Canadian Forces. The respondent finally asserts that from an objective standpoint of a reasonable person fully appraised of the realities of service life, panels based on rank do not lead to a perception of partiality.

[22] The respondent also submits that the provisions of the Queen's Regulations and Orders pertaining to the selection of the panel and the procedures and policies employed by the Court Martial Administrator do not violate s. 11(*d*) of the *Charter*. During his oral submission, the respondent did not present the positions found in his written submission, but only concentrated on the principle of judicial comity as found in *R. v. Bodnar*, 2009 SKPC 115.

Summary

[23] Basically, counsel for the applicant is presenting the same application as was presented in the *Middlemiss* General Court Martial and in the *Wilcox* General Court Martial, 2009 CM 2009. (See paragraph 3 of the decision of Commander Lamont, M.J., dated 6 May 2009). Counsel for the applicant in the present matter was counsel for the applicant in the *Middlemiss* and *Wilcox* matters.

[24] As I indicated during the oral submissions of counsel, I have already rendered a decision in a similar application in the *Sergeant Swaby* General Court Martial, 2009 CM 4010.

Sui Generis

[25] Counsel for the applicant posits that the very nature of panel trials has been overtaken by events and that they should now be considered the same as jury trials. While it is true that today's General Court Martial is quite different from the panel trials that existed when the *R. v. Lunn*, *R. v. Deneault* and *R. v. Brown* decisions were rendered by the CMAC—"CMAC" being the Court Martial Appeal Court—one must not forget that the CMAC in *R. v. Trépanier*, 2008 CMAC 3, agreed that the military justice system is a *sui generis* system that is subject to the constitutional law of the land. This decision is the latest of numerous CMAC decisions that have consistently held that courts martial are *sui generis*. In other words:

> A trial before a General Court Martial is not a jury trial although such Court may share some of the characteristics of a civilian criminal jury trial. [See paragraph 16 in *Deneault*.]

[26] While these numerous fundamental modifications that have occurred in the last few years have in many ways aligned our military justice system with the Canadian criminal justice system, one must keep in mind the very foundations of these two systems. The jury trial, or the right to be tried by a jury of one's peers, evolved originally as one of the means for individuals and for democratic institutions to counterbalance the absolute power of the Monarch and later the executive. See *Trépanier*[1], paragraphs 75 to 80. As described in *Généreux*[2], courts martial are designed to enforce the Code of Service Discipline. Today, in the case of an accused who is a non-commissioned member, the panel members are three officers not below the rank of captain and two non-commissioned members above the rank of sergeant.

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[1] *R. v. Trépanier* 2008 CMAC 3
[2] *R. v. Généreux* [1992] 1 S.C.R. 259

[27] While it is true that panel trials have evolved in the past years, they still remain quite different from jury trials. A panel is comprised of five persons, not twelve. A jury is composed of twelve persons who are considered peers of the accused, subject to exclusions and exemptions found in the *Criminal Code of Canada*, the *NDA* and the different Jury Acts. I find that the Court Martial Appeal Court in *Trépanier* has clearly confirmed that the long established principle that General Courts Martial are *sui generis*. The Supreme Court of Canada and the Court Martial Appeal Court have consistently upheld the concept of a separate system of military justice in Canada because it is based on the need to enforce the Code of Service Discipline. While *The Canadian Charter of Rights and Freedoms* provides at s. 11(*f*) for trials other than jury trials for offences under military law tried by military tribunals, such military trials must still respect other rights found in the *Charter*. The Supreme Court of Canada and Court Martial Appeal Court decisions have not yet put into question the composition of military panels. To the contrary, I find that the Court Martial Appeal Court, at paragraph 102 of *Trépanier*, confirmed the legitimacy of the panel court by stating:

> .... It may be that the denial, under paragraph 11f) of the *Charter*, of the right to jury trials for an accused tried before a military court was more easily accepted by Parliament because there was a long tradition of trials by a judge and panel members in the military justice system which afforded equivalent protection.

[28] The applicant has quoted certain passages from the United Kingdom House of Lords decision in *R. v. Boyd*, [2002] UKHL 31 to support his position. This decision, the *Boyd* decision, reflects the Canadian jurisprudence that consistently identified courts martial as *sui generis* courts involved in the maintenance of discipline. Of note, I refer to paragraphs 3 and 4 of Lord Bingham of Cornhill's decision that provide:

> 3. Since the dawning of the modern age the defence of the state against the threats and depredations of external enemies has been recognised as one of the cardinal functions of government. To this end most countries have over time established regular armed forces, in this country a navy, then an army, and then in due course an air force. The effectiveness of such forces has been recognised to depend on their being disciplined forces: that is, forces in which lawful orders will be obeyed, the law will be observed and appropriate standards of self-control and conduct will be shown.
>
> 4. While disciplinary rules and procedures will inevitably vary from state to state, three principles would now, I think, command acceptance in any liberal democracy governed by the rule of law.

And a bit later in that paragraph:

> .... First, a man does not by becoming a soldier cease to be a citizen. On becoming a soldier he subjects himself to duties and exposes himself to the risk of penalties to which a civilian is not subject or exposed. But he remains subject to almost every law, including the criminal law, which binds other citizens and continues to enjoy almost all the same rights, including the right (if a charge of serious misconduct is made against him) to a fair trial before an independent and impartial tribunal. Secondly, the maintenance of the discipline essential to the effectiveness of a fighting force is as necessary in peacetime as

> in wartime: a force which cannot display the qualities mentioned above in time of peace cannot hope to withstand the much more testing strains and temptations of war. Thirdly, and whatever the practice in former times, a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, nor can it depend on inherited habits of deference or gradations of class distinction. Such a code must of course reflect the hierarchical structure of any army and respect the power of command. But an effective code of military discipline will buttress not only the respect owed to their leaders by those who are led but also, and perhaps even more importantly, the respect owed by leaders to those whom they lead and which all members of a fighting force owe to each other.

[29] Lord Rodger of Earlsferry mentions at paragraphs 84 and 85 that:

> 84. Of course, the members of a court-martial are not just an ordinary jury. The difference shows itself in at least two different respects.
>
> 85. First, the routines, the periods of boredom and the pleasures, pains and pressures of Service life would be unknown to most jurors today, although they would have been familiar to many of their fathers and grandfathers. By contrast, members of a court-martial know all about them and about the society in which the accused lives and works.

Composition of the Panel Based on Rank

[30] As mentioned earlier in this decision, I was asked in the *Sergeant Swaby* General Court Martial to decide an application made pursuant to s. 11(*d*) of the *Charter* that the composition of the panel excluding certain members of the Canadian Forces, specifically officers below the rank of captain and non-commissioned members below the rank of warrant officer, was unconstitutional. Although the evidence in the *Swaby* matter was slightly different than the evidence in this matter, both applications were presented using practically the same case law and practically the same evidence. That documentary evidence is: *CF Non-commissioned Members General Specifications*, found in the applicant's written submission at paragraph 85; *Non-commissioned Member Corps 2020*, found in the applicant's written submission at paragraph 86; *Duty with Honour*, found in the applicant's written submission at paragraph 87*; The Strategic Corporal: Leadership in the 3 Block War*, found in the applicant's written submission, paragraph 90; and *3 Block Warriors: Learning from the US Infantry Tactical Leadership in Afghanistan*, found in the applicant's written submission at paragraph 91. These documents are all found on the CD-ROM provided by the applicant to the court. Portions of the Lamer Report were also used in both of these applications.

[31] In his forward to *The 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 s. 96 of the Statues of Canada 1998, c.35*, "The Lamer Report," found on the CD-ROM provided to the court by the applicant, the Right Honourable Lamer concluded that the military justice system is generally working well. He also was:

> "... pleased to report that as a result of the changes made by Bill C-25, Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence."

[32] While he made numerous comments and recommendations for the improvement of the military justice system, the Right Honourable Lamer did not comment negatively on the composition of the General Court Marital. Further, at page 34, he states:

> "Bill C-25 allows for the first time that if an accused person is a non-commissioned member, a General and a Disciplinary Courts Martial panel must include two non-commissioned members who are of the rank of warrant officer or above in order to more accurately reflect the spectrum of individuals responsible for the maintenance of discipline and morale in the military justice system."

[33] And at page 39, he states:

> "As the Supreme Court of Canada stated in *Généreux*, section 11(*f*) of the *Charter* recognizes the existence of a system of military tribunals with jurisdiction over cases governed by military law. Section 11(*f*) of the *Charter* specifically states that those subject to trial by courts martial are denied the right to a trial by jury and although the *NDA* could well grant that right if Parliament so chose, there are important military requirements that justify it not doing so. However, it must be remembered that a military panel convened to fact-find at a courts martial is not the equivalent of a civilian jury. As pointed out in *R. v. Lunn,* while there are some similarities shared by a military panel and a civilian jury in that they are both the triers of fact, there are also many differences. 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."

[34] Later, when commenting on the Code of Service Discipline, Right Honourable Lamer stated at page 47 of his report:

> "Bill C-25 aligned the Code of Service Discipline more closely with Canadian values and legal standards, in particular in relation to the requirements of the *Charter*. However, it maintained those characteristics of the system necessary to meet the particular disciplinary needs of the military, and maintain a system workable in peace or conflict, in Canada or abroad."

[35] Later, at page 48:

> "Notwithstanding the positive effect of the amendments made by Bill C-25, there remains a need to make amendments to the Code of Service Discipline. Thankfully, none of my recommendations is the result of serious disciplinary incidents that call into question the legitimacy of the military justice system. Rather my recommendations reflect the ongoing need to balance the norms and values of Canadian society, including the rights of the individual, with the unique needs of the military for discipline, efficiency and portability."

[36] I have not been provided with any evidence or any case law that would make me reconsider the decision I made in the *Swaby* matter. Accordingly, I find that the applicant has not provided this court with any evidence or jurisprudence that would indicate that panels composed of officers of or above the rank of captain and non-commissioned members who are of the rank of warrant officer or above are inherently unfair or could be perceived to be unfair, and thus in breach of the *Charter* rights.

Exclusion of Certain Canadian Forces Members from the List of Potential Panel Members and Representativeness

[37] I will now address the applicant's challenge to the exclusion of service CF members from the list of potential panel members and the issue of representativeness. This includes the exclusion of Class "A" reservists, Rangers, CIC officers and every other exclusion described by the CMA. I have carefully reviewed paragraphs 54 to 59 of Colonel Dutil's decision in the *Middlemiss* application. The relevant evidence that supported his decisions in those paragraphs is either identical to the evidence before this court or practically identical. The jurisprudence presented to him appears also to be the same as in this case. Therefore, having considered the similarities in these two applications on this issue, I have come to the same conclusions as he has for the same reasons.

Procedure under 111.03 of QR&O

[38] I will now address the applicant's challenge to the procedure found at article 111.03 of Queen's Regulations and Orders, as used by the Court Martial Administrator to

appoint panel members and alternates. Having reviewed paragraphs 47 to 53 of Colonel Dutil's decision in the *Middlemiss* application, I have come to the same conclusions as he has for the same reasons he has expressed in *Middlemiss*. Again, the relevant evidence that supported his decisions in those paragraphs is either identical to the evidence before this court or practically identical. The jurisprudence presented to him appears to be the same as in this case.

Persons Qualified to Act as Presiding Officers

[39] The applicant submitted that persons qualified to act as presiding officers should be excluded from acting as panel members. I reject this submission and I fully concur with Colonel Dutil's reasons found at paragraph 42 of his decision *Middlemiss*. The applicant has not provided any evidence or case law that would support his position. A two-day certification course cannot be compared to the training and knowledge in the law acquired by lawyers and judges.

Panel Members Using Their Experience and Knowledge

[40] Counsel for the applicant also made reference to panel members using their personal experience and knowledge to decide cases. Counsel based his argument on the passage from the *Lunn* decision that described the special characteristics of a panel. He argued that panel members could use their personal knowledge and experience to decide a case instead of the evidence, yet he offers no evidence to support this assertion. On the one hand, he argues that panels since *Lunn* have been overtaken by events and act solely as a jury and are thus not different anymore; and on the other hand he uses that portion of the *Lunn* decision to support his position and his required remedy. He wants it both ways.

[41] His position is not supported by any evidence nor is it supported by any Supreme Court of Canada or Court Martial Appeal Court decisions. To the contrary, the Court Martial Appeal Court in *Trépanier* has commented favourably on the protection provided to an accused by a panel decision. (See paragraph 102 of *Trépanier*). Also of interest in the *Boyd* decision, Lord Rodger of Earlsferry, when commenting on the British court martial system, states at paragraph 68:

> 68. In the cases under appeal these particular safeguards were present. The oath taken by the members of the court required them to well and truly try the accused "according to the evidence" and to do justice according to the relevant 1955 Act "without partiality, favour or affection". In addition the judge advocate gave the other members of the court-martial directions of the same kind as would have been given to a jury if the case had been tried in a civil court. There is no reason to suppose that the members of the court-martial would be any less faithful to their oath or any less diligent in applying the directions given by the judge advocate than would the members of a jury. Indeed it is at the very least arguable that the officers on a court-martial, as members of the armed forces for whom trust and

> obedience to commands are particularly important, would be even more likely than civilian jurors to be true to their oath and to follow the directions given to them.

[42] Individual panel members must swear an oath to judge without partiality favour or affection. That oath can be found in Chapter 112 of Queen's Regulations and Orders. Canadian military judges instruct panels in the same way as civilian judges instruct juries on the lawful means of arriving at a verdict. I find that these arguments on this specific issue are not based on any evidence or jurisprudence and are in fact frivolous.

Delegation of Authority

[43] Finally, I will address the allegation by the applicant that the Court Martial Administrator unlawfully delegated her authority to Chief Petty Officer 2nd Class Larivée. It is abundantly clear from the evidence of Mrs Morrissey and from the evidence of Chief Petty Officer 2nd Class Larivée that Chief Petty Officer 2nd Class Larivée only provides Mrs Morrissey with a list of names based on the direction he receives from Mrs Morrissey. He has no discretion to modify the parameters stipulated by Mrs Morrissey. He simply executes a task as requested by Mrs Morrissey. I find that the applicant has made this allegation of improper delegation without any evidence to support it, and, to the contrary, I find that the applicant's evidence completely contradicts his assertion. Simply put, it is without merit and I find it to be frivolous.

DECISION

[44] For these reasons, the court denies the application made under paragraph 112.05(5)(*e*). These proceedings under subparagraph 112.05(5)(*e*) are terminated.

LIEUTENANT-COLONEL J-G PERRON, M.J.

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