Citation: *R. v. Sergeant M.G. Swaby*, 2009 CM 4010

Docket: 200874

GENERAL COURT MARTIAL
CANADA
ONTARIO
LIEUTENANT-COLONEL G.T. DENISON III ARMOURY, TORONTO

Date: 7 May 2009

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

HER MAJESTY THE QUEEN
v.
SERGEANT M.G. SWABY
(Applicant)

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)

---

[1] The applicant, Sergeant Swaby, has made an application under sub-paragraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces*, (the QR&Os), alleging that subsections 2 to 7 of section 167 and paragraph 168(*e*) of the *National Defence Act*[1], and paragraphs 111.03(1) and 111.04 of the QR&O breach section 11(*d*) of the *Charter of Rights and Freedoms*. The applicant submits these subsections and these paragraphs are unconstitutional because there exist no valid reasons for precluding officers below the rank of captain and non-commissioned members below the rank of warrant officer from serving as panel members. More specifically, the applicant alleges that excluding these individuals represents a lack of the necessary representativeness to ensure the fairness of the panel and the perception of fairness. The applicant also asserts that determining the composition of the panel based

---

[1] R.S., 1985, c. N-5

on the rank of the accused creates an appearance of a tiered system of justice which violates the right to fair trial pursuant to section 11(*d*) of the *Charter*.

[2] The applicant alleges that this system seems to indicate that officers are more important and receive the benefit of the higher tier of the military population, while non-commissioned members would be tried only by a panel composed of a minority of non-commissioned members. He argues that members currently ineligible to serve on court martial panels would otherwise qualify for service in a jury in a criminal trial for similar matters, particularly in the context of offences prosecuted under section 130 of the *National Defence Act*. Relying on recent Canadian Forces publications and journal articles, specifically: *Canadian Forces Non-Commissioned Member General Specifications*, at the respondent's book of authorities, Volume II, Tab 32; *The Non-Commissioned Member Corps 2020*, found in the applicant's book of authorities, doctrine, Volume II, Tab 3; *Duty with Honour*, found in the applicant's book of authorities, doctrine, Volume I, Tab 2; *The Strategic Corporal: Leadership in the Three Block War*, found in the applicant's book of authorities, doctrine, Vol II, Tab 6; and *Three-Block Warriors Learning from the US Infantry Tactical Leadership in Afghanistan*, applicant's book of authorities, doctrine, Volume II, Tab 5, the applicant argues there is no logical reason to exclude from a court martial panel a non-commissioned member below the rank of warrant officer, considering the skill set required of every member of the Canadian Forces, regardless of rank.

[3] The applicant further submits that panel members are now only triers of facts and that the role of non-commissioned members in the Canadian Forces has also evolved. Thus a panel of a General Court Martial must now be composed of persons from a pool that would include all members of the Canadian Forces.

[4] The respondent submits that sections 167 and 168 of the *National Defence Act* do not violate section 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 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 hierarchical structure of the Canadian Forces. The respondent finally asserts that from an objective standpoint of a reasonable person fully apprised of the realities of service life, panels based on rank do not lead to the perception of partiality.

[5] The applicant is asking this court to declare null and void, under section 52 of the *Constitution Act*, subsections 2 to 7 of section 167 and paragraph 168(*e*) of the *National*

Defence Act and paragraph 111.03(1) and article 111.04 of the Queen's Regulations and Orders.

[6] The applicant and the respondent rely on documents presented on consent. Those documents are found in their books of authorities. The court took judicial notice of certain facts and matters under Rule 15 of the Military Rules of Evidence. At the request of the respondent, and with the agreement of the applicant, the court took judicial notice under Military Rule of Evidence 16(2)(*i*) of the following statement: It being general service knowledge that there are fewer majors than captains; fewer lieutenant-colonels than majors; fewer colonels than lieutenant-colonels; fewer brigadier-generals than colonels; fewer major-generals than brigadier-generals; fewer lieutenant-generals than major-generals; and fewer generals than lieutenant-generals in the Canadian Forces.

[7] It is useful to begin the analysis of this question by examining the 1992 Supreme Court of Canada decision of *R. v. Généreux* [1992] 1 S.C.R. 259. Chief Justice Lamer, as he then was, explained at para. 60 of that decision that the purpose of a separate system of military tribunals, "is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military." He further stated:

> To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

[8] He then quoted the comments of Cattanach J. in *MacKay v. Rippon.* At paragraphs 61 and 62 of *Généreux* Chief Justice Lamer stated:

> Such a disciplinary code would be less effective if the military did not have its own courts to enforce the code's terms. However, I share the concerns expressed by Laskin C.J. and McIntyre J. in *MacKay v. The Queen* with the problems of independence and impartiality which are inherent in the very nature of military tribunals. In my opinion, the necessary association between the military hierarchy and military tribunals—the fact that members of the military serve on the tribunals—detracts from the absolute independence and impartiality of such tribunals. As I shall elaborate in greater detail below, the members of a court martial, who are the triers of fact, and the judge advocate, who presides over the proceedings much like a judge, are chosen from the ranks of the military. The members of the court martial will also be at or higher in rank than captain. Their training is designed to insure that they are sensitive to the need for discipline, obedience and duty on the part of the members of the military and also to the requirement for military efficiency. Inevitably, the court martial represents to an extent the concerns of those persons who are

> responsible for the discipline and morale of the military. In my opinion, a reasonable person might well consider that the military status of a court martial's members would affect its approach to the matters that come before it for decision.
>
> This, in itself, is not sufficient to constitute a violation of s. 11(*d*) of the *Charter*. In my opinion the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11(*d*) of the *Charter*, must be interpreted in this context.

[9] He then stated at paragraphs 64 and 65:

> In my view, any interpretation of s. 11(*d*) must take place in the context of other *Charter* provisions. In this connection, I regard it as relevant that s. 11(*f*) of the *Charter* points to a different content to certain legal rights in different institutional settings:
>
> > 11. Any person charged with an offence has the right
> >
> > ...
> >
> > (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.
>
> Section 11(*f*) reveals, in my opinion, that the *Charter* does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law. The s. 11(*d*) guarantees must therefore be construed with this in mind. The content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. However, any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of s. 11(*d*) it cannot survive unless the infringements can be justified under s. 1.

[10] In *R. v. Trépanier*, 2008 CMAC 3, the Court Martial Appeal Court described at paragraphs 75 to 80 the history and significance of trials by jury in criminal law and the history of courts martial in the military justice system at paragraphs 81 to 87. The Court Martial Appeal Court 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, (see *R. v. Lunn* (1993) 5 C.M.A.R. 145; *R. v. Deneault*, (1994) 5 C.M.A.R. 182; and *R. v. Brown* (1995) CMAC 372), 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 jury trial." (See paragraph 16 in *Deneault*.)

[11] As stated in *R. v. Lunn*:

> A Disciplinary Court Martial does share characteristics of a civilian criminal jury trial; the members are the sole judges of fact and must accept the instruction of the judge advocate as to the law. It is also very different in many respects. For example, as will appear, the members may take judicial notice of matters peculiar to their community to a generous extent not permitted jurors; they find guilt or acquit by majority vote and they, not the judge advocate, pass sentence. When the right to trial by jury is spoken of, it is trite to say that one is entitled to be found guilty by a jury of one's peers. Members of courts martial are historically commissioned officers; those they try are not necessarily their peers. It would be sterile to attempt an exhaustive catalogue of the similarities and dissimilarities. Courts martial are *sui generis*. Trial by Disciplinary Court Martial is not, in the military context, intended to be, nor is it, tantamount to trial by jury in the civilian context.

[12] Although comparing a jury trial with a panel trial may sometimes be of assistance when discussing rights of a military accused person under the *Charter of Rights and Freedoms*, one must be careful with such comparisons. As stated by Létourneau J.A. at paragraphs 73 and 74 of *Trépanier*:

> [73] On this issue, counsel for the intervener drew a useful comparison with jury trials before civilian courts. We want to make it clear that this Court has decided a number of times that trials by General or Disciplinary courts martial sitting with panels are not jury trials: see *R. v. Nystrom*, supra; *R. v. Brown*, supra. In *Lunn*, supra, Chief Justice Mahoney, while acknowledging that a Disciplinary Court Martial shares some of the characteristics of a civilian criminal jury trial, pointed out as substantial differences the fact that the members of a panel can take judicial notice of matters peculiar to their community to an extent not permitted jurors, acquit or convict by majority vote and are not peers in the usual sense because they are servicemen, mostly officers.
>
> [74] That being said, as we shall see, the comparison between jury trials and courts martial with a panel remains quite useful both from a historical perspective and an understanding of the objectives sought by the legislator. We will start first with a short history of jury trials in criminal law.

He then stated at paragraph 102:

> [102] It is trite law that findings made by juries (or a panel in the military justice system) are those which afford an accused the best protection. In his Report, retired Chief Justice Lamer stresses the importance of that protection. At page 36, he writes:
>
> > The protection afforded to an accused through the deliberation of members of a court martial panel is of the utmost import.
>
> Their deliberations are secret, assessment of the facts is their province alone and they give only their ultimate verdict: see *R. v. Ferguson*, 2008 SCC 6; *R. v. Krieger*, [2006] 2 S.C.R. 501 where a new trial by a jury was ordered because, in directing a guilty verdict, the judge usurped the function of the jury which is to find and assess the facts and from these facts determine the guilt or the innocence of the accused. It may be that the denial, under paragraph 11*f*) 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.

[13] The Canadian Military justice system has been modified considerably since the 1992 Supreme Court of Canada decision in *Généreux*. The 1999 amendments to the *National Defence Act* have brought fundamental changes to the basic structure of military justice. Military judges are now appointed by the Governor in Council. Military judges preside every trial; previously the military judge was only a judge advocate advising the President of the General Court Martial or of the Disciplinary Court Martial. The military judge now determines every sentence; previously, the panel of a General Court Martial or of a Disciplinary Court Martial determined the sentence. Non-commissioned members of the rank of warrant officer and above may sit as members of a panel if the accused in a non-commissioned member. The Director of Military Prosecutions, a military lawyer, is now empowered to prefer charges that will be tried by court martial and the Court Martial Administrator is responsible for the convening of courts martial. This is a far cry from the military justice system subject to the scrutiny of the Court Martial Appeal Court in *Lunn*, *Deneault* and *Brown*.

[14] As a result of the *Trépanier* decision, another round of fundamental changes occurred in 2008. Only two types of court martial remain: the General Court Martial and the Standing Court Martial. The maximum punishment that may be handed is not determined by the type of court martial, but is determined by the provisions of the offences being tried. The panel must now determine the verdict by unanimous decision instead of majority vote. The accused, depending on the offences found on the charge sheet, may have a choice of type of court martial.

[15] While these numerous fundamental modifications have in many ways aligned our military justice system with the Canadian criminal justice system, one must keep in mind the very foundations of each of these 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 paragraphs 75 to 80 in *Trépanier*.) As described in *Généreux*, courts martial are designed to enforce the Code of Service Discipline. 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. Even if the accused was a warrant officer, a master warrant officer or a chief warrant officer, it could not be said the accused is judged by his or her peers.

[16] Has the applicant provided this court with evidence that would demonstrate that the present legislative provisions breach his right to a fair trial? Although the CF has evolved and continues to evolve to adapt to a changing world and technology, certain principles cannot change. The military profession is expected to adhere to a military ethos reflecting the values shared by most Western societies and to remain subordinate to civil authority. (See *Duty with Honour* page 7). Although the modern battlefield or operational theatre does require section commanders and even corporals to demonstrate a higher level of knowledge and expertise, officers, non-commissioned officers and

warrant officers are still expected to show the necessary leadership. (See *Duty with Honour* at pages 18 and 19).

[17] Again in *Duty with Honour*, at page 21:

> "Given the current distribution of responsibilities and expertise between officers and non-commissioned members, each corps has a distinct identity. These respective identities are reflected in the insignias of rank that visibly denote responsibility, authority and specialized expertise and in such traditions as separate messing and marks of respect. Commissioned officers identify themselves as potential commanders and leaders, both direct and strategic. Non-commissioned members identify themselves as those responsible for the effective and efficient accomplishment of all tasks, always with an eye on the immediate welfare of individual subordinates. They know that their direct leadership and discipline of subordinates are absolutely essential to the professional effectiveness of the force as a whole, as well as the accomplishment of missions."

[18] Article 3.09 of the Queen's Regulations and Orders provides for the order of seniority. Paragraph1 states that, "An officer takes seniority over all non-commissioned members." Paragraph 2 states that, "Subject to article 3.10 (Seniority Between Types of Rank), officers take seniority among themselves and non-commissioned members among themselves in accordance with the order of ranks prescribed in article 3.01". Article 3.41 deals with the precedence of officers and non-commissioned members. Paragraph 1 stipulates that, "Officers take precedence over all non-commissioned members. Paragraph 2 provides that " The Chief of the Defence Staff takes precedence over all other officers." Paragraph 3 deals with officers commanding a command, officers commanding a formation, commanding a base or unit or an executive officer. And paragraph 4, the last paragraph of this article, provides that "In cases not specifically provided for in this article, the senior member takes precedence over the junior." Article 4.02 of Queen's Regulations and Orders provides that officers, "shall promote the welfare, efficiency and good discipline of all subordinates."

[19] The court finds that the applicant has not provided this court with any evidence that would indicate that panels composed of mostly officers and non-commissioned members who are of the rank of warrant officer or above are inherently unfair or could be perceived to be unfair. To the contrary, in his foreword 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 NDA and to make consequential amendments to other Acts* as required under section 96 of the Statutes of Canada 1998, c.35, known as, "The Lamer Report," found at Tab 1 of the applicant's book of doctrine, Volume 1, 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."

[20] 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 Martial. 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."

[21] And at page 39, he reiterated that a military panel is "quite plainly not the equivalent of a civilian jury trial."

[22] I find that the Court Martial Appeal Court in *Trépanier* has clearly confirmed 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. 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 11*f*) 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.

[23] I also find that the applicant has not provided this court with any evidence or jurisprudence to support his assertion that subsections 2 to 7 of section 167 and paragraph 168(*e*) of the *National Defence Act* and paragraph 111.03(1) and article 111.04 of Queen's Regulations and Orders breach section 11(*d*) of the *Charter of Rights and Freedoms*.

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

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

Counsel:

Major S. MacLeod, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen
Captain C. Walsh-Naraine, Deputy Judge Advocate General, Chief of Staff Ottawa
Assistant counsel for Her Majesty the Queen

Lieutenant-Commander P. Lévesque, Directorate of Defence Counsel Services
Counsel for Sergeant Swaby