Citation: *R v Tomczyk*, 2011 CM 1004

Date: 20110622
Docket: 201123

Preliminary Proceedings
S. 187 *National Defence Act*

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Bombardier N. Tomczyk

Before: Colonel M. Dutil, C.M.J.

REASONS FOR *CHARTER* DECISION RESPECTING A PRELIMINARY APPLICATION PURSUANT TO S. 187 OF THE *NATIONAL DEFENCE ACT* AND ARTICLE 112.03 OF THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES, ALLEGING THAT S. 165.191 OF THE *NATIONAL DEFENCE ACT* IS CONTRARY TO S. 7 AND 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS.*

(Orally)

INTRODUCTION

[1] On 9 June 2011, the applicant filed a notice of application stating that he will make an application challenging the constitutionality of s. 165.191 of the *National Defence Act*, particularly the refusal of the Director of Military Prosecutions to consent that the applicant be tried by Standing Court Martial in relation to the charges preferred by the Director of Military Prosecutions on 18 April 2011. The charge sheet contains two alternatives charges laid under ss.83 and 129 of the *Act*. The applicant advances

that the impugned section infringes on his rights that are protected under s. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms* with regard to his right to make full answer and defence and to control his defence in granting a veto to the prosecutorial authorities as to the type of trial for the offences mentioned in s. 165.191(1) of the *Act* if an accused wishes to be tried by a Standing Court Martial as opposed to a General Court Martial. This application was heard on 20 June 2011. The applicant requests that the judge hearing this application grant an order that the applicant be tried by a Standing Court Martial under s. 24(1) of the *Charter* and such other relief that would be found just and appropriate. He also requests that s. 165.191(2) of the *National Defence Act* be declared invalid and of no force and effect under s. 52 of the *Constitution Act*, 1982.

[2] In the context of this application, it is extremely important to emphasize that no court martial has been convened to deal with the charges preferred against Bombardier Tomczyk to this date. The applicant has purposely made this application to be heard before a military judge assigned to hear such application as opposed to the trial judge assigned to preside at the court martial, once it would be convened.

THE EVIDENCE

[3] The evidence filed in support of this application includes the facts and matters for which I have taken judicial notice under s. 15 of the Military Rules of Evidence; the charge sheet and the letter of Preferral of Charges signed by the prosecutor, Major Carrier, both dated on 18 April 2011; and a letter dated 9 June 2011 signed by the said prosecutor refusing to consent that the applicant be tried by a Standing Court Martial under s. 165.191(2) of the *National Defence Act*.

POSITION OF THE PARTIES

The Applicant

[4] The applicant alleges that his rights protected under s. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms* are violated because s. 165.191(2) of the *National Defence Act* has the effect of providing to the Director of Military Prosecutions a statutory veto by requiring its consent regarding the mode of trial for service offences mentioned in s. 165.191(1) if the accused wish to be tried by Standing Court Martial as opposed to a statutorily imposed General Court Martial. The applicant submits that the refusal of the Director of Military Prosecutions to consent to a Standing Court Martial amounts to a violation of his constitutional rights. The applicant submits that the recent amendments to the *National Defence Act* in 2008 in *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*[1] were passed in a hurry by Parliament as a result of the decision of the Court Martial Appeal Court in *R. v. J.S.K.T.*[2] (often referred to as *R. v. Trépanier*) but they fail to meet the constitutional standards expressed in *Trépanier* with regard to s. 165.191, by effectively leaving the mode of trial in the hands of the prosecution if it

[1] 2008, c. 29 (Bill C-60).
[2] (2008) 232 C.C.C. (3d) 498.

refuses to give its consent that an accused be tried by a Standing Court Martial if he or she so wishes.

[5] The applicant has decided to raise this matter under s. 187 of the *National Defence Act* to a judge specially assigned to preside at the hearing set for this preliminary application, as opposed to the trial judge assigned to preside at the court martial once it will be convened. The applicant submits that this judge not only has jurisdiction to hear this matter under ss. 187 and 179 of the *Act* and art. 101.07 (*Cases not Provided for in QR&O*) of the Queen's Regulations and Orders for the Canadian Forces, but the judge must do so for reasons of efficiency and proper administration of military justice.

The Respondent

[6] The respondent submits that the application should be dismissed because the applicant failed to meet his burden of proof. He further submits that the applicant misinterprets the ruling of the Court Martial Appeal Court in *R. v. J.S.K.T.* He argues that the law does not require that an accused must have the ultimate say as to the mode of his or her upcoming trial. Notwithstanding its position, the respondent argues in general terms that this application is not brought before the proper forum and that this matter should not be decided by a judge other than the trial judge who will be assigned to preside at the General Court Martial of Bombardier Tomczyk. The respondent suggests that this application is premature.

THE ISSUES

[7] Although the parties have framed what they consider to be the legal issue in a different manner, they both limit it to the constitutionality of s. 165.191 of the *National Defence Act* in light of the rights of an accused under ss. 7 and 11(*d*) of the *Charter*. This approach is not adequate to resolve this matter. The following questions that must be must be addressed are:

1. Can a military judge presiding at a hearing pursuant to s. 187 of the *National Defence Act*, other than the judge assigned to preside at a court martial that has been convened, decide a motion that challenges the constitutionality of a statute and grant a remedy under s. 24(1) of the *Charter* and a declaration of invalidity under s. 52 of the *Constitution Act*?

2. If the answer to the first question is "yes", should the application judge exercise jurisdiction or defer the matter to the trial judge?

If the application judge decides to proceed on the merits, the following questions must be answered:

3. Does s. 165.191 of the *National Defence Act* violate the rights of an accused person under ss. 7 and 11(*d*) of the *Charter* by imposing on that person to be tried by General Court Martial for the offences listed in s.

165.191 (1) regardless of the seriousness of the alleged offence as opposed to its maximum punishment? If the answer to this question is "yes", is it a reasonable limit prescribed by law and justified under section 1?

4. Does s. 165.191 (2) of the *National Defence Act* violate the rights of an accused person under ss. 7 and 11(*d*) of the *Charter* in requiring the consent of both the prosecution and the accused to be tried by a Standing Court Martial? If the answer to this question is "yes", is it a reasonable limit prescribed by law and justified under section 1?

ANALYSIS

Can a military judge presiding at a hearing pursuant to s. 187 of the National Defence Act, other that the judge assigned to preside at a court martial that has been convened, decide a motion that challenges the constitutionality of a statute and grant a remedy under s. 24(1) of the Charter and a declaration of invalidity under s. 52 of the Constitution Act?

[8] In the particular circumstances of this application, it is imperative that the issue raised at question No. 1 be determined prior to any other issue raised in this matter.

[9] As part of the amendments to the *National Defence Act* that came into force in 2008[3], s. 187 was modified to allow a military judge to hear an application in respect of a charge that has been preferred when a court martial has not yet been convened . This section reads as follows:

> Preliminary proceedings
>
> 187. At any time after a charge has been preferred but before the commencement of the trial, any question, matter or objection in respect of the charge may, on application, be heard and determined by a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial.

[10] It is therefore possible for a military judge, other than the trial judge presiding at the court martial, to hear preliminary matters with respect to a charge that has been preferred not only prior to the commencement of the trial, but before the court martial is even convened. One valid purpose of this approach is to enable a party to bring a matter as a preliminary proceeding to a military judge that would be best decided before the commencement of the court martial proceedings, thus enhancing the ability of the court martial to be convened to conduct a fair and efficient hearing of the case on its merits and promoting the duty to act expeditiously imposed under s. 162 of the *National Defence Act.*

[3] *Supra* note 1.

[11] There is no issue that a military judge presiding at a hearing under s. 187 of the *Act*, other than the judge presiding at the court martial, has the powers, rights and privileges vested in a superior court of criminal jurisdiction for the purposes enunciated in s. 179 of the *Act*. However, a military judge acting judicially in that capacity does not constitute the court martial or an extension of that court martial. In other words, proceedings conducted by the said judge can not be part of the court martial proceedings as no court martial has been convened, nor can they be deemed to be part of the said proceedings in absence of an express provision to that effect in the *Act* or valid regulations. Courts martial are statutory courts and *sui generis*.

[12] It is well recognized that preliminary proceedings based on *Charter* grounds may be brought prior to the beginning of a trial in criminal or disciplinary matters. For example, a party can apply to the trial judge to issue an order for disclosure. *Charter* violations are also often raised outside trial proceedings. One can imagine a judge presiding at a bail hearing conclude that the *Charter* rights of a detainee have been violated and grant an appropriate remedy.

[13] Notwithstanding these obvious scenarios, it must be emphasized that before a judge or a court proceed to hear a motion based on the *Charter*, it has long been established that it must be satisfied that such motion is made:

1. during a proper proceeding;
2. at a proper time;
3. by a proper party;
4. before the proper court or forum.

[14] A person accused under the Code of Service Discipline or facing criminal charges can make challenges to substantive offences since no one should be convicted under unconstitutional law. The first issue to be determined in this application does not relate to the standing of the accused to challenge the constitutionality of s. 165.191 of the *National Defence Act*. It is whether a military judge presiding at a hearing under s. 187 of the Act, other that the military judge assigned to preside at the court martial i.e. the trial judge, is the proper tribunal or forum to hear and decide the *Charter* issue raised in this application.

[15] In *Mills v. The Queen*[4] , Lamer J., as he then was, (dissenting) defined a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter* in the context of judge presiding at a preliminary inquiry. He stated at 890-891:

> For those reasons, and to summarize, I am of the view that:
>
> -- A court of competent jurisdiction in an extant case is a court that has jurisdiction over the person, the subject matter and has, under the criminal or penal law, jurisdiction to grant the remedy;
>
> -- As a general rule, the court of competent jurisdiction is the trial court;

[4][1986] 1 S.C.R. 863.

> -- A judge presiding at a preliminary inquiry is a court of competent jurisdiction to determine whether there has been a violation, but only if the order sought is the exclusion of evidence under s. 24(2).
>
> 53. For some, this would suffice. The trial court would, without exception (for others subject to the exception I am proposing), be the sole court of competent jurisdiction. This view, at first blush, has a certain appeal. It is simple and straightforward, free of a number of cumbersome problems which might otherwise arise. It introduces no additional delays, follows the usual appeal process and avoids any potential jurisdictional conflicts.
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> 54. Yet what it gains in simplicity it loses in effectiveness. For such a system would not permit early or immediate access to a remedy when such is clearly needed, e.g. under s. 11(*e*), the right not to be denied reasonable bail, or when delay itself is a perpetuation of the *Charter* violation, e.g. under s. 11(*b*), the right to be tried within a reasonable time. In such instances, denial of early access to a remedy is, in effect, denial of the "appropriate and just [remedy] in the circumstances". Denial of early access in such cases must not be countenanced; it would elevate simplicity of procedure above effectiveness of remedy. Simplicity must yield to the greater need for ensuring prompt access to a just, appropriate and effective remedy.
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> 55. For these reasons, I have come to the conclusion that the preferable, alas somewhat more complex, alternate solution to this problem is to acknowledge:
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> 1-- Pre-trial motions to the trial court, and
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> 2-- Original concurrent jurisdiction in the superior court, in cases extant before lower courts.

[16] The Court was unanimous that a judge presiding at a preliminary inquiry was not a court of competent jurisdiction to grant a remedy under s. 24(1) of the *Charter* in a case that alleged the violation of the rights of an accused under s. 11(*b*). The following remarks were made by McIntyre J. at 953:

> 262 The questions then arise as to which of the courts are courts of competent jurisdiction within the meaning of s. 24(1) of the *Charter* and what is the nature of the remedy or remedies which may be given. In attacking these problems, that of jurisdiction and that of remedy, the courts are embarking on a novel exercise. There is little, if any, assistance to be found in decided cases. The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the *Charter* confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect

[17] He later made these comments with respect of pre-trial motions and appeals, at 957-958:

> Pre-Trial Motions

268. There will be occasions when it will be advisable to move for relief under s. 24(1) of the *Charter* before trial. In my view, however, it is by no means necessary to erect a new procedural scheme for this purpose. The pre-trial motion and its near relative, the preliminary motion or preliminary objection, are well known in the law and may be employed in seeking s. 24(1) relief once an indictment has been preferred. Pre-trial motions may be made to quash the indictment for defect in substance or in form (s. 510 of the *Code*), to sever counts in an indictment (s. 520(3) of the *Code*), for particulars of the indictment (s. 516 of the *Code*), and to sever trials of co-accused (s. 520(3) of the *Code*). The general practice of the courts has been to encourage such applications to be brought early so that preliminary matters may be disposed of at the outset, particularly when they are of such nature that they may affect the validity of the proceedings. This principle has been given statutory recognition in s. 529 of the *Code*, which provides in subs. (1) that an objection to a count of an indictment for a defect apparent on its face shall be taken by a motion to quash before plea and thereafter only by leave of the court. A similar provision relating to summary conviction matters was found in s. 732 of the *Code*. This subject is conveniently dealt with in *Canadian Criminal Procedure* (4th ed. 1984) by Salhany, at pp. 209-10. In my view, no great difficulty will be encountered in including in the legal armory a pre-trial motion for s. 24(1) *Charter* relief, subject to the existing practice for other motions. It may be that occasions will arise where a trial judge may find it necessary in dealing with a s. 24(1) application to receive *viva voce* evidence on the question raised to enable him to dispose of the application. In my view, it would be within the discretionary power of a trial judge to follow this practice where, in his view, it was necessary. For the purpose of a pre-trial motion for s. 24(1) relief, the claimant may institute his motion at any time before plea and at any time after he has received or become entitled to receive the indictment or information. Where a court has not been ascertained for trial by committal, election, summons, preferment or arraignment, the application could be made to the superior court for prerogative relief.

Appeals

269. Criminal appeals by a person convicted of an indictable offence are provided for in the *Criminal Code* in s. 603 to the Court of Appeal, in ss. 618 and 620 to the Supreme Court of Canada, and in s. 719 in respect of the prerogative matters involving mandamus, *certiorari* or prohibition. It has long been settled law that there is no right of appeal in criminal matters, save as provided by statute, and the *Code* in s. 602 reinforces this proposition by providing that "No proceedings other than these authorized by this Part [Part XVIII--Appeals, Indictable Offences] and Part XXIII [Extraordinary Remedies--*certiorari, habeas corpus*, mandamus and prohibition] shall be taken by way of appeal in proceedings in respect of indictable offences."

270. Again, it must be observed that the *Charter* is silent on the question of appeals and the conclusion must therefore be that the existing appeal structure must be employed in the resolution of s. 24(1) claims. Since the *Charter* has conferred a right to seek a remedy under the provisions of s. 24(1) and since claims for remedy will involve claims alleging the infringement of basic rights and fundamental freedoms, it is essential that an appellate procedure exist. There is no provision in the *Code* which provides a specific right to appeal against the granting, or the refusal, of a *Charter* remedy under s. 24(1), but appeals are provided for which involve questions of law and fact. The *Charter*, forming part of the fundamental law of Canada, is therefore covered and the refusal of a claim for *Charter* relief will be appealable by a person aggrieved as a question

> of law, as will be the granting of such relief by the Crown. The appeal will follow the normal, established procedure. When the trial is completed the appeal may be taken against the decision or verdict reached and the alleged error in respect of the claim for *Charter* relief will be a ground of appeal.

[18] For almost 25 years, Canadian courts and tribunals have had to make rulings in particular instances as to whether they were a court of competent jurisdiction in the context of s. 24(1) of the *Charter.* The Supreme Court of Canada has provided us with more guidance to conduct a proper analysis in *R. v. 974649 Ontario Inc.*[5], McLachlin C.J. stated at paragraphs 23-24:

> 23 As McIntyre J. cautioned in *Mills*, *supra*, at p. 953, the *Charter* was not intended to "turn the Canadian legal system upside down". The task facing the court is to interpret s. 24(1) in a manner that provides direct access to *Charter* remedies while respecting, so far as possible, "the existing jurisdictional scheme of the courts": *Mills*, at p. 953 (per McIntyre J.); see also the comments of La Forest J. (at p. 971) and Lamer J. (at p. 882) in the same case; and *Weber*, *supra*, at para. 63. The framers of the *Charter* did not intend to erase the constitutional distinctions between different types of courts, nor to intrude on legislative powers more than necessary to achieve the aims of the *Charter*.
>
> 24 In summary, the task of the court in interpreting s. 24 of the *Charter* is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies under ss. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals. With these guiding principles in mind, I return to the question at the heart of this appeal: when does a court or tribunal possess "power to grant the remedy sought", such that it satisfies the final branch of the *Mills* test of a court of competent jurisdiction?

[19] She then examined various approaches to later conclude at paragraphs 42-47:

> 42 In my view, the "functional and structural" approach is more consistent with the original intention of Parliament or the legislature in establishing the tribunal (albeit interpreted in light of the *Charter's* enactment) and the aspirations of the *Charter* itself. Where the *Charter's* enactment implicated a court or tribunal in new constitutional issues, it should be presumed that the legislature intended the court or tribunal to resolve these issues where it is suited to do so by virtue of its function and structure. It is only in this manner that the purpose of the *Charter* – and the mandates of those courts and tribunals that predate its enactment – can be meaningfully realized.
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> 43 The content of the "functional and structural" approach may also require elaboration. Framed broadly, this test asks whether the court or tribunal in question is suited to grant the remedy sought under s. 24 in light of its <u>function</u> and <u>structure</u>. The assessment is contextual. The factors relevant to the inquiry and the weight they carry will vary with the particular circumstances at hand. Nonetheless, it is possible to catalogue some of the considerations captured under the general headings of "function" and "structure".

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[5] [2001] 3 S.C.R. 575.

> 44 The <u>function</u> of the court or tribunal is an expression of its purpose or mandate. As such, it must be assessed in relation to both the legislative scheme and the broader legal system. First, what is the court or tribunal's function within the legislative scheme? Would jurisdiction to order the remedy sought under s. 24(1) frustrate or enhance this role? How essential is the power to grant the remedy sought to the effective and efficient functioning of the court or tribunal? Second, what is the function of the court or tribunal in the broader legal system? Is it more appropriate that a different forum redress the violation of *Charter* rights?
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> 45 The inquiry into the <u>structure</u> of the court or tribunal relates to the compatibility of the institution and its processes with the remedy sought under s. 24. Depending on the particular remedy in issue, any or all of the following factors may be salient: whether the proceedings are judicial or quasi-judicial; the role of counsel; the applicability or otherwise of traditional rules of proof and evidence; whether the court or tribunal can issue subpoenas; whether evidence is offered under oath; the expertise and training of the decision-maker; and the institutional experience of the court or tribunal with the remedy in question: see *Mooring, supra,* at paras. 25-26. Other relevant considerations may include the workload of the court or tribunal, the time constraints it operates under, its ability to compile an adequate record for a reviewing court, and other such operational factors. The question, in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.
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> 46 Two sources may provide guidance in determining the function and structure of a court or tribunal: the language of the enabling legislation and the history and accepted practice of the institution. The court or tribunal's constituting legislation may clearly describe its function and structure. However, it often may be necessary to consider other factors to fully appreciate the court or tribunal's function, or the strengths and limitations of its processes. Factors like the workload of the court or tribunal, the time constraints it operates under, and its experience and proficiency with a particular remedy, cannot be assessed on the face of the relevant legislation alone; rather, regard must be had to the day-to-day practice of the court or tribunal in question.
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> 47 Having outlined the "functional and structural" approach to defining the third element of the *Mills* test, the power to grant the remedy sought, I turn to the considerations that support it. First, this approach is consistent with the authorities. Second, it is consistent with the Court's approach to discerning legislative intent in other contexts, such as the authority of a tribunal to consider the constitutionality of its enabling legislation under s. 52 of the *Constitution Act*, 1982. Finally, and most importantly, it comports with the foundational principles animating s. 24. I will discuss each of these reasons in turn.
> [Emphasis in original.]

[20] After concluding that considerations of function and structure were central to the Supreme Court decisions regarding s. 24(1) of the *Charter*, the Chief Justice illustrated this point in quoting McIntyre J. in *Mills* in the context of the judge preliminary inquiry in the criminal process and the incompatibility of this function and the remedy sought, at 954-55. McIntyre made the following remarks:

> 264 The preliminary hearing magistrate, now ordinarily a provincial court judge, finds his jurisdiction in Part XV of the *Criminal Code* of Canada. He is given jurisdiction to conduct the inquiry and in the process he must hear the evidence called for both parties and all cross-examination. He is given procedural powers under ss. 465 and 468 of the *Code*, including a power to direct the trial of an issue as to the fitness to stand trial. His principal powers are conferred in s. 475. After all the evidence has been taken, he may commit the accused for trial if, in his opinion, the evidence is sufficient, or discharge the accused if, in his opinion, upon the whole of the evidence no sufficient case is made out to put the accused on trial. He has no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy. He is given no jurisdiction which would permit him to hear and determine the question of whether or not a *Charter* right has been infringed or denied. He is, therefore, not a court of competent jurisdiction under s. 24(1) of the *Charter*. It is said that he should be a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). In my view, no jurisdiction is given to enable him to perform this function. He can give, as I have said, no remedy. Exclusion of evidence under s. 24(2) is a remedy, its application being limited to proceedings under s. 24(1). In my view, the preliminary hearing magistrate is not therefore a court of competent jurisdiction under s. 24(1) of the *Charter*, and it is not for courts to assign jurisdiction to him. I might add at this stage that it would be a strange result indeed if the preliminary hearing magistrate could be said to have the jurisdiction to give a remedy, such as a stay under s. 24(1), and thus bring the proceedings to a halt before they have started and this in a process from which there is no appeal. [Emphasis added.]

[21] It should no longer be the subject of dispute that courts martial convened under the *National Defence Act* are courts of competent jurisdiction to hear and decide *Charter* issues and grant appropriate remedies. The same reasoning applies to the competence of courts martial to decide the constitutionality of a legislative provision under s. 52 of the *Constitution Act, 1982*. These questions are questions of law or mixed law and fact to be determined by the military judge presiding at the court martial, whether at a General Court Martial or Standing Court Martial. In matters of pre-trial custody review hearings under Division 3 of the Code of Service Discipline, a military judge is also a court of competent jurisdiction. This authority does not derive from s.179(2) of the *National Defence Act*, but from considerations of the structure and function of the particular forum under the *Act*.

[22] Courts Martial are *sui generis*. They are presided by military judges who enjoy the guarantees of judicial independence for the benefits of a person subject to the Code of Service Discipline. Under the *National Defence Act*, these judges perform other judicial duties that are required to be performed by military judges and any other duties that the Chief Military Judge may direct, that are not incompatible with their judicial duties[6].

[23] In light of the structure and function of the Canadian system of service tribunals and the judicial duties performed by military judges under the *Act*, it must be determined if a military judge presiding at a hearing under s. 187 of the *Act*, other than the military judge assigned to preside at a court martial, i.e., the trial judge, constitute

[6]ss. 165.23(1) and (2)

the appropriate forum or whether that judge is suited to grant the precise remedy sought or a remedy of the same type. The problem in this case does not relate to the structure, but to the function exercised by a military judge presiding at a hearing under s. 187 of the *Act*, other than the military judge assigned to preside at a court martial, i.e., the trial judge.

[24] Ss. 230 and 230.1 of the *Act* set out the rights of appeal for the person tried and for the Minister or counsel for the Minister. These sections provide:

> Appeal by person tried
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> 230. Every person subject to the Code of Service Discipline has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court <u>from a court martial</u> in respect of any of the following matters:
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> (*a*) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;
>
> (*b*) the legality of any finding of guilty;
>
> (*c*) the legality of the whole or any part of the sentence;
>
> (*d*) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;
>
> (*e*) the legality of a disposition made under section 201, 202 or 202.16;
>
> (*f*) the legality of a decision made under any of subsections 196.14(1) to (3); or
>
> (*g*) the legality of a decision made under subsection 227.01(2).
>
> Appeal by Minister
>
> 230.1 The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court <u>from a court martial</u> in respect of any of the following matters:
>
> (*a*) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;
>
> (*b*) the legality of any finding of not guilty;
>
> (*c*) the legality of the whole or any part of the sentence;
>
> (*d*) the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;
>
> (*e*) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;
>
> (*f*) the legality of a disposition made under section 201, 202 or 202.16;

> (*f.1*) the legality of an order for a stay of proceedings made under subsection 202.121(7);
>
> (*g*) the legality of a decision made under any of subsections 196.14(1) to (3); or
>
> (*h*) the legality of a decision made under subsection 227.01(2).
> [Emphasis added.]

[25] A military judge presiding at a hearing under s. 187 of the *Act* is not a court martial and therefore his or her decision could not be the subject of an appeal. However, if a similar issue is dealt with as a preliminary proceeding, once court martial proceedings have commenced, it may be appealed if the decision falls within the ambit of ss. 230 and 230.1 of the *Act.* It is trite law that there is no right of appeal in criminal matters, except what is provided by statute. In another context, it is also relevant to specify that a decision of a military judge at a pre-trial custody review hearing under the *Act*, may also be reviewed by the Court Martial Appeal Court under s. 159.9 of the *Act.* The structure and function of military judges presiding at pre-trial custody review hearings under the *Act* are also quite different that those of a military judge performing judicial duties under s. 187 of the *Act.*

[26] In a case involving an accused where his or her rights to make full answer and defence under s. 7 and 11(*d*) under the *Charter* may have been violated, there is no doubt that the only judge than should be allowed to examine these issues must be the trial judge at the moment that he or she considers appropriate. In my respectful view, a military judge presiding at a hearing under s. 187 of the *Act*, other that the judge assigned to preside at the court martial that has been convened, who would decide to make a ruling on a constitutional issue and potentially invalidate legislation—where such a ruling could not be subject of an appeal—would, clearly exceed its jurisdiction.

[27] It does not mean that a military judge hearing a preliminary application pursuant to s. 187 of the *Act*, other than the trial judge, should refrain to exercise jurisdiction in contexts other that alleged *Charter* violations. It is a common practice in other criminal and penal jurisdictions that a judge, other that the trial judge, will hear preliminary applications on specific matters and his or her decisions are binding on the trial judge. However, these situations are expressly provided in legislation or valid statutory instruments[7].

[28] Although the ruling made by a military judge—other than the trial judge—at a preliminary proceedings brought under. 187 of the *Act* is binding on the parties, I find no comfort, and it is of little assistance to the litigation process, in a legislative or regulatory framework that does not assist the parties to know in advance whether a particular question, matter or objection can be properly litigated before an application judge other than the trial judge. I would respectfully suggest that for matters other than the scheduling and the location of an upcoming court martial, the subjects of these applications—or in the alternative the principles and factors to determine the

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[7]See *Code of Penal Procedure*, R.S.Q., Chapter C-25.1, ss. 169, 174 and 196 that apply to judges of the Court of Québec.

admissibility of these applications—I submit that it should be clearly enunciated in the *National Defence Act* or regulations made under that *Act.* There are policy considerations that should be the subject of discussions. For example, should a military judge, other than the trial judge, hear preliminary applications for matters specifically covered in art 112.05 of the *QR&Os* such as a motion for further particulars or separate trials? One should also consider whether a particular ruling should be the subject of a subsequent appeal or review by the Court Martial Appeal Court. If so, it should also be prescribed in the *Act.*

Disposition and Conclusion

FOR ALL THESES REASONS:

[29] I conclude that a military judge presiding at a hearing pursuant to s. 187 of the *National Defence Act*, other that the judge assigned to preside at a court martial that has been convened, is not a court of competent jurisdiction to decide a motion that challenges the constitutionality of a statute and grant a remedy under s. 24(1) of the *Charter* and a declaration of invalidity under s. 52 of the *Constitution Act*. This function rests entirely with the military judge assigned to preside at the court martial that has been convened, i.e., the trial judge.

[30] I do not have to answer to questions 2, 3 and 4.

[31] The application is dismissed. Should the applicant decide to do so, he may wish to bring this matter to the military judge assigned to preside at the court martial once the proceedings will have commenced.

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