**COURT MARTIAL**

**Citation:** *R. v. Semrau*, 2010 CM 1007

**Date:** 20100205
**Docket:** 200945

General Court Martial

Asticou Centre courtroom
Gatineau, Québec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Capt Semrau, Applicant**

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

---

**REASONS FOR DECISION RELATING TO AN APPLICATION PURSUANT TO S. 191 OF THE *NATIONAL DEFENCE ACT* AND ARTICLE 112.03 AND 112.05(5)(E) OF THE *QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES* THAT THE SS. 139 TO 149.2 AND 195 OF THE *NATIONAL DEFENCE ACT* VIOLATE SS. 7, 11(*D*), AND 12 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS***

(Orally)

## INTRODUCTION

[1] On 5 January 2010, the Applicant filed a notice of application stating that he would make an application challenging the constitutionality of the sentencing regime set out in the *National Defence Act*. The applicant advances that this sentencing regime infringes on his rights that are protected under ss. 7, 11(*d*), and 12 of the *Canadian Charter of Rights and Freedoms*. The applicant is charged with four offences under the *National Defence Act*, two of which contrary to the *Criminal Code*. The first charge relates to the offence of second degree murder contrary to subsection 235(1) of the

*Criminal Code*, whereas the second charge refers to the offence of attempt to commit murder using a firearm contrary to paragraph 239(1)(*a*.1) of the *Code*. The applicant is also charged under s. 93 of the *National Defence Act* for disgraceful conduct, and under s. 124 of the said *Act*, negligent performance of duties. These charges arose during an alleged event in Helmand Province, Afghanistan, that would have occurred on 19 October 2008. The current application is brought as a preliminary proceedings, prior to entering a plea to the charges.

## THE EVIDENCE

[2] The evidence before this court consists of the facts and matters under s. 15 of the Military Rules of Evidence for which the court has taken judicial notice, as well as extracts from the Lamer Report on the subject of the sentencing regime under the *National Defence Act*.

[3] Both parties have provided oral and written submissions.

## POSITION OF THE PARTIES

*The Applicant*

[4] The applicant alleges that his rights protected under s. 7, 11(*d)*, and 12 of the *Canadian Charter of Rights and Freedoms* are violated by the failure to include in the Scale of Punishments under s. 139 of the *National Defence Act* many of the punishments included in Part XXIII of the *Criminal Code*. Counsel for the applicant argues that this inability for military tribunals to use these various sentencing measures prevents military accused from receiving fair and just sentences. He further argues that there is no compelling military rationale that the full range of punishments available in the *Criminal Code* cannot be included within the existing punishments in s. 139 of the *National Defence Act*. As a remedy, he asks this court to order a stay of proceedings or to terminate the proceedings. The applicant seeks also a declaration of unconstitutionality under s. 52 of the *Constitution Act* or a remedy under s. 24(1) of the *Charter*.

*The respondent*

[5] The respondent submits that the application should be dismissed because the applicant has no standing to raise this matter at this stage, and that such issue would be premature as the applicant is presumed innocent and that the sentencing regime does not apply at this stage. If the court disagrees, the respondent submits that the applicant has failed to establish on a balance of probabilities that the sentencing regime under the *National Defence Act* violates the rights of the applicant under ss. 7, 11(*d*), and 12 of the *Charter*.

## DECISION

[6] The Court considers that the applicant has standing to raise the issue of constitutionality of the sentencing regime under the *National Defence Act*. However, it is recognized that, except in rare cases, a substantive challenge in a criminal case should be

heard at the end of a trial. But where issue will affect how the trial unfolds, it may be appropriate to deal with the challenge before trial, such as where there is a challenge to a reverse onus provision.

[7] The issue raised by the applicant does not fall within that second category. Wherever possible, courts should not decide constitutional issues that are not necessary to resolve the case. The punishments available to a court martial pursuant to s. 139 of the *National Defence Act*, in order to determine what is a fit and proper sentence, do not come into play before an accused person has been found guilty of a service offence.

[8] The issue raised by the applicant is premature. A court, properly seized with the matter, could conclude that s. 139 of the *National Defence Act* does not violate the rights of the accused under the *Charter*. A court could also find that a violation exists and that it affects the totality of the sentencing regime or any part of it, in all or in some specific circumstances. These conclusions could only be made after one or more findings of guilty are entered at the conclusion of the trial.

*Conclusion*

[9] For all these reasons, the application is dismissed, but leave is granted to the applicant to raise and argue fully this matter again, with any modification required, should the court be required to determine sentence under s. 193 of the *National Defence Act*.

COLONEL M. DUTIL, C.M.J.

---

**Counsel:**

Lieutenant-Colonel J.A.M. Léveillée, Major A.M. Tamburro, and
Captain T,K, Fitzgerald, Canadian Military Prosecution Service
Counsel for Her Majesty The Queen (Respondent)

Lieutenant-Colonel J.M. Dugas and Major S.E. Turner,
Directorate of Defence Counsel Services
Counsel for Captain R.A. Semrau (Applicant)