Citation: *R. v. Master Seaman R.J. Middlemiss,* 2009 CM 1001

Docket: 200857

GENERAL COURT MARTIAL
CANADIAN FORCES SUPPORT UNIT COLORADO SPRINGS
COLORADO SPRINGS, COLORADO
UNITED STATES OF AMERICA

Date: 6 January 2009

PRESIDING: COLONEL M. DUTIL, C.M.J.

MASTER SEAMAN R.J. MIDDLEMISS
(Applicant)
v.
HER MAJESTY THE QUEEN
(Respondent)

DECISION RESPECTING AN APPLICATION 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 S. 7 AND S. 11(*d*) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

(Rendered orally)

INTRODUCTION

[1] The applicant has made an application on 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* (the *Charter*) and that these violations cannot be demonstrably justified under s. 1. The applicant also advanced an alleged breach of his rights under s. 15 of the *Charter* in his written submissions, but he did not provide any substantive submissions in writing or orally in support of such breach. The applicant submits that the sum of violations

warrants that the court terminates the proceedings of this General Court Martial or such other relief as this court would find just an appropriate. The court heard the application in the Military Courtroom located in Gatineau, Quebec on 12-13-14 November and 15-16 December 2008 in absence of a court martial panel. This court now resumes at the Peterson Air Force Base in Colorado Springs.

THE EVIDENCE

[2] The evidence before this court consists of the following:

(1) the facts and matters that the court took judicial notice under section 15 of the Military Rules of Evidence, including the *National Defence Act*, Volume I (Administration) and Volume II (Discipline) of the *Queen's Regulations and Orders for the Canadian Forces*; Canadian Forces Administrative Orders (CFAOs), 2-8 (Reserve Force-Organization, Command and Obligation to Serve); CFAO 11-9 (Commissioning from the Ranks Plan); CFAO 11-6 (Commissioning and Promotion Policy- Officers - Regular Force); and CFAO 49-4 (Career Policy - Non-Commissioned Members Regular Force);

(2) the testimony before the court of Mrs Simone Morrissey, the Court Martial Administrator, appointed under s. 165.18 of the *National Defence Act;*

(3) the testimony of Chief Petty Officer 2nd Class (CPO2) Larivée from the Directorate of Human Resource Information Management Output Products (DHRIM) within the Assistant Deputy Minister (Information Management) Group ; and

(4) the exhibits filed before the court by consent of the parties and for the limited purposes stated by the parties, including:

a. M2-3: Undated sample document by S.J. Blythe, Court Martial Administrator, to Select Panel for a General Court Martial addressed to DHRIM Help Desk;

b. M2-4: Undated document entitled, "CMA Guidelines on Selection of Panel Members for General and Disciplinary Court Martial," prepared by S.J. Blythe, Court Martial Administrator;

c. M2-5: A document dated 11 October 2006, entitled, "Aide Memoire on Selection of Panel Members for General Courts Martial or Disciplinary Courts Martial by M. Cotter, Court Martial Administrator;

d. M2-6: A request to DHRIM from Simone Morrissey for an ad hoc report with a list of inclusions and exclusions in September 2008;

e. M2-7: Two lists of 25 members from a randomly generated list of 9863 0fficers and 5345 Non-Commissioned Officers for this General Court Martial;

f. M2-8: The Court Martial Administrator, "Court Martial Panel Member Selection Criteria Worksheets" prepared for the members selected to sit as members and alternates for this General Court Martial;

g. M2-9: A Strength Summary Report, dated 2008-09-30 prepared by CPO2 Larivée at the request of Defence Counsel, and used during his testimony;

h. M2-10: A CD-ROM containing the various Jury Acts for the Provinces and Territories;

i. M2-11: The Judge Advocate General (JAG) Report for 2006-2007;

j. M2-12: A Canadian Forces publication entitled, "Duty with Honour- The Profession of Arms in Canada", 2003;

k. M2-14: A document entitled, "Military Justice at the Summary Trial Level," B-GG-005-027/AF-011, updated, September 14th, 2001;

l. M2-15: A document entitled "The Canadian Forces Non-Commissioned Members in the 21st Century (NCM Corps 2020)," January 2003;

m. M2-16: A document entitled, "Canadian Officership in the 21st Century (Officership 2020)," January 2003;

n. M2-17: DAOD 5031-8, (Canadian Forces Development Identification;

o. M2-22: A document entitled, "Clause by Clause Analysis" which provides the rationale for Clause 42 of Bill C-25 which became an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, Chapter 35, in force on 1 September 1999, including ss. 166 and 167, as they relate to the jurisdiction and composition of General Courts Martial;

p. M2-23: The Judge Advocate General Report for the period of 1 September 1999 to 31 March 2000.

q. M2-24: The Canadian Forces Personnel Appraisal System (CFPAS) Handbook;

r. M2-25: The CFPAS Word Picture Book;

s. M2-26: A document entitled, “Canadian Forces Non-Commissioned Member General Specification," A-PD-055-002/PP-002, 29 October 2003;

t. M2-27: CF MIL PERS INSTR 20/04 - Administrative Policy of Class "A", Class "B" and Class "C" Reserve Service, 1 December 2004, Amendment 5, 18 September 2008; and,

u. M2-28: Report of the Special Advisory Group on Military Justice and Military Police Investigation Services to the Prime Minister, March 25, 1997, hereafter the “Dickson I Report”.

[3] The testimony of Mrs Morrissey provided the following information. She performs her functions in the office of the Chief Military Judge. She described her main statutory role included the convening of courts martial and selecting and appointing panel members for General Courts Martial as the case may be. Mrs Morrissey stated that she somewhat acts as the Chief of Staff and comptroller to the Chief Military Judge as well as her other prescribed duties under the statutory framework. She testified as to her knowledge of the Canadian Forces, including its administrative and legal aspects as a result of her extensive career as an officer in the field of human resources. She testified that her statutory duties use 50 to 60 per cent of her time, where her other functions fill the remaining of her schedule. Mrs Morrissey stated that the function of Court Martial Administrator does not require specialized training, but she found it helpful to have a background in human resources and administration. She described her extensive career as both a non-commissioned member and officer in the Canadian Forces, until her retirement in 2007 and accepting her appointment, as a civilian, as the Court Martial Administrator on 14 March 2007. She explained the method she uses for the selection of panel members in the case of a General Court Martial. First, she requests, twice a year, a randomly selected list of Canadian Forces personnel through the Directorate of Human Resource Information Management (DHRIM) based on a series of inclusions and exclusions criteria that she provides. The random list of members, generated by DHRIM with the exclusions has a row number by the name of each member using a Microsoft Excel Formula. She stated that her targeted population includes all active Regular Force personnel and personnel on Class "B" and "C" Reserve Service of a rank of captain and above and non-commissioned members of a rank of warrant officer and above. The following personnel are excluded: legal officers and military police officers, officer cadets, personnel with less than one year of service on Class “A” Reserve Service or CIC, personnel posted on foreign exchange or deployed operations outside Canada, personnel untrained, personnel on non-effective manning strength, personnel on non-effective overhead, personnel on terminal leave or leave of absence, personnel with any civilian or military conviction. She stated that the list generated by DHRIM meets the requirements of eligible members under the current legal regime. The list includes members from the three environments from across Canada: Army, Air Force and Navy

with no distinction based on gender, age, religion, sexual orientation, or ethnicity, race or colour. It contains approximately 700 pages of data listing over 15000 of eligible panel members who are identified only by number. The numbers mean nothing to her. On this topic, she referred to Annex C of Exhibit M2-5 which is an Aide Memoire for the Selection of Panel Members for General Courts Martial and Disciplinary Courts Martial that had been created and used by her predecessor in October 2006. She explained that she was in general agreement with the policies and practices developed by her predecessors Blythe and Cotter—and I refer to M2-3 to M2-5—with the exception that she now includes personnel on Class "B" Reserve Service because they are on full-time duty. Mrs Morrissey considers the documents prepared by her predecessors as guidance, but she recognized that they are out of date. She explained further that she matches up the list of randomly generated numbers to the row number on the list of individuals generated by DHRIM in order to create a new list of members. Mrs Morrissey then enters the contact information for each individual and calls the individual on her list generally in order from the top of her list. She then conducts an individual interview over the phone using a worksheet to have a record of the interview. When she reaches an individual she then conducts the interview to determine if the individual is eligible to serve on the court martial panel using the "Court Martial Panel Member Selection Criteria Worksheet," which can be found at Annex C of Exhibit M2-5. If there is no answer, she phones the next person on the list. She first explains to the person as to the role and duties of the Court Martial Administrator and why she contacts them directly and not through their chain of command. The interview then progresses using the worksheet. In response to counsel for the applicant, she stated that she does not ask a potential panel member whether he or she knows the military judge assigned to the court martial or counsel for the prosecution or defence. Mrs Morrissey testified that this issue could be raised in court. She also stated that she does not ask whether a potential member knew potential witnesses because she did not possess that information, nor did she ask a potential member if he or she had presided at a summary trial. In this particular case, the worksheets were produced in evidence under exhibit M2-8. The first page of the worksheet outlines 13 circumstances to exclude and the reference or authority to do so. It also tells the user, the Court Martial Administrator, the means available to verify the exclusions, i.e., through the random electronic selection method or the telephone interview or both. The Court Martial Administrator indicates on the worksheet the result of her verification. The second page of the worksheet sets out six additional reasons for which a potential member may be excused. There again, the Court Martial Administrator records the result of her interview on the worksheet and finally indicates her conclusion as to whether the individual is accepted or excluded. If a person is accepted, he or she is appointed as a member of the panel or as an alternate. This documentation is available to counsel upon request. Mrs Morrissey testified that in this case she excused the first name who appeared on the random list, Colonel O'Rourke, because she knew that he had served as a member of a court martial panel within the previous 24 months. She did not call him personally, but she annotated the random list of names to reflect that fact. She did not exclude any other potential panel member. The convening order dated 9 October 2008, marked as Exhibit 1 in these proceedings, indicates that the Court Martial Administrator

appointed the following personnel: Colonel Shaw as the senior panel member, and Major Brodhagen, Captain Wright, Chief Petty Officer Second Class Chippa and Warrant Officer Smith as the panel members. She also appointed two alternate panel members, Captain Morrison and Warrant Officer Hunter.

[4] Questioned by counsel for the applicant on her reasons to exclude personnel on Class "A" Reserve Service or personnel from the Cadet Instructor Cadre, CIC, Mrs Morrissey indicated that they are not on full-time service and she could not contact them easily without the assistance of their chain of command. She stated that members on Class "A" Reserve Service could not be compelled to serve as court martial panel members because they serve only on consent and on part-time basis. She explained that, to her knowledge, Class "A" reservists are mostly students, persons who have regular jobs, or retired personnel who have no intent to be employed on full-time service in the Canadian Forces. Finally, she added that she has no budget allocated to pay members who are on Class "A" Reserve Service who would consent to serve as a court martial panel member and that the funds would have to be absorbed by their unit. She also provided also her rationale for some of the exclusions provided to DHRIM when generating a random list. For example, Mrs Morrissey explained that persons deployed on foreign operations were excluded because it could cause hardship to the operations and that these members would not be available in a timely manner and they have duties sufficiently urgent and important to warrant their exclusion. However, these persons would become available, in any event, upon their return from operations. Concerning the exclusion of members with convictions, she stated that it was her intention to include members who would have received only minor punishments. She did not expand any further on this issue.

[5] CPO2 Larivée also testified during the application. In his testimony, CPO2 Larivée corroborated the testimony of Mrs Morrissey with regard to the request that they receive, generally twice a year, to generate a randomly selected list of personnel for court martial panel selection based on the information and the specific parameters for exclusions provided by the Court Martial Administrator. He explained how the lists were so generated and stated that he exercised no discretion in the process. CPO2 Larivée stated that he produced the reports with the information requested and forwarded them to the Court Martial Administrator. He stated that his directorate could provide a variety of information because it was possible to formulate the requests in many different ways, including the provision of a list that would include members on Class "A" Reserve Service. At the request of counsel for the applicant, he has prepared a document on 30 September 2008 entitled, “Strength Summary Report,” filed as Exhibit M2-9. The document provides, in numerical form, the effect of excluding the members in compliance with the instructions provided by the Court Martial Administrator. Significant examples include the exclusion of personnel on Class “A” Reserve Service, which reduced the pool of potential panel members by 2,561 persons; however, Chief Petty Officer 2nd Class Larivée could only state that these members where on unit strength, but he could not affirm whether they effectively paraded at their effective unit,

which could negatively affect the number provided. His testimony provided also that members excluded for having recorded convictions, regardless of their component, did amount to 3,085 persons. Of significance, the persons deployed on operations reduced the pool of potential candidates by a further 880 persons. The essence of Chief Petty Officer Larivée's testimony is captured by Exhibit M2-9. This summarizes the evidence before the court for the application. I will now move to the position of the parties with regard to this application.

POSITION OF THE PARTIES

The Applicant

Introduction

[6] 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 QR&Os for this General Court Martial. Alternatively, he relies on s. 7 of the *Charter* because this matter involves: (1) a potential deprivation of liberty; (2) principles of fundamental justice requiring procedural fairness in panel selection and, more generally, a fair trial and; (3) the necessary deprivation of these principles.

Improper Exclusion from the Pool-Representativeness

[7] Firstly, the applicant submits that the pool of potential eligible members under paragraph QR&O 111.03(3) is inappropriately reduced, through the automatic and arbitrary use by administrative personnel, in this case by CPO2 Larivée, in his capacity as Operations Chief of DHRIM Output Products, who is not members of the Court Martial Administrator's office, who does not have the discretionary powers of excusing members given exclusively to the Court Martial Administrator.[1] He submits that two examples of this problem are that eligible members of the Reserve Force—most importantly members on Class "A" Reserve Service, but also Rangers and CIC officers—are automatically excluded from consideration; and, personal on postings or on deployed operations outside Canada are automatically excluded, apparently without regard to whether or not they would be available at the time of trial; or, want to serve on a panel; and, without recourse to QR&O article 111.03(4)(*a*) or (*f*). In addition, he submits that the Court Martial Administrator exceeds its statutory authority in applying policies and practices mostly prepared by her predecessors for reasons of efficiency and practicalities and to create the least disruption to the operation of the Canadian Forces in a manner that overrides the regulatory framework. The applicant also submits that potential panel members are

[1] QR&O 111.03(4)

inappropriately excluded for minor service offences set out on their conduct sheets, whereas only members with service offences analogous to indictable offences should be excluded from panels by analogy with potential jurors across Canada. However, he submits that persons having received Presiding Officer Training to hold summary trials and 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.

[8] The applicant advances that although a military panel is not a jury, its members resemble jurors and should bring to the task the freshness of approach which is one of the benefits of the jury system. He submits that the purpose of QR&O article 111.03 is to obtain that type of representative cross-section of society, honestly and fairly chosen described by the Ontario Court of Appeal in *R. v. Church of Scientology of Toronto*[2].

[9] He further submits that the older view of panel trials expressed by the Court Martial Appeal Court in *R. v. Brown*[3], *R. v. Lunn*[4] and *R. v. Deneault*[5] are no longer relevant to the debate. The criteria utilized in those cases to distinguish panels from juries have been overtaken by events. The characteristics identified as similar—such as members are the sole judges of fact and must accept the instruction of the judge—remain; and, the differences said to demonstrate a *sui generis* system—such as majority verdict, passing sentence, and panel members being only officers—do not. The applicant rather relies on paragraph 7(2) of the decision of the House of Lords in *R. v. Boyd*, [2002] UKHL 31, to depict what represents a more accurate reflection of the modern role of court martial panels in Canada.

[10] The applicant argues that the representativeness, which is required in a jury flows not from the composition of the twelve members of the actual jury, but the pool from which they are drawn. The same principle would apply to court martial panel members. In support of his argument, the applicant relies on the remarks of Justice L'Heureux-Dubé in *R. v Sherratt*[6], where she stated at p. 525:

> The perceived importance of the jury and the *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place. Provincial legislation guarantees representativeness, at least in the initial array.

[11] He submits that the trial cannot properly take place after potential members have

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[2](1997) 116 C.C.C. (3d) 1.
[3][1995] CMAC 372.
[4](1993) 5 C.M.A.R. 157.
[5](1994) 5 C.M.A.R. 182.
[6][1991] 1 S.C.R. 509.

been improperly excluded, such as members on Class "A" Reserve Service, particularly in the context that they would represent an increase pool of available persons by more than 2000 persons, which is very significant. At this point, the necessary level of representativeness has been lost and the pool has been deprived on the necessary level of randomness. The applicant draws a parallel with the situation in the decision of the British Columbia Court of Appeal in *R. v. Butler*[7], where a new trial was ordered after it became evident that aboriginal persons might have been improperly excluded from the pool.

[12] The applicant submits that potential panel members need only be members of the Canadian Forces and that they are not required to be in the Regular Force or on Class "A" Reserve Service. He advances that there is no requirement that panel members must be on full-time service and capable of being ordered to attend a court martial, therefore making CF MIL PERS INSTR 20/04; and, the obligation to serve set out in CFAO 2-8 (Reserve Force - Organization, Command and Obligation to Service) irrelevant. The applicant finds significant that the Court Martial Administrator is a civilian, with no powers according to customs of the service or through legislation to order a panel members to attend a court martial, even where panel members are part of the regular force.

[13] The applicant further submits that the trial cannot proceed where the panel does not represent the composition of the pool demanded by QR&O article 111.03 and by ss. 167 and 168 of the *NDA*, which can only be composed of all officers and non-commissioned members of the Canadian Forces, who hold the necessary rank as set out in s. 167 of the *NDA*, and a member may only be excluded where that member, according to the applicant:

a. is currently serving, was serving at the time of the alleged commission of the offence, or will be serving during the period the court martial is expected to take place, in the unit of the accused (QR&O 111.03(3)(*b*));

b. is the immediate subordinate of another officer or non-commissioned member who has been selected as a member of the court martial (QR&O 111.03(3)(*c*));

c. will be on the Medical Patient Holding List or retirement leave during the period the court martial is expected to take place (QR&O 111.03(3)(*d*)); and,

d. has been convicted of a service offence or of an indictable offence under the *Criminal Code* or any other Act of Parliament, unless the officer or non-commissioned member has subsequently been granted a pardon (QR&O 111.03(3)(*e*).

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[7](1991) 63 C.C.C. (3d) 243. (Rendered on July 17, 1984)

Composition of a General Court Martial panel and ineligibility to serve (ss. 167 and s.168 of the *National Defence Act)*

[14] The second theme 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 (ss. 167 and 168 of the *Act*). The applicant submits that the practice in the Canadian Forces is now so similar to the civilian system of jury selection that, therefore, the same principles should apply. He reiterates that the previous rationale to validate panel trials expressed by the Court Martial Appeal Court in *R. v. Brown*[8], *R. v. Lunn*[9] and *R. v. Deneault*[10] is no longer applicable in the context of the recent evolution of the military justice system. The criteria utilized in those cases to distinguish panels from juries would have been overtaken by events to the point that these provisions violate directly the rights of an accused person under ss. 7 and 11(*d*) of the *Charter*. The characteristics identified as similar—the members are the sole judges of fact and must accept the instruction of the judge—remain; and, the differences said to demonstrate a *sui generis* system—the majority verdict, the passing sentence and panel members being only officers—do not. He notes however that despite certain similarities, the courts martial do not provide for peremptory challenges and impose significantly more narrow criteria for eligibility. Therefore, unlike a military panel, the composition of a civilian jury remains the same, regardless of the class, position, education or importance of the accused. The applicant submits that differences in selecting panel members from selecting jury members must be analyzed and a military rationale, if not set out in the legislation itself, must be identified. He further submits that the purpose of this application is not to override s. 11(*f*) of the *Charter*, but to bring it into conformity with existing doctrine. The evolution of the military justice system has undermined the *sui generis* nature examined in the previous cases by the Court Martial Appeal Court and General Courts Martial are now composed of panels that resemble five person juries.

[15] The applicant submits also that s. 167 of the *National Defence Act* and QR&O articles 111.03 and 111.04 are unconstitutional on the basis that officers below the rank of captain and non-commissioned members below the rank of warrant officer are inappropriately excluded for reasons that have no compelling military rationale in modern times, and, in the further alternative, that there is no logical or military rationale for changing the rank composition of the panel according to the rank of the accused. The applicant relies on the remarks made by the late Chief Justice of Canada, where he reviewed s. 165.14 of the *National Defence Act* contained in *The First Independent Review by the Right Honourable Antonio Lamer* (*Lamer Report*) where he stated:

> To look at the rank of an accused as one of the factors governing the type of court martial to be convened is contrary to the modern-day spirit of equality before the law. There must be a military justification important enough to justify this

[8](1995) 5 C.M.A.R. 280.
[9]*Supra*, note 4.
[10]Supra, note 5.

different treatment.

[16] The applicant finds no logical reason to ensure that accused officers have panels members more closely based on their own rank than non-commissioned members. The current regime based on rank of panel members and on the rank of the accused does create the appearance of two tiers of justice: officers being more important and receiving the benefit of the higher tier of the military population, where non-commissioned members would be tried only by a minority of non-commissioned members on the panel. He argues that members currently ineligible to serve on court martial panels would otherwise qualify for service in a jury in criminal court in similar matters particularly in the context offences prosecuted under s. 130 of the *National Defence Act* for ordinary criminal offences. Relying on recent Canadian Forces doctrine—see in particular Exhibits M2-12, M2-15 and M2-17—the applicant cannot foresee any 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 status or rank in the regular or reserve component.

[17] The applicant further submits that panel members are now only trier of facts and they are not performing 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. He notes that during this period, the role of non-commissioned members in the Canadian Forces has also evolved. In substance, the panel of a General Court Martial must now be composed of persons from a pool that would include all members of the Canadian Forces. Otherwise, the rights of an accused under s. 11(*d*) are violated.

Panel Selection should be made in the presence of the accused

[18] The last main theme raised by the applicant concerns a violation of the rights of the accused because the current process does not provide a mechanism that would include him or her in the selection of a court martial panel. The applicant submits that the powers granted to the Court Martial Administrator under QR&O article 111.03(4) 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 array. The latter has been found to be part of the trial, which directly affects the vital interests of the accused, despite that fact that, for most purposes, the trial has not formally commenced at this point. The applicant relies on the following decisions of the Supreme Court of Canada to illustrate his view: *R. v. Barrow* (1987), 38 C.C.C. (3d) 193 (S.C.C.); in *Basarabas and Spek v. The Queen*, [1982] 2 S.C.R. 730, at pp 8-9; and, in *Tran v. The Queen*, [1994] 2 S.C.R. 951. He advances that just as an accused should not have to rely on the exemplary conduct of the prosecution for protection of basic rights, it should not be necessary to rely on the exemplary conduct of the Court Martial Administrator. Therefore he must be present

where the selection process takes place, particularly in the context where the Court Martial Administrator gave evidence that she is also the Chief of Staff of the Chief Military Judge, who assigns the trial judge, and who may, in fact, be the trial judge. In his written submissions, the applicant argued that the importance that the Court Martial Administrator should not be in a position to make decisions affecting the interests of the accused, directly or indirectly, outside the courtroom, in the absence of the accused and in circumstances where no public record of any action taken by the Chief Military Judge would necessarily be made.

Remedies Sought

[19] The applicant seeks several remedies from this court. He asks this court to provide various forms of constitutional remedies under s. 52 of the *Constitution Act* with regard to ss. 167 and 168 of the *National Defence Act* and QR&O article 111.03. In addition, he asks that the court terminate the proceedings of this court martial on the same basis as a mistrial as it could not utilize the panel presently selected and lacks the tools to properly select another panel. However, the applicant submits that should this court find that ss. 166 through 168 of the *National Defence Act* and QR&O article 111.03 do not meet the requirements of ss. 11(*d*) or 7 the *Charter,* and that correcting the problems would violate the separation of powers and usurp the role of Parliament, the applicant seeks a stay of proceedings.

[20] Finally, the applicant seeks an order that would read in that any provisions purporting to authorize a potential panel member to be excused on a discretionary basis be exercised only in court, in the presence of the accused. Alternatively, an order that the provisions purporting to authorize the Court Martial Administrator to excuse potential panel members on a discretionary basis be completely documented and that such documentation be provided to counsel prior to the commencement of each trial.

The Respondent

Introduction

[21] The court will now move to the submissions by the respondent. The respondent submits that the application should be dismissed. She circumscribes the applicant's arguments into three questions:

1. Does the manner in which the Court Martial Administrator appoint court martial panel members violate ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. Does the provision that prohibits the Court Martial Administrator from appointing a convicted person as a member of a court martial panel found at subparagraph 111.03(3)(*e*) of the QR&O violate ss. 7 or 11(*d*) of the *Charter*?

3. Do the provisions regarding the ranks of court martial panel members found in ss. 167 and 168 of the *National Defence Act* violate ss. 7, 11(*d*), or 15 of the *Charter*?

[22] The respondent submits that the manner in which the Court Martial Administrator appoints court martial panel members does not violate ss. 7 or 11(*d*) of the *Charter*. For each General Court Martial, the Court Martial Administrator selects the panel members in accordance with the relevant provisions of the QR&Os. She excludes all individuals who must be excluded. Further, she would appropriately exercise her discretion to excuse some individuals who may be excused while including all individuals who may reasonably be included. Above all, the respondent submits that she selects the panel members using random methodology without partiality, favour, or affection. In short, the manner in which the Court Martial Administrator appoints the members of a panel is such that the resulting panel may reasonably be perceived as independent and impartial.

[23] The respondent further submits that the QR&O provision that prohibits the Court Martial Administrator from appointing a convicted person as a member of a court martial panel does not violate ss. 7 or 11(*d*) of the *Charter*. To that extent, the respondent refers to similar provisions found in provincial jury Acts and the lack of convicted persons on court martial panels could not objectively, from the perspective of a reasonable person informed, lead to the perception of partiality.

[24] Finally, she submits that the *NDA* provisions regarding the ranks of court martial panel members do not violate ss. 7, 11(*d*), or 15 of the *Charter*, as persons tried before military tribunals do not have the right to the benefit of trial by jury under s. 11(*f*) of the *Charter*. She submits that 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 whose training is designed to ensure that they are sensitive to the need for discipline, obedience, and duty on the part of the members of the military and to the requirement for military efficiency. She further argues that unlike the case in contemporary civilian society, rank-based divisions continue to play an important part in military culture and are inherent in the hierarchical structure of the Canadian Forces. Again, she refers to the reasonable and informed person fully appraised of the realities of service life, who arguably would conclude that court martial panels based on rank do not lead to the perception of partiality.

[25] The respondent submits that the applicant is attempting to have this court grant a right that is not provided by the *Charter*; that is, to provide the accused with a jury trial. She argues that the applicant's submissions amount to an argument that any process that varies from the jury selection process is unconstitutional. The respondent submits that s. 11(*d*) cannot be read to override s. 11(*f*), which expressly excludes giving the applicant a right to a civilian jury trial. She strongly argues that the Court Martial Appeal Court has recognized for many years that a military trial with a panel is not, in the military context,

intended to be, nor is it, tantamount to a trial by jury in the civilian context. She invites the court to consider the decisions of the Appeal Court in *R. v. Lunn* (1993) 5 C.M.A.R. 157; *R. v. Deneault* (1994), 5 C.M.A.R. 182; and *R. v. Trepanier*, 2008 C.M.A.C. 3 on this issue.

The manner in which panel members are appointed

[26] The respondent submits that the applicant's argument related to s. 11(*d*) and his cases are associated with the right of a Canadian civilian to a representative jury. She further submits that should the court accept that there are some parallel aspects between a military panel and jury, it should recognized that there are appropriate practical limitations to including all members of the Canadian Forces as potential panel members. The respondent refers to the testimony of Mrs Morrissey concerning the deployments and service outside of the country and the limitations on service for reserve force members serving on Class "A" terms of service, most of whom serve evenings and weekends while holding a regular day job or attending school, are practical limitations. She states that it would be inappropriate to expect that the military should call members from all over the world to sit on General Courts Martial. The respondent suggests that military operations in a theatre such as Afghanistan would be negatively affected by a requirement for individuals to return to Canada to sit on a court martial panel.

[27] The respondent submits that the Court Martial Administrator performed her duties in this case in accordance s.165.19 of the *National Defence Act* and Chapter 111 of the QR&Os. She argues that the list of exclusions provided to DHRIM to obtain a random list fell within the ambit of the *Act* and applicable regulations. In particular, she refers to the list of exclusions found at Exhibit M2-6, which can all be linked to a specific legislative or regulatory provision. The respondent further submits that there is no delegation of authority by the Court Martial Administrator. She alleges that the testimony of Chief Petty Officer 2nd Class Larivée, as well as the documentary evidence, show that DHRIM merely produces a report in accordance with the instructions provided by the Court Martial Administrator. The exercise of discretion rests entirely with the Court Martial Administrator.

[28] As to the alleged improper exclusion of members on Class "A" Reserve Service, the respondent submits that Reserve Force members are neither "eligible" nor "unlawfully excluded". She refers to the testimony of Mrs Morrissey who said that she has no authority to compel members on Class "A" Reserve Service and she excludes them from the list that is generated by DHRIM. The respondent argues that they serve only with their consent, on a part time basis and that they usually have regular civilian employment or are students. The respondent submits that in light of their non-compellability under s. 33 of *the National Defence Act*, Reserve Force members on Class "A" terms of service are not eligible to sit as panel members.

[29] With regard to the applicant's submission that the Court Martial unlawfully excludes deployed personnel, the respondent submits that the Court Martial Administrator properly applies her discretion to exclude deployed persons on the basis that they have "duties sufficiently urgent and important to warrant" not being appointed to a court martial panel as permitted under QR&Os 111.03(4)(*a*) and 111.03(4)(*f*). These deployed members are only excluded from the list during the period of their deployment, therefore their exclusion is only temporary.

[30] The respondent also addressed the allegations of the applicant that officers having qualified as presiding officers are inappropriately included in the pool. She argues that presiding officer training provides only a certification by the Judge Advocate General that the member is qualified to perform the duties of a presiding commanding officer or delegated officer. The training confers no status on the recipient. The authority to preside over summary proceedings is based on appointment as a commanding officer, superior commander, or delegated officer. The training and certification provides a commanding officer, or delegated officer, with the knowledge and skill necessary to perform the duties in administering the Code of Service Discipline at the summary trial level. She further advances that as many panel members will likely have completed presiding officer training at some point during their career, the risk of undue influence by members with such training is minimized. The respondent submits that it must also be remembered that courts martial serve the purpose of enforcing discipline in the Canadian Forces and that the court martial panel is composed of those members responsible to enforce it, and, as such, these members must have the requisite knowledge of the Code of Service Discipline. She notes also that excluding all members who have completed a short presiding officer training course from participation as panel members in courts martial, would make a significant portion of the officer corps permanently unavailable for this duty. The respondent considers this element to be a significant difference between a court martial and a trial by jury.

The Exclusion of Members with Records of Conviction

[31] The respondent answers to the applicant with regard to the exclusion of members with record of convictions and submits that individuals with records of conviction are properly excluded by law; however, this is not a permanent exclusion. She argues that the

exclusion applies until their record of conviction is expunged either by way of a pardon or the operation of the DAOD 7006-1 (Preparation and Maintenance of Conduct Sheets). She points to the notable differences in various provincial jury legislation to illustrate that these exclusions are not typically limited to persons convicted of indictable offences.

The composition of the panel based on rank

[32] The respondent also submits that ss. 166 and 167 of the *National Defence Act* meet the constitutional threshold. She states that, contrary to the submissions of the applicant, there is a military rationale for excluding officers below the rank of captain and NCMs below the rank of warrant officer from panels: lieutenants and sergeants simply do not have sufficient training and experience to make rational and informed decisions vis-à-vis military justice. In support of her views, she refers to the remarks of Chief Justice Lamer in *R. v. Généreux*[11], with regard to court martial panel members:

> [T]heir training is designed to insure [*sic*] 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 addition, the respondent submits that given the degree of hierarchy within the Canadian Forces, it is counterintuitive to expect that subordinates should stand in judgement of their superiors. She concludes that there is a military necessity and logical basis for the fact that the composition of a panel is determined by the rank of the accused person.

[33] Finally, the respondent addresses the applicant's allegation that members of the Canadian Forces without the necessary rank are excluded, although they would qualify for service on a civilian jury in regard to the same type of charges, in violation of s. 15 of the *Charter*. She submits that if the applicant claims that certain members are deprived of their rights to participate on a court martial panel, such right would be a personal right and as the applicant did not claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the *Charter*, this claim should be dismissed.

DECISION

Legal Analysis

[34] The court will address the issues raised in this application in examining the following questions:

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[11] [1992] 1 S.C.R. 259, at p. 295.

4. Do the provisions regarding the composition of the panel of a General Court Martial based on the rank of the accused and the ineligibility of officers below the rank of captain and non-commissioned members below the rank of warrant officer to serve as panel members found in ss. 167 and 168 of the *National Defence Act* violate ss. 7, 11(*d*), or 15 of the *Charter*? In the affirmative, are they reasonable limits in a free and democratic society and justified under s. 1 of the *Charter*?

5. Does the procedure set out in article 111.03 of the QR&O and the methods and practices used by the Court Martial Administrator to appoint panel members and alternates at a General Court Martial violate ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*? In the affirmative, are they reasonable limits in a free and democratic society and justified under s. 1 of the *Charter*?

6. If the answer to the second question is answered negatively, does the exclusion of certain categories of persons not expressly mentioned, such as members on Class "A" Reserve Service, from the pool of eligible persons to be randomly selected by the Court Martial Administrator fall within the ambit of article 111.03 of the QR&O? If the answer to this question is no, did these exclusions constitute an abuse of authority or an improper use of discretion by the Court Martial Administrator that violated the rights of Master Seaman Middlemiss under ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

The composition of a General Court Martial based on the rank of the accused and the ineligibility of officers below the rank of captain and non-commissioned members below the rank of warrant officer to serve as panel members (ss. 167 and 168 of the *National Defence Act*)

[35] There is no issue with the fact that many aspects of the military justice system and the system of courts martial in Canadian military law has evolved significantly over the recent years and will continue to evolve as part of the broader Canadian legal system of courts and tribunals. This evolution will abide by the values set out in the *Charter* and likely reflect to some degree the evolution of the Canadian criminal law. This application challenges one of the particularities of the General Court Martial that has yet to be aligned more closely with the rules applicable in Canadian criminal courts, such as a finding of guilty or not guilty by the unanimous vote of its members[12]. The *National Defence Act* only allowed the presence of non-commissioned members not below the rank of warrant officer to serve as panel members in 1998, when the current ss. 167 and 168 were enacted. This change was prompted, at least in part, by the intent of the Government of Canada to have court martial panels that better represents the personnel for the maintenance of discipline, efficiency and morale.[13]

[12] S. 192(2) of the *National Defence Act*.
[13] See Exhibit M2-22.

[36] The applicant submits that composition of a court martial panel based on rank violate the rights of an accused to a fair trial before an independent and impartial tribunal under s. 11(*d*), because it lacks the required level of representativeness in the context of the role and duties of court martial panel members that have now become, in practical terms, a jury composed of five persons. He asks this court to set aside the decisions of the Court Martial Appeal Court that validated panel trials and delivered prior to 1998, i.e., *R. v. Brown*[14], *R. v. Lunn*[15] and *R. v. Deneault*[16].

[37] In *R. v. Généreux*[17], Chief Justice Lamer, as he then was, made the following remarks in the context of the nature of military tribunals and the necessary association between the military hierarchy and the military tribunals, at pp. 294- 295:

> 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 [sic] 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.

He then continued at p. 296 and provided his view with regard to interplay between s. 11(*d*) and 11(*f*) of the *Charter*:

> 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

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[14] *Supra* note 8.
[15] *Supra* note 4.
[16] *Supra* note 5.
[17] *Supra* note 11.

. . .

> (*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.

And then he continues:

> 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.

[38] This court holds the view that these remarks are still relevant for the determination of this application. In *R. v. Brown*[18], Hugessen J.A, delivering the reasons for the Court Martial Appeal Court, reemphasized that military panel courts are not jury trials in the context of an alleged infringement of the presumption of innocence under s. 11(*d*) of the *Charter* in absence of a requirement of unanimity to support a court martial's finding. He stated, at pp. 290-291:

> Whatever may be the constitutional position with regard to the requirement of unanimity in a jury verdict, and whether or not such requirement is *Charter* protected, it is clear that a court martial is not a jury and that its role and functions are different from those of a jury. In *R. v. Lunn* (1993) 5 C.M.A.R. 157, Mahoney C.J., for the Court, said:
>
> > A Disciplinary Court Martial does share the 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 can take judicial notice of matters peculiar to their community to a generous extent not permitted to jurors; they find guilt or acquit by majority vote and they, not the judge advocate, pass sentence. When the right to trial by a 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. [At page 164]
>
> Although the Chief Justice's remarks were specifically directed to the disciplinary courts martial, there can be no valid distinction made for these purposes between disciplinary and general courts martial...

[18] *Supra* note 3.

[39] These remarks highlight several important aspects of the role and function of a military panel that differed from a jury at a criminal trial that have since ceased to exist. Except for matters for which a panel could take judicial notice to an extent not permissible to a jury, panels for General Courts Martial now include non-commissioned members of the rank of warrant officer or above for the trial of a non-commissioned member, although those they try are still not necessarily their peers; the military judge determines the sentence; and the panel decides its verdict by a unanimity vote. In addition, I would note that the accused now enjoy the right to choose the type of court martial in a manner that bears significantly with the regime provided in the *Criminal Code*[19]. These most recent amendments to the *National Defence Act* were in direct response to the decision of the Court Martial Appeal Court in *R. v. Trepanier*[20], delivered on 24 April 2008, where Létourneau J.A., for a unanimous Court, declared that ss.165.14 and 165.19(1) of the *National Defence Act* and their counterpart, article 111.02(1) of the QR&O, which gave the prosecution exclusive power to unilaterally choose the type of court martial before which trial would take place, violated s. 7 and the right to fair trial guaranteed by s. 11(*d*) of the *Charter*, and pronounced a declaration of invalidity for the impugned provisions. In *Trepanier*[21], the court provided some background as to the Canadian military legal system at paragraphs 23-26:

> [23] The military justice system in Canada has taken the opposite direction and expanded over time. First, notwithstanding its derogatory nature and the right of every individual to equality before and under the law pursuant to section 15 of the *Charter*, its constitutional legitimacy and validity have been affirmed by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259.
>
> [24] Second, even the Charter recognized the existence of the courts martial by denying in paragraph 11f) the right to a jury trial to an accused tried before a military tribunal for an offence under military law.
>
> [25] Third, at one time the jurisdiction of the courts martial was clearly conditional on the existence of a military nexus. In other words, the offence had to be "so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service": see for example *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 410; *Ionson v. R.* (1987), 4 C.M.A.R. 433; and *Ryan v. The Queen* (1987), 4 C.M.A.R. 563. Indeed, in *R. v. Brown* (1995), 5 C.M.A.R. 280, at page 287, the Court Martial Appeal Court unanimously reasserted as a matter now "well settled that the exception to the guarantee of the right to a jury trial in paragraph 11f) is triggered by the existence of a military nexus with the crime charged".
>
> [26] In the following year, however, our Court ruled in *R. v. Reddik* (1996), 5 C.M.A.R. 485, at pages 498-506, that the notion of military nexus has no place when the debated issue is one of division of constitutional powers. In that context,

[19] See ss. 165.191 to 165.193
[20] (2008) 232 C.C.C. (3d)498; 2008 CMAC 3
[21] *Ibid.*

> the Court found that the concept was misleading and distracted from the issue. Finally, in *R. v. Nystrom*, supra, our Court narrowed the scope of the ruling in the *Reddick* case and left for another time the determination of the need for a military nexus which, according to the *Brown* case, appears to be a prerequisite under paragraph 11f) of the *Charter*. We hasten to add that the existence of a military nexus is not in dispute in the present instance.

[40] Like in many other cases dealing with the rights of a military accused person under the *Charter,* it is not only appropriate but often necessary to provide the court with analogies and make useful comparisons with the civilian criminal justice system. Again in *Trepanier*[22], counsel for the intervener drew what the court considered to be a useful comparison with jury trials before civilian courts before Létourneau J.A. made the following remarks promptly, at paragraphs 73-74:

> [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.

[41] After having provided the abovementioned history and stressed the importance of jury trials in criminal law, as well as the history of courts martial in Canada, the court 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 11f) of the *Charter*, of

[22] *Ibid.*

> 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.

[42] The views recently expressed by the Court Martial Appeal Court in *Trepanier* indicate clearly that the long established principle that General Courts Martial composed of mostly officers are not jury trials still applies. In addition, the Court Martial Appeal Court clearly indicates that the fairness of a trial before an independent and impartial tribunal composed by mostly officers in the context of military law is not diminished below the constitutional threshold. The court also rejects the applicant's submission that officers who have received a presiding officer training course to conduct summary trial should be excluded from the pool of eligible candidates. Firstly, the exclusion of all members who have completed a short presiding officer training course from participation as panel members at courts martial, would indeed make a significant portion of the officer corps permanently unavailable for this duty. Secondly, these officers are clearly included in those persons who are responsible for the discipline and morale of the military that makes the General Court Martial *sui generis*. Officers having received presiding officer training are not legally trained to the extent that would make them unsuitable to serve in a jury. This argument has no merit.

[43] Despite its genuine interest from an academic legal perspective in the context of a violation of s. 11(*d*) of the *Charter*, the applicant's submissions to the effect that a court martial panel resembles so more closely now to a jury in a criminal court that every principle applicable to a jury trial should now apply to the composition of the panel, are not compelling and they would mostly serve to embark on what the Court Martial Appeal Court considered a sterile attempt of looking at the similarities and dissimilarities that exist between a General Court Martial and a trial by jury.

[44] The applicant also relied on s. 7 of the *Charter* during his submissions. In the context of a challenge to the fairness of his trial by General Court Martial, the court does not believe that s. 7 offers greater protection, in this particular context, than the specific rights guaranteed under s. 11(*d*) because the applicant's submissions fall clearly within s. 11(*d*). Therefore, his argument is not strengthened by the broader language of s. 7.

[45] The applicant timidly relied on an alleged violation of his rights under s. 15 of the *Charter* in his written submissions. As I said previously, he did not expand on this issue and did not offer any substantive arguments in its support during his oral presentation. The respondent addressed the applicant's allegation that members of the Canadian Forces without the necessary rank are excluded, although they would qualify for service on a civilian jury in regard to the same type of charges, in violation of s. 15 of the *Charter*. As I said before, she submitted that if the applicant claims that certain members are deprived of their rights to participate on a court martial panel, such right would be a personal right; therefore, as the applicant did not claim to be a member of a

"discrete and insular minority" so as to bring himself within the meaning of s. 15 of the *Charter*, this claim should be dismissed. I agree. The applicant has not demonstrated that the law limiting the composition of a panel based on rank creates a distinction based on an enumerated or analogous ground; and that such distinction creates a disadvantage by perpetuating prejudice or stereotyping.

[46] It does not mean, however, that the current framework governing the composition of a General Court Martial panel cannot be improved or opened to a broader pool of eligible officers and non-commissioned members for legitimate policy considerations. This court believes that the comments made by Létourneau J.A. in *Trepanier*[23], are relevant despite the fact that some issues have now become moot:

> [111] The General and the Disciplinary Court Martials possess unique features. The composition of the panel varies according to the status and rank of the accused. Thus, on a General Court Martial, all the members of the panel must be officers if the accused has a status of officer. Then the rank of the members of the panel will vary according to the rank of the accused...
>
> ...
>
> [113] At the choice of the prosecution, are junior officers in the Canadian Forces less deserving of protection with a trial by a panel of three members, or no panel at all before a judge alone, than senior officers with a panel of five senior ranking officers? Should junior officers, at the choice of the prosecution, be possibly subjected to less equality before and under the law than more senior officers? It is disturbing that in 2008 these questions can still be asked and that these possibilities still exist under the *NDA* when our Charter promoting equality before and under the law was enacted in 1982 and, on this particular point, came into effect in 1985, nothing less than 23 years ago.

I understand that some issues may have become moot, but I find that those comments made by the Court Martial Appeal Court are relevant.

Does the procedure set out in article 111.03 of the QR&O and used by the Court Martial Administrator to appoint panel members and alternates at a General Court Martial violate ss. 7 or 11(d) of the *Canadian Charter of Rights and Freedoms*? In the affirmative, are they reasonable limits in a free and democratic society and justified under s. 1 of the *Charter*?

[47] The second main issue of this application concerns the legality of the procedure set out in article 111.03 of the QR&O and used by the Court Martial Administrator to appoint panel members and alternates at a General Court Martial. The court believes that this broad topic includes the determination as to whether the accused should be present at any stage of the selection process of the eligible candidates to be appointed as members or alternates at a court martial panel.

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[23] *Ibid.* at 111-113 [Emphasis added].

[48] The *National Defence Act* does not set out the process for the selection and appointment of the members who will serve at a General Court Martial. S. 165.19 (1) simply states:

> 165.19 (1) The Court Martial Administrator performs the duties specified in sections 165.191 to 165.193 and, if ... she convenes a General Court Martial, shall appoint its members.

[49] The evidence indicates that the process for the selection of members of a panel at a General Court Martial is found in Chapter 111 (Convening of Courts Martial and Pre-Trial Administration) of the QR&O. It is also based on past practices and self-generated policies by the Court Martial Administrator or her predecessors.[24] She then uses her discretion and judgment when she follows the procedure expressly provided in article 111.03 (Procedure for Appointment of Court Martial Members). It reads as follows:

> 111.03 – PROCEDURE FOR APPOINTMENT OF COURT MARTIAL MEMBERS
>
> (1) The Court Martial Administrator shall select, using random methodology, sufficient eligible officers and, where applicable, non-commissioned members capable of performing the duties of members and alternate members for the court martial in the language of trial chosen by the accused.
>
> (2) The Court Martial Administrator shall appoint the officers and non-commissioned members selected pursuant to paragraph (1).
>
> (3) The Court Martial Administrator shall not appoint an officer or non-commissioned member selected pursuant to paragraph (1) where the officer or non-commissioned member:
>
> (*a*) is a person referred to in section 168 of the *National Defence Act* . (18 July 2008)
>
> (*b*) is currently serving, was serving at the time of the alleged commission of the offence or will be serving during the period the court martial is expected to take place, in the unit of the accused;
>
> (*c*) is the immediate subordinate of another officer or non-commissioned member who has been selected as a member of the court martial;
>
> (*d*) will be on the Medical Patient Holding List or retirement leave during the period the court martial is expected to take place; or
>
> (*e*) has been convicted of a service offence or of an indictable offence under the *Criminal Code* or any other Act of Parliament, unless the officer or non-commissioned member has subsequently been granted a pardon.
>
> (4) The Court Martial Administrator may excuse from performing court martial duties

[24] See Exhibits M2-3 to M2-5.

an officer or non-commissioned member selected pursuant to paragraph (1) where the Court Martial Administrator is satisfied that:

(*a*) the officer or non-commissioned member will be required, during the period the court martial is expected to take place, for duties sufficiently urgent and important to warrant the officer or non-commissioned member not being appointed;

(*b*) the officer or non-commissioned member is scheduled during the period the court martial is expected to take place, to attend a course for which the officer or non-commissioned member is placed on the Advanced Training List or a similar course that is important for the officer or non-commissioned member's professional development or career progression;

(*c*) the officer or non-commissioned member has served as a member of a court martial within the preceding 24 months;

(*d*) the officer or non-commissioned member is unfit to perform court martial duties as a result of illness or injury;

(*e*) the officer or non-commissioned member has compassionate reasons for not being appointed to perform court martial duties, such as serious illness, injury or death in the officer's or non-commissioned member's family; or

(*f*) appointment of the officer or non-commissioned member to perform court martial duties may cause serious hardship or loss to the officer or non-commissioned member or others.

(5) Where an officer or non-commissioned member selected pursuant to paragraph (1) is not appointed to perform court martial duties for a reason set out in paragraph (3) or (4), the Court Martial Administrator shall record the reason and select a replacement in accordance with this article.

(6) The Court Martial Administrator shall, at the request of the presiding military judge, appoint a replacement for any member of a General Court Martial if no alternate remains to replace the member. (18 July 2008)

(7) The Court Martial Administrator shall maintain for each General Court Martial a record indicating. (18 July 2008)

(a) the name of each officer and non-commissioned member selected pursuant to paragraph (1); and

(b) the name of any officer or non-commissioned member who is not appointed pursuant to paragraph (3) or who is excused pursuant to paragraph (4) and the reasons therefor.

(8) The record referred to in paragraph (7) shall be open to examination on request by the accused or the prosecutor of a court martial.

(9) The Chief Military Judge may issue such instructions and directions to the Court Martial Administrator as the Chief Military Judge considers necessary for the proper

administration of the selection and appointment of the members of General Courts Martial. (18 July 2008)
(G) (P.C. 2008 1319 of 4 July 2008 effective 18 July 2008)

[50] To appoint the required number of officers and non-commissioned members to serve as panel member or alternate at a General Court Martial, the only positive duty imposed on the Court Martial Administrator in relation to the appointment of panel members lies with her obligation to select, using random methodology, sufficient eligible officers and, where applicable, non-commissioned members capable of performing the duties of members and alternate members for the court martial in the language of trial chosen by the accused. However, the applicant submits that the principle of representativeness applicable to jury trials, which is required in a jury, flows not from the composition of the twelve members of the actual jury, but from the pool from which it was drawn, and that would apply to court martial panel members. For the reasons stated previously, the long established principle that General Courts Martial composed of mostly officers are not jury trials still applies. The pool from which panel members are selected does not serve nor is it designed to ensure a level of representativeness that would be required of a jury of peers. Not only did the applicant argue that the pool should include all Canadian Forces members in principle, he advanced that the current pool used to select the members of this General Court Martial was unlawfully reduced, mostly by excluding personnel on Class "A" Reserve Service as well as others for improper considerations. The evidence indicates that the Court Martial Administrator asked the DHRIM to generate a list of potential candidates using a random methodology that would satisfy certain criteria and exclusions. She makes such a request twice a year. Exhibit M2-7 indicates that the list of randomly generated numbers, which would correspond to members, was composed of 9,863 officers not below the rank of captain and 5,345 non commissioned members of the rank of warrant officer and above. The applicant not only advances that this list, composed of more than 15,000 members, was insufficient, he contented that the simple effect of having improperly excluded certain categories of persons had reduced it by over 2000 persons. Even if the applicant is right, the court cannot agree that a pool that consists of 15,000 members of the Canadian Forces is not sufficient. The sufficiency of eligible personnel in the pool is not to achieve representativeness of the military community, it is rather to select the members and alternates who will fulfill a military duty as members of a court martial panel.

[51] The Court Martial Administrator explained the process that she uses to make her original selection and how she would contact the persons selected and conduct a telephone interview to determine if such person shall not be appointed for one or more reasons listed in paragraph 111.03(3) of the QR&O or could be excused for one or more reasons listed in paragraph 111.(04). This paragraph, unlike the previous one, explicitly provides the Court Martial Administrator with significant discretionary authority when she decides to excuse a person that had been randomly selected. She explained how she conducted her interviews with the selected persons and her use of individual selection

criteria worksheet[25]. The first page of the worksheet outlines 13 circumstances to mandatorily exclude a selected member, as well as the reference or authority to do so by listing the applicable provision in the *National Defence Act* or in the QR&O. It also tells the user—and the user being the Court Martial Administrator—the means available to verify the exclusion, i.e., through the random electronic selection method or the telephone interview or both. In this case, the Court Martial Administrator wrote on each worksheet the result of her verification. The second page of the worksheet sets out six additional reasons for which a potential member may be excused from performing court martial duties if the Court Martial Administrator is so satisfied. There again, the Court Martial Administrator recorded the result of her interview on the worksheet, and finally indicated her decision as to whether the individual was accepted or excluded. The records indicating the name of the persons selected, as well as the name and the reasons of persons that were not selected, were available to counsel on request.[26] The applicant submitted that the Court Martial Administrator acted improperly when she excluded, at her own initiative, the first person on her list of selected officers, Colonel O'Rourke. The fact that the Court Martial Administrator did not contact personally Colonel O'Rourke, because she knew he had served as a panel member at a court martial in the previous 24 months, falls also squarely within her regulatory discretion under QR&O subparagraph 111.03(4)(*c*). She did not have to call him to exercise her discretionary authority.

[52] The applicant strongly argued that the process for the selection and appointment of court martial panel members ought to be in the presence of the accused. The procedure set out in QR&O article 111.03 does not provide for peremptory challenges of potential panel members and does not allow the presence of the accused or the prosecution during the selection process. The applicant relies on the decision of the Supreme Court of Canada in *R. v. Barrow*[27]. He further submitted that the testimony of Mrs Morrissey to the effect that she considers herself as the Chief of Staff of the Chief Military Judge is another cause for concern to have the selection process in the presence of the accused, because the Chief Military Judge assigns the presiding judge to a court martial, including himself. It is important to state that *Barrow* was not decided on a constitutional basis. It dealt with the meaning of the word "trial" for the purposes of s. 577 of the *Criminal Code* in relation to the broader question, "When does a trial before a jury begin for the purposes of s. 573 of the *Criminal Code*?" The court concluded that the examination of prospective jurors by the trial judge, relating in part to their impartiality and following arraignment and plea, formed part of the trial for the purposes of s. 577. At a General Court Martial, there is no such process. This is yet another dissimilarity with a jury trial that does not affect the fairness and impartiality of the trial in the context of a court martial. In addition to her statutory duties to convene courts martial and, in the case of a General Court Martial, appoint its members[28], the Court Martial Administrator performs other duties

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[25] See Exhibit M2-8.
[26] See *QR&O* 111.03(7).
[27] (1987) 38 C.C.C. (3d) 193 (S.C.C.).
[28] See s. 165.19(1) of the *National Defence Act*.

that are set out in QR&O article 101.26 (Duties and Functions of the Court Martial Administrator). One of the significant roles of the Court Martial Administrator consists in the management of the Office of the Chief Military Judge and the supervision of personnel within the Office of the Chief Military Judge, other than military judges.[29] In addition, she stated that she received independent legal advice to fulfill her duties. In absence of evidence that would support any tangible impropriety from the Court Martial Administrator or the Chief Military Judge in this matter, the mere fact that the Court Martial Administrator works under the general supervision of the Chief Military Judge pursuant to s 165.19(3) of the *National Defence Act* does not violate the rights of an accused to a fair trial before an independent and impartial tribunal. It must be remembered that an accused may always object to the military judge or to a panel member for cause after the commencement of the proceedings, and after entering a plea, under paragraph 112.05(9) of the QR&O, in the case of an objection aimed at a panel member. It is trite law that such procedure shall always take place in presence of the accused. Once again, the Court Martial Administrator does not perform a function similar to that of a judge under the *Criminal Code*, which was the case for s. 577 and dealing with that matter in *Barrow*. Caution should also be exercised and used in comparing her role and functions to that of a sheriff in the context of a jury trial. As the General Court Martial, the role and functions of the Court Martial Administrator are *sui generis*. The late Chief Justice Lamer dressed an accurate portrait of the essence of the composition of a panel for a General Court Martial and the role played by the Court Martial Administrator, at p. 39 of his report[30]:

> 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.

[53] The applicant has not established on a balance of probabilities that the procedure contained in Chapter 111 of the Q&O, including the discretion vested in the Court Martial Administrator to appoint panel members, violates the rights of an accused person under s. 11(*d*) of the *Charter* that would affect the fairness of his trial before an independent and impartial tribunal. He has also not established that such procedure would affect the rights of the accused under s. 7 of the *Charter* to full answer and defence.

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[29] See *QR&O* subparagraph 101.26(2)(a).

[30] *The First Independent Review by the Right Honourable Antonio Lamer* (*Lamer Report*), 3 September 2003.

Did the exclusion of certain categories of persons not expressly mentioned, such as members on Class "A" Reserve Service, from the pool of eligible persons to be randomly selected by the Court Martial Administrator fall within the ambit of article 111.03 of the QR&O?

[54] The applicant strongly argued that certain categories of persons not expressly mentioned in the regulations, such as members on Class "A" Reserve Service, Canadian Rangers and members from the CIC were illegally removed from the pool of eligible persons. Setting aside the issue of representativeness that was not accepted by the court, the automatic exclusion of these persons looks problematic. The evidence before the court seems to suggest that members on Class "A" Reserve Service are not compellable by the Court Martial Administrator to fulfil the military duty of member of a court martial panel. Mrs Morrisey relies broadly on her long time experience in Human Resources and Personnel as well as her understanding of Chapter 9 of the QR&O, which sets out the parameters of Reserve Service. The respondent argues that they serve only with their consent under s. 33 of the *National Defence Act* and, therefore, are not compellable. This reality would make them ineligible to sit as panel members.

[55] Members of the Reserve Force may be called out on service to perform any lawful duty other than training at such times and in such conditions as by regulations or otherwise are prescribed by the Governor in Council, but they are not liable to serve without their consent if they are, by virtue of the terms of their enrolment, liable to perform duty on active service only.[31] A member of the Reserve Force may consent to be employed in the Regular Force or another sub-component of the Reserve Force.[32] Only members serving on Class "B" and "C" Reserve Service are on full-time service.[33] It is logical to include them, Class "B" and Class "C" Reserve Service personnel, in the pool of eligible candidates because they have already given their consent.

[56] However, the mere fact that members on Class "A" Reserve Service serve only with consent does not make them *per se* ineligible to serve as panel members should they meet the basic requirements to be selected on a panel such as the minimum rank. The court fully understands that the process in place and the inherent administrative difficulties to include members on Class "A" Reserve Service to serve as members of a court martial panel in the original pool of selected members would be overwhelming. It is fair to say that excluding these members from the original pool of candidates for reasons of efficiency and expediency makes sense. It is equally fair to say that many members on Class "A" Reserve Service with the requisite rank would have also relevant experience from previous service in the Regular Force or in the Reserve Force. Members on Class "A" Reserve Service are eligible to serve as members of a court martial panel in absence

[31] See s. 33(2) of the *National Defence Act*.
[32] See *QR&O* article 9.05.
[33] See *QR&O* articles 9.07, 9.075 and 9.08.

of a specific statutory or regulatory exclusion.

[57] This is not determinative of the issue raised by the applicant. The court holds the view that the Court Martial Administrator authority is not limited to the exclusions specifically provided in paragraphs 111.03(3) and (4) of the QR&O. The Court Martial Administrator shall select a sufficient eligible members; not all eligible members. The evidence reveals that over 15,000 officers and non-commissioned members were part of the initial pool before the Court Martial Administrator proceeded to exclude members under paragraphs (3) and (4) of article 111.03 of the QR&O. In the context of the current statutory framework, it cannot be considered insufficient. There is certainly serious policy considerations that would strongly militate in favour of including members in Class "A" Reserve Service in the pool of sufficient eligible members, which would enhance the efficiency of the court martial process, in particular in the case where the accused is a member of the Reserve. As much as a member of the Regular Force with the requisite rank can serve as panel member at a General Court Martial of a reservist, a member on Class "A" Reserve Service, who meets the minimum requirements for his rank, can serve as a panel member at a General Court Martial for the trial of a member of the Regular Force or of another sub-component of the Reserve Force.

[58] With regard to the applicant's submission that the Court Martial unlawfully excludes deployed personnel, the court is satisfied that this decision falls within her discretionary authority under QR&O article 111.03(4)(*a*) and 111.03(4)(*f*). These deployed members are only excluded from the list during the period of their deployment, therefore their exclusion is only temporary. Whether the CMA asks their exclusion from the initial pool or after conducting an interview with them does not affect the fairness of the trial.

[59] With regard to the exclusion of members with record of convictions, the court finds no substantive reason that would affect the constitutional validity of QR&O article 111.03(3)(*e*) with regard to the rights of the applicant to a fair trial before an impartial and independent tribunal or his right to make full answer and defence.

[60] Finally, the court rejects the argument of the applicant concerning the alleged improper delegation authority by the Court Martial Administrator to DHRIM, who generate a computer list of numbers based on pre-determined criteria provided by the Court Martial Administrator. The evidence of Mrs Morrissey and Chief Petty Officer 2nd Class Larivée clearly indicates that DHRIM does not exercise any discretion and only performs a mere administrative task for the Court Martial Administrator.

Conclusion

[61] For all these reasons, the application is dismissed.

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