



COURT MARTIAL

Citation: *R v Penner*, 2013 CM 1005

Date: 20130529

Docket: 201281

General Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Ex-Ordinary Seaman C.G. Penner, Applicant

- and -

Her Majesty the Queen

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

REASONS FOR A DECISION RESPECTING AN APPLICATION THAT THE SELECTION AND THE APPOINTMENT PROCESS FOLLOWED BY THE COURT MARTIAL ADMINISTRATOR FOR THE MEMBERS OF THE PANEL OF THIS GENERAL COURT MARTIAL VIOLATES ARTICLE 111.03 OF THE *QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES* AND THE RIGHTS OF THE ACCUSED UNDER SECTION 7 AND SECTION 11(d) OF *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

INTRODUCTION

[1] Counsel for the applicant challenges the legality of the actions of the Court Martial Administrator in the selection and the appointment of those persons whose names appear on the Convening Order dated 14 May 2013 and marked as Exhibit 1. He alleges that the process followed by the Court Martial Administrator culminating in the ap-

pointment of the subject officers and non-commissioned members violated the scheme provided in article 111.03 of the *Queen's Regulations and Orders for the Canadian Forces (QR&O)* as well as the rights of the accused under section 7 and 11 (d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to a fair and public hearing by an independent and impartial tribunal. The applicant submits that should the court conclude that the Court Martial Administrator's actions violated *QR&O* article 111.03, the court would lack jurisdiction to try this matter and should terminate the proceedings of this court martial under *QR&O* article 112.24. He further submits that should the court conclude to a violation of section 7 and 11(d) of the *Charter*, it should grant a remedy under section 24(1) in the nature of appointing those persons whose names appeared in a chronological order as being eligible and available on the list made by the Court Martial Administrator from the original randomly generated list of selected officers and non-commissioned members capable of performing the duties of members and alternate members for the court martial of ex-Ordinary Seaman Penner in the language of trial chosen by the accused.

THE EVIDENCE

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

- (1) the facts and matters that the court took judicial notice of 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*;
- (2) the exhibits filed before the court by consent of the parties, namely:
 - a. M1-1: a notice of application signed by Major Berntsen dated 23 May 2013;
 - b. M1-2: this exhibit contains several documents, namely:
 1. a letter signed by M.S. Morrissey, the Court Martial Administrator, dated 14 May 2013, informing the parties that as a result of an excusal of a panel member from performing court martial duties, the Convening Order and Administrative Instruction dated 2 May 2013 and the Order to Assemble dated 10 May 2013 is cancelled and an enclosed new Convening Order and Administrative Instruction are provided to the Military Judge assigned to preside at the court martial of Ordinary Seaman Penner;
 2. the Convening Order dated 14 May 2013 for this court martial, which is Exhibit 1 in these proceedings;

3. the Charge Sheet dated 7 December 2012, which is marked as Exhibit 2 in these proceedings; and
 4. the Administrative Instruction for this court martial signed by the Court Martial Administrator and dated 14 May 2013;
- c. M1-3: a letter issued by the Chief Military Judge on 22 February 2008 entitled, "Court Martial Panel Selection Replacement Directive";
- d. M1-4: a binder prepared by counsel for the defence entitled, "Record Documents pursuant to in (*sic*) QR&O 111.03(7) for the Selection of the General Court Martial Panel in this Matter." This binder is divided into seven tabs, namely:

Tab 1: a list of 27 officers in the rank of colonel and above from a randomly generated list of 446 officers with comments as well as completed questionnaires of several of these officers and accompanying emails with regard to their availability and eligibility to participate as senior member of the panel for a court martial scheduled to commence on 29 April 2013 as well as one scheduled to commence on 27 May 2013, both in the English language. This list indicates that 13 officers were eligible for court martial panel duties, three of them being available for a General Court Martial to begin on 27 May 2013;

Tab 2: a list of ten officers, one brigadier-general and nine colonels whose names appeared on the list at Tab 1 and that were commented as eligible and available. It is accompanied by a completed questionnaire entitled, "Court Martial Panel Selection-Part II-Eligibility," from the ten officers. Of those ten officers, the comments column indicates that six are excused under *QR&O* paragraphs 111.03 (4)(a) or (b); two are declared eligible and available; and no comments were made with regard to the last two officers. The eligible and available officers are Colonel Lalonde and Captain (N) Cassivi;

Tab 3: a two-pages list of 52 officers in the rank of captain to lieutenant-colonel from a randomly generated list of 16,887 officers with comments for the officers whose names appear on the first page as well as a completed questionnaire from these officers to the questionnaire with regard to their availability and eligibility to participate as

a member of the panel for a court martial scheduled to commence in May, June 2013;

- Tab 4: a list of nine officers of the rank of Captain and Major, with an assigned number from 1 to 9 under the column entitled, "RAND". It is accompanied by a completed questionnaire entitled, "Court Martial Panel Selection-Part II-Eligibility," from six of these officers. Of those nine officers, one was excused under *QR&O* paragraphs 111.03 (4)(a);
- Tab 5: a list of six officers of the rank of captain and major, with an assigned number from 6 to 1 under the column entitled, "RAND". The officer with the number 6 was excused under *QR&O* article 111.03(4)(e); those officers with the assigned numbers 3 and 2 were appointed panel members, whereas, the officer referred to as number 4 was appointed as an alternate member. Numbers 1 and 5 were declared to be eligible and available;
- Tab 6: a two-page list of 54 non-commissioned members in the rank of warrant officer to chief warrant officer from a randomly generated list of 7,057 non-commissioned officers with comments for those whose names appear on the first page as well as a questionnaire and the responses of these officers to the questionnaire with regard to their availability and eligibility to participate as members of the panel for a court martial scheduled to take place in May-June 2013; and
- Tab 7: a list of six non-commissioned officers from warrant officer to master warrant officer with assigned numbers again from 6 to 1, not necessarily in that order. Numbers 2 and 4 were appointed as panel members and number 1 was appointed as an alternate. Numbers 5, 3 and 6 were declared eligible and available. It also consists of a list of nine non-commissioned officers which contains three additional persons who were excused under the regulations or could not be reached.

This constitutes the evidence before the court for this application. I will now move to the position of the parties with regard to this application.

POSITION OF THE PARTIES

The Applicant

Introduction

[3] 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 section 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 the *QR&O* for this General Court Martial. Alternatively, he relies on section 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.

[4] The applicant has no issue with the status of General Courts Martial as *sui generis* and that they have been recognized in our law. This is not an attack on the validity of certain provisions of the *National Defence Act* or any provision of Chapter 111 of the *Queen's Regulations and Orders for the Canadian Forces* dealing with the authority of the Court Martial Administrator to select and appoint the members of a panel of a General Court Martial and to convene courts martial. The applicant submits that the manner in which the Court Martial Administrator has made the selection and the appointment of the members for the panel of this court martial was flawed in that it did not respect the required random selection imposed under *QR&O* article 111.03.

[5] Based on the documentary evidence filed in this application, the applicant submits that the Court Martial Administrator has re-shuffled the list of eligible members and in doing so, she has purposely affected the order of precedence of the potential members as it was created when the original list of names was randomly and electronically generated for the different categories of service personnel eligible to serve as members of a court martial panel. In support of his argument, he gave several examples that he draws from the documentary evidence filed in support of the application. For example, he suggests that Captain (N) Cassivi should not have been appointed as the senior panel member, but Colonel Lalonde ought to have been so appointed because the latter was randomly selected in the sixth position, whereas Captain (N) Cassivi was selected in eleventh position out of 446 officers in the rank of colonel or above. The applicant suggests that after excluding all the others for reasons that are not challenged, the Court Martial Administrator ought to appoint the person who was originally selected before the other. The applicant submits that this is equally applicable to the other officers and the non-commissioned members appointed to this court martial.

[6] The applicant submits that allowing the Court Martial Administrator to re-shuffle or change the order of the original random selection is *ultra vires* of its authority and that it is not only contrary to *QR&O* article 111.03, but that it amounts to a violation of section 7 and 11(d) of the *Charter* because it attacks the impartiality and independence of the court martial, in particular the security of tenure that would apply to a person randomly selected under *QR&O* article 111.03(1); tenure that would exist before the appointment of that person to perform the duties as a member of a court martial

panel, and before that person is sworn in as a member of a court martial under *QR&O* article 112.05(9)(c). He further submits that allowing the Court Martial Administrator to re-select or re-shuffle the initial list, after the application of the mandatory exclusionary rules and the exercise of her discretionary exclusions under the *QR&O* article 111.03(4), affects the independence of the tribunal and makes the process unfair. Such actions would make the selection process open to manipulation and there is no public interest to allow such interference by the Court Martial Administrator.

Remedies Sought

[7] The applicant seeks two remedies from this court. He asks this court to terminate the proceedings because it would have no jurisdiction as a result of the non-compliance of the provisions contained in Chapter 111 of the *QR&O* by the Court Martial Administrator. In addition, should the court conclude that the actions of the Court Martial Administrator violated the rights of the accused under section 7 and 11(d) of the *Charter*, the court should craft a remedy, under section 24(1), to modify the composition of the court martial panel to reflect as closely as possible the sequential ranking of those persons, in their respective pool, when they were originally randomly selected.

The Respondent

[8] The respondent submits that the application should be dismissed. First, she indicates that the application should be denied because the application is not supported by the evidence. Second, the respondent suggests the evidence does not support the view that the actions of the Court Martial Administrator contravened the regulatory framework that applies to the selection and appointment of court martial panel members. In addition, she submits that the Court Martial Administrator exercises an administrative function under the *National Defence Act* that is independent and impartial. Simply, the respondent argues that there is no breach under the *Charter*.

DECISION AND ANALYSIS

[9] In *R v Middlemiss*, 2009 CM 1001, 6 January 2009, the court martial highlighted several aspects of the role and function of a military panel that differed from a jury at a criminal trial that had ceased to exist with the recent evolution of Canadian military law which took place over the last 15 years. Nevertheless, it left no doubt that the law still recognizes military tribunals, including General Courts Martial, as *sui generis*.

[10] The Court Martial Administrator performs the duties and functions set out in section 165.19 of the *National Defence Act*. They include the duties specified in sections 165.191 to 165.193 under the *Act* and, if he or she convenes a General Court Martial, the Court Martial Administrator shall appoint its members. The Court Martial Administrator performs such other duties specified under the *Act* or prescribed by the Governor in Council in regulations. He or she acts under the general supervision of the Chief Military Judge. The regulatory framework that governs the convening of courts martial and pre-trial administration is found in Chapter 111 of the *Queen's Regulations*

and Orders for the Canadian Forces. The procedure for the selection and appointment process of court martial panel members is provided at *QR&O* articles 111.03 and 111.04. These provisions read 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* .
- (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 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.

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

- (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.

111.04 – APPOINTMENT OF ALTERNATE MEMBERS

(1) At least two officers should be appointed as alternates for each General Court Martial of an officer.

(2) At least one officer and one non-commissioned member should be appointed as alternates for each General Court Martial of a non-commissioned member.

[11] The regulations governing the selection and appointment process that must be followed by the Court Martial Administrator are minimalist. 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 his or her duty 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. The regulations are silent with regard to the specific characteristics of the random methodology to be used and how the Administrator must use the list throughout the process, including in the determination of the mandatory and discretionary exclusions granted under paragraphs 111.03(3) and (4) of the *QR&O*. There are no express limitations imposed on the Court Martial Administrator in the manner he or she can select those eligible officers or non-commissioned members. For example, there is no obligation imposed on the Administrator to select in a specified chronological or numerical order such as selecting the candidates starting from the top or the bottom of the original randomly selected list of eligible candidates; there is no provision that would prohibit the Court Martial Administrator from conducting a special ballot, at random, once the exclusionary regulations have been applied, with the remaining eligible candidates originally selected under *QR&O* paragraph 111.03(1) and appoint those members using a repeated random methodology.

[12] The applicant submits that *QR&O* paragraph 111.03(1) limits the use of random methodology by the Court Martial Administrator and that the chronological order of eligible members obtained through the method so used is binding on him or her. Otherwise, he strongly argues that the selection can be manipulated or subject to manipulation. However, the applicant does not challenge the validity of any statute or regulation, simply the actions of the Court Martial Administrator in this case.

[13] I agree with counsel for the applicant that the process followed by the Court Martial Administrator ought to be more transparent. In absence of a clear and publicly available policy, it is open to speculation and criticism. This is not in the best interests of the administration of military justice. There is no evidence before this court as to how she appointed one officer as opposed to another and how she proceeded after she had made the decisions to exclude individuals after the applicable provisions. However, the court does not agree with the theory of the applicant that the Court Martial Administrator shall select in a specific order as it was randomly produced starting by the first one on the list and that order remain throughout the process. This argument is not supported by the plain reading of *QR&O* article 111.03 nor can it be implied.

[14] As General Courts Martial are *sui generis*, the principles and rules that apply to the selection and appointment of persons at a civilian jury trial are not all applicable. In the criminal process, the process for the selection of jurors does not rest on one person. In addition, the manner to challenge the suitability of a potential juror is done in open court. In *R v Find*, 1 S.C.R., 863, 154 C.C.C. (3d) 97, McLachlin C.J.C., for the Supreme Court of Canada, provided an overview of the process followed in the Canadian criminal courts and its rationale, at paragraphs 18-24:

[18] To provide context and guidance to the determination of this issue, it is necessary to consider the process of jury selection and the place of challenges for cause in that process.

[19] The jury selection process falls into two stages. The first is the "pre-trial" process, whereby a panel (or "array") of prospective jurors is organized and made available at court sittings as a pool from which trial juries are selected. The second stage is the "in-court" process, involving

the selection of a trial jury from this previously prepared panel. Provincial and federal jurisdictions divide neatly between these two stages: the first stage is governed by provincial legislation, while the second stage falls within the exclusive domain of federal law (see C. Granger, *The Criminal Jury Trial in Canada* (2nd ed. 1996), at pp. 83-84; *R. v. Barrow*, [1987] 2 S.C.R. 694 at pp. 712-13, 38 C.C.C. (3d) 193, 45 D.L.R. (4th) 487).

[20] Both stages embody procedures designed to ensure jury impartiality. The "pre-trial" stage advances this objective by randomly assembling a jury pool of appropriate candidates from the greater community. This is assured by provincial legislation addressing qualifications for jury duty; compilation of the jury list; the summoning of panel members; selection of jurors from the jury list; and conditions for being excused from jury duty. These procedures furnish, so far as possible, a representative jury pool: *R. v. Sherratt*, [1991] 1 S.C.R. 509 at pp. 525-26, 63 C.C.C. (3d) 193; P. Schulman and E.R. Myers, "Jury Selection", in *Studies on the Jury* (1979), a report to the Law Reform Commission of Canada at p. 408.

[21] The "in-court" process is governed by ss. 626 to 644 of the *Criminal Code*. Its procedures directly address juror impartiality. The selection of the jury from the assembled pool of potential jurors occurs in an open courtroom, with the accused present. The jury panel is brought into the courtroom and the trial judge makes a few opening remarks to the panel. Provided the validity of the jury panel itself is not challenged (pursuant to the grounds listed in s. 629(1)), the Registrar reads the indictment, the accused enters a plea, and the empanelling of the jury immediately begins: see *Sherratt, supra*, at pp. 519-22.

[22] Members of the jury pool may be excluded from the jury in two ways during the empanelling process. First, the trial judge enjoys a limited preliminary power to excuse prospective jurors. This is referred to as "judicial pre-screening" of the jury array. At common law, the trial judge was empowered to ask general questions of the panel to uncover manifest bias or personal hardship, and to excuse a prospective juror on either ground. Today in Canada, the judge typically raises these issues in his remarks to the panel, at which point those in the pool who may have difficulties are invited to identify themselves. If satisfied that a member of the jury pool should not serve either for reasons of manifest bias or hardship, the trial judge may excuse that person from jury service.

[23] Judicial pre-screening at common law developed as a summary procedure for expediting jury selection where the prospective juror's partiality was uncontroversial, such as where he or she had an interest in the proceedings or was a relative of a witness or the accused: *Barrow, supra*, at p. 709. The consent of both parties to the judicial pre-screening was presumed, provided the reason for discharge was "manifest" or obvious. Otherwise, the challenge for cause procedure applied: *Sherratt, supra*, at p. 534. In 1992, s. 632 of the *Criminal Code* was enacted to address judicial pre-screening of the jury panel. This provision allows the judge, at any time before the trial commences, to excuse a prospective juror for personal interest, relationship with the judge, counsel, accused or prospective witnesses, or personal hardship or other reasonable cause.

[24] The second way members of the jury may be excluded during the empanelling process is upon a challenge of the prospective juror by the Crown or the accused. Both parties are entitled to challenge potential members of the jury as these prospective jurors are called to "the book". Two types of challenge are available to both the Crown and the accused: (1) a limited number of peremptory challenges without providing reasons pursuant to s. 634; and (2) an unlimited number of challenges for cause, with leave of the judge, on one of the grounds enumerated under s. 638(1) of the *Criminal Code*.

[15] Evidently this civilian process does not resemble the court martial panel selection process, but both have the common goal of ensuring that the triers of fact discharge

their duties with impartiality. The important distinction to be made between the two distinct processes resides in the purpose behind the procedures. In the case of the criminal justice system, these procedures furnish, so far as possible, a representative jury pool, whereas the selection and appointment process to serve as members of a court martial panel is rather to select the statutorily imposed members and alternates based on a specific rank who will fulfill a specific military duty as members of a court martial panel. Challenge for cause of those officers and non-commissioned members appointed to serve as members of a court martial panel is always available under article 112.14 of the *QR&O*.

[16] The regulations impose the use of random methodology in paragraph 111.03(1) of the *QR&O*, but they do not provide the extent, parameters and the characteristics of the procedure leading to the selection and appointment of eligible members, except for the rules governing the mandatory and discretionary exclusions. As I said earlier, there are no express limitations imposed on the Court Martial Administrator in the manner he or she can select those eligible officers or non-commissioned members. For example, there is no obligation imposed on the Administrator to select in a specified chronological or numerical order such as selecting the candidates starting from the top or the bottom of the original randomly selected list of eligible candidates; there is no provision that would prohibit the Court Martial Administrator from conducting a special ballot, at random, once the exclusionary regulations have been applied, with the remaining eligible candidates originally selected under *QR&O* article 111.03(1) and appoint those members using a repeated random methodology.

[17] Randomness is not a sacred and rigid concept. It is a tool that is used to achieve the selection and the appointment of a panel that is impartial and made of persons that will perform a specific military duty that would impact the least possible on their normal military functions. In the civilian justice system, the *Criminal Code* and the provincial jury legislation each use random procedures to achieve the characteristics of representativeness and impartiality at each stage of the selection process: from the time when the sheriff randomly selects the persons to be members of the array to the random selection of jurors' names from the drum.

[18] Randomness can be used on more than one occasion as long as it does not impair the required impartiality of the panel or one of its members. This principle applies to the Court Martial Administrator when he or she performs the statutory duty imposed to the incumbent of that position to appoint the members of a court martial panel under section 165.19(1) of the *National Defence Act*.

[19] This is not to say that the concerns mentioned by the applicant do not raise legitimate questions as to how the Court Martial Administrator ultimately appoints those eligible members selected after using random methodology. I am of the view that the process followed should be as transparent as possible. This result may be achieved through a modernized regulatory framework or the publication of the policy followed by the Court Martial Administrator during the selection process. However, this is not a

policy or a regulation that is being attacked in this application, but the actions of the Court Martial Administrator in this specific case.

[20] This application must fail because the evidentiary foundation is insufficient on the balance of probabilities to conclude that the Court Martial Administrator did not follow the requirements set out in paragraphs 111.03(1) to (4) of the *QR&O*, or that the appointment of the officers and the non-commissioned members for this court martial is the outcome of manipulation by the Court Martial Administrator or that the panel is affected by any impropriety. At least, the evidence filed during this application is not conclusive to support this assertion.

[21] The documentary evidence filed during this application raises more questions than it provides answers. The applicant asks the court to speculate as to what and why the Court Martial Administrator selected and appointed one person over another. The applicant's premise is that the list generated in the first place must be followed in chronological order throughout the selection process. He gave the example of Colonel Lalonde, whose name appears before Captain (N) Cassivi on the list provided at Tab 1 of Exhibit M1-4 and whose randomly generated number was lower. The applicant then moves to the list provided at Tab 2 of that exhibit and submits that Colonel Lalonde ought to have been appointed because his random number is 6 where Captain (N) Cassivi's number is 11. Consequently as they were the only remaining officers eligible and available, Colonel Lalonde was the only available officer. This interpretation exceeds the contents of these documents and requires additional evidence as to the meaning of those records and their use by the maker of the document. For example, a logical approach would be that all 13 eligible officers listed at Tab 1 would have made the list at Tab 2. Their chronological order would have been reproduced from Tab 1 to Tab 2, and accordingly Colonel Grondin and Colonel Dalton would have followed the name of Captain (N) Wadell on the list at Tab 2. However, I note that Colonel Grondin made it on the penultimate line of Tab 2, where Colonel Dalton's name appears nowhere on Tab 2. It would be inappropriate for the court to embark on its own interpretation on the basis of these documents alone.

[22] Even if the court adopts the approach that once the mandatory and discretionary exclusions provided in the regulations have been applied, the remaining eligible members must be selected impartially by the Court Martial Administrator to the extent that a panel not selected impartially would negatively affect the jurisdiction of the court to try the accused, it remains that the court can not speculate on the basis of an insufficient record or relevant evidence, including testimonial evidence. In absence of evidence to the contrary, the Court Martial Administrator, a public official whose position is created by statute, must benefit of the doctrine of regularity or *omnia praesumuntur*. Of course, this presumption can be rebutted by way of evidence. The degree of proof required to displace the application of the presumption is also that of proof on a balance of probabilities. Again, the applicant has not met that burden of proof.

[23] After concluding that the applicant has not established on a balance of probabilities that the Court Martial Administrator has selected and appointed the members of the

court martial panel for this court martial contrary to the applicable regulations or that her actions in returning a panel demonstrate partiality, fraudulent practices or misconduct, the application cannot succeed. Of course, the members of the panel can be challenged for cause under the provisions contained in *QR&O* article 112.14.

[24] For the same reasons, the court concludes the applicant has not established on a balance of probabilities a violation of his rights under section 7 or his specific rights guaranteed under section 11(d) of the *Charter*.

FOR THESE REASONS, THE COURT:

[25] **DISMISSES** the application.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major D. Berntsen, Directorate of Defence Counsel Services
Counsel for ex-Ordinary Seaman C.G. Penner