**COURT MARTIAL**

**Citation:** *R v Edmunds*, 2013 CM 4015

**Date:** 20130719
**Docket:** 201272

Standing Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Ex-Master Corporal N.S. Edmunds, Accused**

**Before:** Lieutenant-Colonel J-G Perron, Military Judge

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**DECISION ON 112.03 APPLICTION: RE-ELECTION OF TYPE OF TRIAL**

(IN WRITING)

[1] Ex-Master Corporal Edmunds is accused of having committed fraud contrary to section 380(1) of the *Criminal Code*, of forgery contrary to section 367 of the *Criminal Code* and of having wilfully made a false a false entry in a document that was required for official purpose contrary to section 125(a) of the *National Defence Act (NDA)* The accused has made an application under section 187 of the *NDA* and article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) requesting an order declaring the accused is entitled to make a new choice of type of court martial. The prosecution objects to this application. The application was heard on 17 June 2013 and the prosecutor and counsel for ex-Master Corporal Edmunds agreed the decision would be rendered in a written format and that there was no need to reconvene in court.

[2] The evidence consisted of an agreed statement of facts which included three exhibits and the testimony of Corporal Partridge and Master Corporal Reesor. The court took judicial notice of the facts contained in MRE 15.

[3] Firstly, I will review the facts in this application. Ex-Master Corporal Edmunds was charged on 18 June 2012. A charge sheet alleging seven offences was signed on 9 November 2012 and the charges were preferred on 15 November. The Applicant was informed on 21 November 2012 that he had 14 days to make an election. The Applicant did not submit an election form for a Standing Court Martial (SCM) and was thus deemed to have elected a General Court Martial (GCM) pursuant to section 165.193(3). The prosecutor requested the military police (MPs) conduct further investigations in November and December 2012.

[4] A plea agreement was reached on 9 Jan 2013 and a re-election to SCM with the consent of the prosecutor was made on 11 Jan 2013. A SCM scheduled for 13 Feb 13 was convened on 17 Jan 13.

[5] On 8 Feb, the prosecutor advised defence counsel that he had received new disclosure and offered to provide it by encrypted email on 8 Feb. Disclosure was executed in person on 12 Feb because defence counsel did not have access to a DWAN computer. On 12 Feb, the prosecutor was advised at approx 13:30 hours the accused could change his plea and at approx 20:00 hrs that the accused would change his plea to not guilty. The prosecutor was informed on 13 Feb the accused may want to elect to be tried by GCM.

[6] On 13 Feb, the trial did not commence and the court martial proceedings were adjourned until 2 April to fix a new date for the trial and to determine when the additional investigation would be completed. On 11 March, the prosecutor sent an email to defence counsel informing him that the prosecutor did not have any objection to an election to trial by GCM, but that he had to "make a final confirmation before providing you with the decision."

[7] Having reviewed the main facts of this application, I will now address the issues. Firstly, the applicant seeks an order declaring the accused is entitled to make a new election pursuant to section 165.193 given that the new allegations and disclosure raised by prosecution on 13 Feb 2013 amount to a substantial change in the case against the accused.

[8] Section 165.193 reads as follows:

> **165.193** (1) An accused person may choose to be tried by General Court Martial or Standing Court Martial if a charge is preferred and sections 165.191 and 165.192 do not apply.
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> (2) The Court Martial Administrator shall cause the accused person to be notified in writing that he or she may make a choice under subsection (1).
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> (3) If the accused person fails to notify the Court Martial Administrator in writing of his or her choice within 14 days after the day on which the accused person is notified under subsection (2), the accused person is deemed to have chosen to be tried by General Court Martial.

> (4) The accused person may, not later than 30 days before the date set for the commencement of the trial, make a new choice once as of right, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.
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> (5) The accused person may also, with the written consent of the Director of Military Prosecutions, make a new choice at any time, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.
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> (6) If charges are preferred jointly and all of the accused persons do not choose — or are not deemed to have chosen — to be tried by the same type of court martial, they must be tried by a General Court Martial.
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> (7) The Court Martial Administrator shall convene a General Court Martial or Standing Court Martial in accordance with this section.

[9] A Standing Court Martial has been convened and the applicant now wishes to be tried by a General Court Martial. The procedure followed in Canadian criminal courts when an accused wishes to change his or her election or deemed election as to the mode of trial is found at section 561 of the *Criminal Code*. An accused that elected to be tried by a superior court and wishes to change from a judge alone trial to a judge and jury trial, or vice versa, has a right to do so for up to 14 days following the completion of the preliminary inquiry (subsection (1)(b)). The written consent of the prosecutor is required (subsection (1)(c)) after that time period.

[10] An accused that has elected to be tried by a provincial court judge or has not requested a preliminary inquiry may re-elect as of right up to 14 days before the first trial date that has been fixed. The written consent of the prosecutor is required after that 14 day period (subsection (2)).

[11] Paragraphs 165.193(3) and (4) are the portions of the *NDA* that pertain to a change of election of mode of trial similar to what is found at paragraphs 561(1) and (2) of the *Criminal Code*. Whereas the *Criminal Code* allows for 14 days after the preliminary inquiry or before the first trial date set; the *NDA* allows for 30 days before the date set for the commencement of the trial. Both allow a re-election as of right during these periods of time and then a re-election with the consent of the prosecution.

[12] Counsel for the applicant based most of his argument on the Manitoba Court of Appeal decision *R v Ruston*, (1991) 63 C.C.C. (3d) 419. Although the appellant had challenged the constitutionality of paragraphs 561(1)(b) and (c), that court concluded the issue was not the validity of the legislation but its correct interpretation in light of the right guaranteed by section 11(*f*) of the *Charter* (paragraph 13). Section 11(*f*) of the *Charter* provides that a person charged with an offence has the right to the benefit of a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment except in the case of an offence under military law tried by a service tribunal.

[13] The guarantee of the benefit of a trial by jury may only be waived by the accused if the waiver is an informed one (see paragraph 14 of *Ruston* referring to *R v Turpin*, [1982] 1 SCR 1296 at page 1316, and *Korponay v Attorney General of Canada*,

[1989] 1 SCR 41 at p 49). Having quoted paragraph 561(1) the court went to state the following on the significance of the preliminary inquiry:

> [16] The significance of the preliminary inquiry, as the event from which time for re-election runs, is that it is at that inquiry that the accused ordinarily will be apprised of the case he has to meet. Only when he has that knowledge can his decision not to seek the benefit of a jury trial be described as an informed one.
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> [17] If s. 561(1) is construed literally, the Crown might introduce at the inquiry the minimum of evidence required to obtain a committal and then give notice to the accused weeks later of its intention to introduce at trial additional evidence which changes the nature of the case. And an accused person, having made his decision not to re-elect on the basis of the case made out at the inquiry, would then be precluded from making a re-election on the basis of the totally different case now relied on by the Crown.
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> [18] Such a result, in our opinion, has the potential of amounting to a denial of the accused's *Charter* right to the benefit of a jury trial. It depends upon the nature of the additional evidence to be called. In circumstances such as the present, the possible introduction of similar fact evidence changes the Crown's case in a substantial way. And it does so in a way material to the mode of trial selected.

[14] The court then described the recent history re-election process in Canada at paragraphs 30 and 31 as follows:

> [30] Prior to 1985, re-election was permitted at any time up to a fortnight before the commencement of the trial. Inevitably, this created administrative difficulties for the courts. Trials had to be postponed where a last-minute re-election was made, particularly where a trial scheduled to proceed before a judge alone had to be re-scheduled for hearing with a jury. We are of the view that it was to prevent these difficulties from occurring that s. 561(1) in the present form was passed (s.110 of the *Criminal Law Amendment Act*, 1985 S.C. 1985, c.19).
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> [31] In enacting the amendment, Parliament must have been aware of the Charter right of an accused person to make an informed choice of his mode of trial. Parliament must also have been aware that, for the choice to be informed, the accused person must have knowledge of the substance of the case against him. That, no doubt, is why Parliament provided that an accused person should have fourteen days after he has had the opportunity of acquiring such knowledge within which to re-elect. Because such knowledge will ordinarily be available to an accused person at the preliminary inquiry, it seems to us that it was the opportunity to acquire such knowledge, rather than the event, which Parliament intended to stipulate as the point from which time for re-election runs.

[15] The *Ruston* decision has since guided many courts in the interpretation and application of section 561. That section has thus been interpreted as giving the accused the right to re-elect his or her mode of trial within 14 days of learning of a substantial change in the Crown's case, even if this re-election is beyond 14 days following the completion of the preliminary inquiry.

[16] Section 561(1)(c) has also been found to be constitutionally valid by the Quebec Court of Appeal in *R v Savage*, Que.C.A., 1990, No. 500-10-000378-883, and by the Nova Scotia Court of Appeal in *R v K.J.F.*, (1993) 123 N.S.R. (2d) 142 (N.S.C.A.). The Quebec Court of Appeal referred to the following passage from the 1988 District

Court of Ontario decision in *Her Majesty The Queen and Charles H.L.* to support its decision:

> Rather it would appear that the purpose of the provision is to ensure that the administration of justice not be subverted by tardy and untimely changes of mind of accused persons as to the mode of trial desired. If an accused were to have an unfettered right to change his mind at any time as to the mode of his trial there could be chaos in the judicial system with consequential disastrous results to the administration of justice, and to our society in general. The uncertainty, delay and expense which a capricious accused could impose upon the judicial system without some such limits could result in a complete miscarriage of justice.
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> Consequently, I cannot agree that the objective of this legislation is trivial, or aimed at avoiding a minor administration inconvenience, but find that the objective is of sufficient importance to meet the first criterion set out in *Oakes*.

[17] The military justice system does not provide for a preliminary inquiry. An accused becomes aware of the substance of the prosecution's case against him or her through the disclosure provided by the prosecution and the will-say statements of the prosecution's witnesses pursuant to article 111.11 of the *QR&O*. In the military justice system, an accused may only re-elect as of right 30 days before the date set for the commencement of the trial. This right of re-election resembles the one found at section 561(2).

[18] Just as in *Ruston*, in *R v Bennett*, (1993) 83 C.C.C.(3d) 50 (Ont.Prov.Ct.), the Court declined to declare section 561(2) invalid and chose to read down those provisions to allow the accused to re-elect. As was the case in *Ruston*, that relief was granted based on the particular facts of that case. The Supreme Court of British-Columbia (*R v Taj Ishmail*, 6 W.C.B. 148 1981 CLB 2434 *BCSC)* and the Cour du Québec (*R c Savoie*, 2012 QCCQ 3864) have both concluded that section 561 of the *Criminal Code* only offers one re-election as of right to the accused.

[19] A common theme may be found in all of these cases; namely, that the accused was permitted to re-elect without the consent of the prosecution if it was deemed that, in the specific circumstances of the case, the accused had not been fully informed of all his rights and of all the issues when he or she had exercised his or her first election.

[20] The Court Martial Appeal Court also commented on the need of consent of the prosecution to a second re-election at paragraph 31 of *R v MacLellan*, 2011 CMAC 5.

> [31] Consent of the prosecution to a second re-election by the accused provides a measure of control against judge shopping and abusive re-elections, contributes to the orderly and efficient administration of criminal justice and serves the overall interest of justice while providing, at any time, flexibility in appropriate and deserving cases or unexpected situations. In *R. v. Ng* (2003), 18 Alta. L.R. (4th) 77, at paragraphs 121 and 122, the learned Chief Justice of the Alberta Court of Appeal wrote:
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> > 121. <u>This historical review reflects Parliament's efforts to balance competing interests - the interests of the accused on the one hand and the interests of society, including those of victims and witnesses, on the</u>

> other - in order to preserve a fair and impartial criminal justice system. Where s. 469 offences are concerned, Parliament has determined that the public interest in such crimes does not warrant leaving the decision as to mode of trial in the hands of the accused alone, based solely on the accused's assessment of what is in his or her self-interest. As explained by the Supreme Court of Canada in *R. v. Turpin*, *supra*, at 1309-1310:
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> > The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community standards to trial verdicts . In both its study paper (The Jury in Criminal Trials (1980), at pp. 5-17) and in its report to Parliament (The Jury (1982), at p. 5) the Law Reform Commission of Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles.
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> 122. However, Parliament has also recognized that, subject to the Attorney General's right to compel a jury trial under s. 568, it is appropriate, for electable offences, to allow the accused alone the ability to select the mode of trial. But even so, Parliament has imposed time limits on an accused's 'as of right' election or re-election in order to avoid its being used as a vehicle for judge shopping as well as to provide procedural certainty in the scheduling of criminal cases. On this latter point, see *R. v. Jerome*, [1997] N.W.T.J. No. 40 (N.W.T. S.C.).

[21] As stated by the Court at paragraphs 39 and 40:

> [39] The issue of re-election did not arise in the *Trépanier* case and, therefore, our Court made no pronouncement in that respect. Nor did our Court put in question or in doubt Parliament's right within the confines of the Charter to regulate the conditions governing the exercise of election and re-election rights in the interests of the litigants and justice: see *R. v. Ng*, *supra*, at paragraphs 108 to 135. The *Trépanier* case does not stand for the proposition that an accused possesses a right to re-elect his mode of trial without the prosecution's consent after his trial has begun.
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> [40] To sum up, the factual situation in the present instance was governed by section 165.193, especially subsection (5). No re-election is to be permitted without the consent of the Director of Military Prosecutions. I will now address the respondent's allegation that the prosecution consented to the re-election and is estopped from pursuing its appeal.

[22] The CMAC dealt with a situation in *MacLellan* that is factually different from this case. Capt MacLellan was to be tried by GCM and wanted to re-elect to a SCM but the prosecution refused to consent to that re-election. Although the panel was on location, it had not yet been assembled. He indicated his intention to re-elect during the course of preliminary motions during the court martial proceedings. Ex-Master Corporal Edmunds wishes to re-elect to a GCM because he alleges there is a substantial change to the case he has to meet because of the disclosure received the day before the start of his SCM. I thus conclude that the *MacLellan* decision does not stand for the proposition that a re-election under subsection 165.193(5) will only be permitted with

the consent of the Director of Military Prosecutions in every case, but that this decision dealt with a specific factual situation.

[23] An application of the Canadian criminal case law to the military justice system would result in the following interpretation of subsection 165.193(5): a court martial could allow an accused to re-elect as of right for a second time within 30 days of the date set for the commencement of the trial if, in the specific circumstances of the case, the accused had not been fully informed of all his or her rights and of all the issues when he or she had exercised his or her re-election under 165.193(4).

[24] The applicant re-elected to be tried by SCM following the plea agreement and obtained the written consent of the prosecutor. Defence counsel stated during the hearing that it was the practice to elect for an SCM once a plea agreement had been reached. The applicant could have pled guilty at his GCM without the need to assemble the court martial panel (see section 191.1 of the *NDA*). A sentence is always determined by the military judge at a GCM or at a SCM. A guilty plea pursuant to section 191.1 would have in effect been the same procedure as if he had pled guilty before a SCM. Although it is clear the accused made a new choice of mode of trial after the plea agreement had been reached with the prosecutor, the evidence does not indicate this new choice was a part of that plea agreement. It is also clear that defence counsel was aware of the procedure found at section 191.1 since he had represented an accused in 2012 who had pled guilty before a GCM following a plea agreement.

[25] Lamer J. in *Korponay*, at pages 49 to 50, provides trial courts the following guidance when determining whether or not an accused made an informed decision to waive the benefit of a jury trial :

> ... The judge's duties concerning any waiver are no different than those on a plea of guilty. The factors he will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect. However, always relevant will be the fact that the accused is or is not represented by counsel, counsel's experience, and, in my view of great importance in a country so varied as ours, the particular practice that has developed in the jurisdiction where the events are taking place.

[26] The applicant alleges the cheques found at Exhibit M2-1, representing a value of approximately $29,000, are a substantial change in the case and could have an impact on his defence. He cites section 138 of the *NDA* as an example of the effect these cheques have on the case before this court martial. Section 138 of the *NDA* reads as follows:

> **138.** Where a service tribunal concludes that
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> (*a*) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and
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> (*b*) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,

> the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.

[27] The evidence does not demonstrate the cheques found at Exhibit M2-1 have any bearing on the charges found in the charge sheet. Ex-Master Corporal Edmunds is to be tried for alleged fraudulent transactions totalling $8,515 which would have occurred during the period of 4 Apr to 5 May 2011. The dates of the cheques found at Exhibit M2-1 precede or come after the dates found in the charges before this court. The prosecutor has also stated in court that he would not be using this evidence during this trial. Thus, it does not appear, based on the evidence, that this disclosure is relevant to the charges before this court. This evidence is also not relevant to a special finding of guilty under section 138.

[28] The court martial proceedings have not begun and he has not yet been asked to plead to the charges before this court. It appears this new disclosure did have an impact on the accused in that he has indicated through his counsel that he intends to plead not guilty. This new disclosure may mean that a plea of guilty is not the better option for him. The accused is represented by an experienced lawyer. The exact details of the plea agreement were not put before the court. Based on the evidence, I find the disclosure of the cheques does not change substantially the case to be met by the accused. I also find that I have not been presented with any evidence that would demonstrate the accused had not been fully informed of the consequences of his decision to re-elect to be tried by Standing Court Martial.

[29] The applicant also seeks, in the alternative, an order declaring that section 165.193 violates his right to make full answer and defence pursuant to section 7 and right to a fair tribunal pursuant to section 11(*d*) of the *Charter of Rights and Freedoms.* He also requests as relief pursuant to section 24 of the *Charter* that subsection 165.193(1) be read down to provide that the accused can re-elect in the circumstances of the present case.

[30] Section 11(*d*) reads as follows:

> Every person charged with an offence has the right
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> ...
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[31] The applicant referred to *R v McGregor*, (1992) 14 C.R.R.(2d) 155 (Ont Gen Div), to buttress his argument. This case was appealed to the Ontario Court of Appeal in 1999 (see 134 CCC (3d) 570). That Court ruled that the decision by the trial judge to overrule the Crown's decision not to consent to a re-election to trial by judge alone was correct in the specific circumstances of that case:

[2] The appellant was tried on a charge of first degree murder by Charron J., without a jury. The case attracted considerable notoriety in Ottawa, where the killing took place, and in the rest of the country. The appellant and his counsel were concerned that the appellant could not obtain a fair trial in Ottawa. From the appellant's point of view at trial, however, a change of venue was not a reasonable alternative and he made no such application. The reasons for not seeking a change of venue need not be detailed. Suffice it to say that there was evidence from which the trial judge could conclude that, in the unusual circumstances, a change of venue would interfere with the appellant's right to make full answer and defence. The remedy sought at trial by the appellant was a trial before a judge without a jury. Charron J. granted that remedy. The appellant argues, contrary to his counsel's position at trial, that the trial judge should have granted a change of venue of her own motion over the objections of both the Crown and defence counsel. He now complains that she erred in granting the remedy requested and that she had no jurisdiction to try him without a jury.

[3] The problem arose because, despite the evidence demonstrating that the appellant could not receive a fair trial by an impartial jury, the Crown refused to consent, as required by s. 473 of the Criminal Code, to a trial by judge alone. The trial judge found that although the Crown's position was that an impartial jury could be empanelled through the use of traditional Criminal Code procedures, an informed person viewing the matter realistically and practically would conclude that the Crown was seeking a favourable jury, rather than simply an impartial one. She also found, based on the evidence placed before her, that the exercise of the Crown's discretion in refusing to consent to a trial by judge alone resulted in an infringement of the appellant's right to a trial by an independent and impartial tribunal, as guaranteed by ss. 11(d) and 7 of the Charter of Rights and Freedoms. In view of that finding, the trial judge held that the appellant was entitled to a remedy under s. 24(1) of the Charter. The remedy granted was to dispense with the Crown's consent under s. 473.

[4] We have not been persuaded that in the unusual circumstances of this case, the trial judge erred. There was evidence upon which she could find, as she did, that the Crown's conduct would infringe the appellant's rights. The remedy was one she was entitled to give. In R. v. E. (L.) 1994 CanLII 1785 (ON CA), (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), this court held that in narrow circumstances, where the conduct of the Crown threatens to deprive an accused of his right to a fair trial as guaranteed by the Charter, a trial judge has the right to override the Crown's refusal to consent to a trial by judge alone. Thus, at p. 241, Finlayson J.A. writing for the court held:

> While I do not believe that the Crown has an unfettered right to withhold consent to a re-election under s. 561(1)(c), the court cannot review this exercise of statutory discretion relating to the mode of trial unless it has been demonstrated on the record that there has been an abuse of the court's process through oppressive proceedings on the part of the Crown. I would think that there would have to be some showing before the trial judge that the Crown had exercised its discretion arbitrarily, capriciously or for some improper motive so as to invite an examination as to whether there was an abuse of process under s. 7 of the Charter.

and at p. 243:

> I recognize that a trial judge must have some flexibility in ensuring that the prosecution does not overreach when asserting Crown prerogatives. In my opinion, based on the authority of Turpin, supra, a trial judge can only supplant or ignore the clear language of the Code when constitutional considerations are engaged. The level of intervention in this case required a finding that the conduct of the Crown amounted to an abuse of process. [Emphasis added.]

> [5] On the findings made by the trial judge, which were open to her on the evidence, constitutional considerations were engaged. Accordingly, the court was properly constituted.

[32] I find this case is not relevant to this matter since the facts of that case are so different from those before this court. The applicant has not produced any evidence which would prove that a SCM is not an independent and impartial tribunal. He has not presented any evidence which would prove that he would not be presumed innocent until proven guilty according to law; nor has he presented any evidence that he could not benefit from a fair and public hearing should he tried by a SCM. The applicant has failed to produce any evidence that demonstrates his right to a fair trial by an impartial tribunal is prejudiced in any way.

[33] Lastly, the applicant also seeks, in the alternative, an order declaring that the refusal of prosecution to consent under section 165.193(5) was exercised arbitrarily, capriciously, and for an improper motive and amounted to an abuse of the court's process which violates the rights of the accused under section 7 of the *Charter*. He requests as relief pursuant to section 24 of the *Charter* an order overriding the refusal of prosecution to consent to a re-election pursuant to section 165.193(5).

[34] The Alberta Court of Appeal in *R v Ng*, (2003) 173 CCC (3d) 349, was asked to decide whether the absence of reasons by the Crown when refusing to consent to a re-election amounted to an abuse of process. Having reviewed the history of re-elections, the concept of prosecutorial discretion and the basis for review of prosecutorial discretion, Wittmann JA, addressed the onus and standard of proof in such situations as follows:

> [34] The accused, who is making the allegation, bears the onus of proof that the Crown's exercise of discretion amounts to, or would amount to, an abuse of process but for the intervention by the trial judge. The standard of proof is on the balance of probabilities: ***Cook*** at para. 60.
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> [35] In ***R.* v. *E.(L.)***, *supra*, Finlayson, J.A. said at 241-3, "there would have to be some showing before the trial judge that the Crown had exercised its discretion arbitrarily, capriciously or for some improper motive", which required a finding that the conduct of the Crown amounted to an abuse of process. He also noted that the standard for establishing an abuse of process is very onerous.
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> [36] The case authorities confirm that a trial judge may review a prosecutor's discretionary decision where the accused has proven on a balance of probabilities that the prosecutor exercised his discretion abusively, capriciously, or for improper motive such that the court may examine whether there was an abuse of process. The court may intervene if it finds it is necessary to prevent the prosecutor's conduct from resulting in oppressive or vexatious proceedings that would have violated the fundamental principles of justice underlying the community's sense of fair play and decency.

[35] He concluded the trial judge had erred in deciding the prosecutor had to give reasons in the case at hand. He explained his reasons for this decision as follows:

> [67] Here, the exercise of prosecutorial discretion was not shown to be arbitrary, capricious or motivated by an improper consideration. The absence of reasons does not make it so. I adopt the reasoning in ***Tonner (No. 1)*** and the Ontario Court of Appeal decisions discussed above and find that they represent the law in Alberta. I do not agree with the line of authorities preferred by the trial judge. The inquiry by a court into the exercise of prosecutorial discretion is premised upon the need to determine whether there was an abuse of process. The standard for establishing an abuse of process is very onerous, the court having discretion to remedy abuse only in the clearest of cases. It is inconsistent with this very high standard to permit a court to conclude an abuse of process has occurred when a prosecutor declines to give reasons for an exercise of discretion, particularly, in this case, where the requirement for Crown consent is conferred by the *Criminal Code* without obligation to give reasons.

[36] The Chief Justice, the Honourable Justice Fraser, concurred with the decision and added to the discussion on prosecutorial discretion as follows:

> [133] Third, while the exercise of prosecutorial discretion is subject to review, the accepted test remains whether the exercise of prosecutorial discretion amounts to, or would amount to, abuse of process: *R. v. E.(L.)* 1994 CanLII 1785 (ON CA), (1994) 94 C.C.C. (3d) 228 (Ont. C.A.); *R. v. O'Connor* 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411; *R. v. Regan* 2002 SCC 12 (CanLII), (2002) 161 C.C.C. (3d) 97 (S.C.C.); *R. v. Cook* 1997 CanLII 392 (SCC), [1997] 1 S.C.R. 1113; *R. v. Power* 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601; *R. v. Conway* 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659. Abuse of process in this context includes not only conduct impairing an accused's *Charter* rights; it also includes conduct which contravenes fundamental notions of justice and thereby the integrity of the judicial process: *R. v. O'Connor*, *supra*; *R. v. Regan*, *supra*. Accordingly, where the Crown's refusal to consent to a trial by judge alone would result in an unfair jury trial or in some other breach of an accused's *Charter* rights, the Court would have the jurisdiction to order that the trial proceed by judge alone: *R. v. E.(L.)*, *supra*; *R. v. McGregor* 1999 CanLII 2553 (ON CA), (1999) 134 C.C.C. (3d) 570 (Ont. C.A.). Therefore, if circumstances exist which would arguably render a jury trial unfair, the defence is free to adduce evidence to this effect in support of its abuse of process claim.
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> [134] What must be emphasized, however, is that it is the accused who bears the onus to establish abuse of process on a balance of probabilities: *R. v. O'Connor*, *supra*; *R. v. Cook*, *supra*; *R. v. Regan*, *supra*. For a Court to focus on whether the Crown has good reasons for not consenting to trial by judge alone, and then to de-construct and analyze the proffered reasons, would turn this approach on its head. The question would no longer be whether bad reasons could be proven by the defence but rather whether good reasons – indeed good enough reasons – could be proven by the Crown. That is not the test for judicial review of the exercise of prosecutorial discretion, and with sound justification: *R. v. T.(V.)* 1992 CanLII 88 (SCC), [1992] 1 S.C.R. 749; *Kreiger v. Law Society of Alberta* 2002 SCC 65 (CanLII), (2002) 168 C.C.C. (3d) 97 (S.C.C.); *R. v. Power*, *supra*; *R. v. Smythe* 1970 CanLII 29 (SCC), [1971] S.C.R. 680.

[37] The applicant alleges the prosecutor failed to perform his duties as prescribed by his code of ethics found at the Director of Military Prosecutions Policy Directives 008/99 and 010/00 because he would have negotiated the plea agreement without informing counsel for the accused that he had asked the military police investigators to continue their investigation of ex-Master Corporal Edmunds. He alleges there was a lack of fairness on the part of the prosecutor and that the resolution agreement was not based on an informed decision.

[38] The prosecutor does not have to justify his decision to refuse to consent to a re-election. I have not been informed of the contents of the plea negotiations and of the plea agreement. The late disclosure is not relevant to the charges before this court martial. I find the applicant has not presented evidence that would demonstrate on a balance of probabilities that proceeding with a review of the actions of the prosecutor is warranted in this case (see paragraphs 60 to 62 of *R. v Nixon*, 2011 SCC 34).

**FOR THESE REASONS, THE COURT**

[39] The court denies the application.

[40] These proceedings under section 187 of the *NDA* and article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces* are terminated.

J-G Perron, Lieutenant-Colonel
(Presiding Military Judge)

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