Date: 20080424

Docket: CMAC-498

Citation: 2008 CMAC 3

CORAM: **LÉTOURNEAU J.A.**
S. NOËL J.A.
DE MONTIGNY J.A.

BETWEEN:

JOSEPH SIMON KEVIN TRÉPANIER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

EX-CORPORAL BEEK, D.D.

Intervener

Heard at Ottawa, Ontario, on March 28, 2008.

Judgment delivered at Ottawa, Ontario, on April 24, 2008.

REASONS FOR JUDGMENT BY THE COURT

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BY THE COURT

[1] We include, for reference and for the benefit of the parties, the intervener and the readers, a table of contents of the topics that will be discussed:

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Issues

[2] This appeal involves a challenge to the constitutionality of section 165.14 and subsection 165.19(1) of the *National Defence Act*, RSC 1985, c. N-5 (NDA) and their counterpart, article 111.02 (1) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os). It also seeks a declaration that, as a result of being unconstitutional, these provisions are invalid and inoperative. To put it differently, they are alleged to be of no force or effect. For reasons that follow, we think this appeal should be allowed in part.

The addition of interveners

[3] By order of Chief Justice Blanchard issued on February 15, 2008, appellants McRae and Beek in files *McRae v. The Queen*, CMAC-499 and *Beek v. The Queen*, CMAC-504 were given intervener status in the present instance. Since then, Master Corporal McRae has abandoned his appeal: see notice of abandonment dated March 17, 2008. However, counsel for Mr. Beek has filed written submissions and made oral submissions at the hearing. Both sets of submissions were helpful. With the able submissions of counsel for the appellant and the respondent they have enlightened this important legal debate.

The source of the alleged unconstitutionality

[4] According to the appellant and the intervener Ex-Corporal Beek, the impugned provisions are unconstitutional for common law and Charter of Rights reasons. There allegedly is a violation of section 7 and paragraph 11*d*) of the *Canadian Charter of Rights and Freedoms* (Charter). The

violation, it is argued, originates from the fact that the provisions under attack give an exclusive power to the prosecution, i.e. the Director of Military Prosecutions (Director), to unilaterally choose the court martial before which a trial will take place. Article 111.02(1) of the QR&Os is merely a re-statement of subsection 165.19(1) of the NDA.

[5] As we understand the position of the appellant and the intervener, this power constitutes an unjustifiable breach of the accused's right to present a full answer and defence and to control the conduct of his defence. This right is one which is required by the principles of fundamental justice as the Supreme Court of Canada found in *R. v. Swain*, [1991] 1 S.C.R. 933, at pages 972 and 1025. Thus, the accused is deprived of his right to liberty and security under section 7 in a manner which is not in accordance with the principles of fundamental justice.

[6] In addition, the intervener invokes the common law right given to an accused, wherever a choice is available, to choose his or her mode of trier of facts. This right, the intervener submits, is both a constitutional protection from the *Magna Carta* and a benefit as found in the *Swain* case. It has now been enshrined in section 7 and paragraph 11*d*) of the Charter.

[7] The relevant provisions read:

Charter

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
…	[…]
d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

NDA

165.15 The Director of Military Prosecutions may be assisted and represented, to the extent determined by the Director of Military Prosecutions, by officers who are barristers or advocates with standing at the bar of a province.	**165.14** Dans la mise en accusation, le directeur des poursuites militaires détermine le type de cour martiale devant juger l'accusé. Il informe l'administrateur de la cour martiale de sa décision.
165.19 (1) When a charge is preferred, the Court Martial Administrator shall convene a court martial in accordance with the determination of the Director of Military Prosecutions under section 165.14 and, in the case of a General Court Martial or a Disciplinary Court Martial, shall appoint its members.	**165.19** (1) L'administrateur de la cour martiale, conformément à la décision du directeur des poursuites militaires prise aux termes de l'article 165.14, convoque la cour martiale sélectionnée et, dans le cas d'une cour martiale générale ou d'une cour martiale disciplinaire, en nomme les membres.
(2) The Court Martial Administrator performs such other duties as may be specified by this Act or prescribed by the Governor in Council in regulations.	(2) Il exerce toute autre fonction qui lui est conférée par la présente loi ou que lui confie par règlement le gouverneur en conseil.
(3) The Court Martial Administrator acts under the general supervision of the Chief Military Judge.	(3) Il exerce ses fonctions sous la direction générale du juge militaire en chef.

QR&Os

111.02 – CONVENING OF COURTS MARTIAL	**111.02** – CONVOCATION DES COURS MARTIALES
(1) Subsection 165.19(1) of the National Defence Act provides:	(1) Le paragraphe 165.19(1) de la Loi sur la défense nationale prescrit :

"165.19 (1) When a charge is preferred, the Court Martial Administrator shall convene a court martial in accordance with the determination of the Director of Military Prosecutions under section 165.14 and, in the case of a General Court Martial or a Disciplinary Court Martial, shall appoint its members."	«165.19 (1) L'administrateur de la cour martiale, conformément à la décision du directeur des poursuites militaires prise aux termes de l'article 165.14, convoque la cour martiale sélectionnée et, dans le cas d'une cour martiale générale ou d'une cour martiale disciplinaire, en nomme les membres.»

[8] Since the decision of this Court in *R. v. Nystrom*, 2005 CMAC 7, there has been five challenges to these provisions before the court martial: *R. v. Ex-Corporal Chisholm*, 2006 CM 07; *R. v. Pejanovic*, 2006 CM 20; *R. v. MacRae*, 2007 CM 4003; *R. v. Beek*, 2007 CMAC 504; and the present appeal, *R v. Trépanier*, 2007 CM 1002, CMAC 498.

[9] In *Nystrom*, *supra*, our Court declined to deal with the issue because the appeal could be decided on the question of the legality of the court martial's verdict. However, it unanimously expressed serious concerns about the fairness of the impugned provisions. The time has now come to address the constitutional challenge.

Facts and proceedings

[10] The appellant was charged with a service offence pursuant to section 130 of the NDA, to wit a sexual assault contrary to section 271 of the *Criminal Code* of Canada. The offence, if prosecuted as an indictable offence under the *Criminal Code*, carries a maximum penalty of ten years of imprisonment. If punishable on summary conviction, the accused is liable to a term of imprisonment not exceeding eighteen (18) months.

[11] The charge was laid on February 6, 2006 for an act allegedly committed on or about July 24, 2005 on the Canadian Forces base in Borden, Ontario.

[12] In view of the nature of the alleged offence, the commander or his delegated officer did not have jurisdiction to try the charge summarily: see article 108.07 of the QR&Os. Consequently, a demand was made to the referral authority that the accused be tried by a court martial: *ibidem*, articles 108.16 and 109.03.

[13] The charge was then transmitted by the referral authority to the Director who decided to prefer the charge previously mentioned. Pursuant to section 165.14 of the NDA, he chose a Standing Court Martial as the court before which the trial would proceed.

[14] Once the court martial convened pursuant to section 165.19 of the NDA, counsel for the appellant filed a preliminary motion challenging the constitutionality of the provisions under attack. His motion was dismissed on January 26, 2007. Thereafter, the trial proceeded on a number of admissions of fact regarding the event.

[15] On January 29, 2007, the appellant was found guilty as charged on the basis of the admissions. Two days later, the Chief Military Judge, who tried the accused, imposed as sentence a reprimand and a fine of $2,000.

[16] Pursuant to section 230 of the NDA, the appellant appeals against the legality of the guilty finding on the basis that, for the constitutional grounds previously mentioned, the Standing Court Martial did not have jurisdiction to try him.

The decision of the Standing Court Martial

[17] In the course of analysing the arguments submitted by the parties, the Chief Military Judge made a number of statements that need to be addressed. We will do that later in part when stating the background to the impugned provisions and in part when analysing his decision.

[18] Suffice it to say that the Chief Military Judge was confronted with the *obiter* of this Court in *Nystrom* and an earlier decision of this Court in *R. v. Lunn* (1993), 5 C.M.A.R. 157. He was of the view that the two decisions were irreconcilable. Applying the *stare decisis* rule, he followed the *Lunn* decision which he believed could not be distinguished.

[19] The Chief Military Judge understood the decision in *Lunn* to mean that the discretionary power to choose a particular type of court martial, given to a person other than the accused, as well as the exercise of that power do not affect the rights of an accused guaranteed by section 7, paragraph 11*d*) and subsection 15(1) of the Charter. Such power, however, is subject to review if it has been used for improper motives, in which case a remedy under section 24 of the Charter could be granted. This is in essence the rationale for his dismissal of the appellant's motion: see page 133 of the appeal book.

The background to the impugned provisions

[20] Before analysing the decision of the Standing Court Martial and the submissions of the parties and the intervener, we believe it is appropriate to give some background information as to the legal system in which sections 165.14 and 165.29 find themselves.

[21] French Emperor Napoléon Bonaparte also known for his epic wars believed in an equal and unified justice for French citizens. He is quoted as saying (see Pierre Hugueney, *Traité théorique et pratique de droit pénal et de procédures pénales militaires*, cited in *Actes du Colloque Droit Pénal et Défense*, Ministère de la Défense, secrétariat général pour l'administration, Direction des affaires juridiques, Paris, 2001, at page 5):

> [TRANSLATION]
>
> There is one justice in France: one is a French citizen before being a soldier. If a soldier kills another one in France, he has no doubt committed a military offence, but he has also committed a civilian crime. All crimes must first be dealt with by the civilian courts each time such court is available.

[22] Based on the French constitution which states that every citizen is equal before the law and the derogatory nature of the military justice system, the French authorities have abolished the military courts in time of peace. They have kept them in time of war and for crimes committed abroad. The following excerpts from Solange Apik in *L'histoire de la justice militaire*, published in *Actes du Colloque Droit pénal et Défense* at pages 32-33 illustrate the evolution which occurred and the rationale for it:

La loi du 29 décembre 1966 induit enfin la disparition du corps des magistrats militaires. Les fonctions judiciaires sont exercées concurremment par des magistrats civils en détachement, les magistrats militaires ne l'étant plus qu'à titre provisoire jusqu'à l'extinction du corps.

L'égalité de traitement entre civils et personnels militaires demeure pourtant encore imparfaite. Au début des années 1980, les revendications se font plus précises et remettent en cause le dogme même de la justice militaire en se fondant sur deux principes. Il ne saurait exister qu'une seule justice aux yeux de la nation. Par ailleurs, la teneur des affaires traitées par la justice militaire ne justifie guère l'existence d'un tel système dérogatoire, nombre des affaires pouvant être traitées par la justice civile.

Ces arguments sous-tendent la loi adoptée le 21 juillet 1982 qui supprime en temps de paix les tribunaux permanents des forces armées. 37 juridictions de droit commun sont désormais compétentes, toutefois dans le cadre d'une chambre spécialisée en matière militaire. Les tribunaux permanents des forces armées sont supprimés. La spécificité demeure mais dans le cadre des chambres spécialisées des tribunaux de droit commun. Le militaire bénéficie de tous les droits de la défense y compris l'appel. Deux tribunaux militaires (Paris et Landau) demeurent liés à la présence des armées en dehors du territoire national.

En 1992, une réforme législative donne quelques droits à la partie civile, résidant dans la possibilité de déclencher des poursuites pénales contre un militaire mais uniquement en cas de mort, de mutilation ou d'infirmité permanente.

Enfin la loi du 4 janvier 1993 étend les droits de la défense et de la partie civile pour tous les justiciables civils.

Nous parvenons à la dernière réforme importante. Il s'agit d'une réforme essentielle, celle du 10 novembre 1999. Elle assure l'égalité des justiciables devant la justice pénale en préservant les intérêts des armées. Cette loi a un triple objectif :

- l'alignement des procédures : le militaire dispose des mêmes droits que le civil notamment dans le régime ordinaire de garde à vue, de détention provisoire, l'assistance d'avocat et le jury populaire;

- le regroupement devant une seule juridiction (le tribunal aux armées de Paris) des procédures relatives aux infractions en dehors du territoire national;

- le respect de la spécificité militaire : le ministre de la défense donne toujours son avis avant l'ouverture de poursuites pénales.

[Emphasis added]

[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 11*(f)* 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 11*(f)* 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, 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 11*f*) of the Charter. We hasten to add that the existence of a military nexus is not in dispute in the present instance.

[27] Yet, irrespective of its nature and the circumstances of its commission, section 130 of the NDA transforms into a military offence triable by military tribunals every violation of the *Criminal Code* of Canada, except the offences of murder and manslaughter when committed in Canada and those found in section 280 to 283 of the *Criminal Code* relating to the abduction of children: see section 70 of the NDA.

[28] Until amendments brought to section 70 of the NDA, the military tribunals did not have jurisdiction to hear and decide charges of sexual assault, aggravated sexual assault, and sexual assault with a weapon or with threats or causing bodily harm when these offences were perpetrated in Canada. In other words, prior to the 1998 amendments which expanded in this respect the jurisdiction of the military tribunals, the appellant in this case would have been tried by the civilian courts for a *Criminal Code* offence, charged as a criminal law offence, not a service offence. It is not disputed that if he had been so charged under section 271 of the *Criminal Code* and the charge prosecuted as an indictable offence, he would have had the right to elect and choose the court before which he would have wanted his trial to be held.

[29] As stated by the Chief Military Judge, prior to the 1998 amendments, the choice of the court martial before which a trial would be held was made by the convening authority which was part of the chain of command and acted on behalf of the prosecution and the executive. The learned Chief Military Judge saw an improvement in the fact that, as a result of the amendments, the choice is now made by the Director who is independent from the chain of command: see his reasons for judgment on the motion, at pages 128 and 131 of the appeal book. While we agree that it is better now than it was before, it does not mean for all that that it is right. Two wrongs do not make a right if the choice of the trier of fact does not constitutionally belong to the prosecution in the first place, whether the prosecution is independent or not from the chain of command.

[30] The scope of application of the military justice system is very broad with respect to offences (jurisdiction *rationae materiae*) and the place of their commission (jurisdiction *rationae loci*). While more limited as regards offenders (jurisdiction *rationae personae*), the scope remains important. The military justice system exercises its jurisdiction *rationae personae* over:

a) members of the regular forces composed of non-commissioned members and officers (subsection 15(1));

b) officers and non-commissioned members who are part of the special force; and

c) officers and non-commissioned members who are in the reserve when, for example, they are on duty, in practice, on training sessions, in uniform or called upon to assist civilian authorities (section 60).

[31] Indeed, all the persons enumerated in section 60 of the NDA are subject to the *Code of Service Discipline*. The section reads:

60. (1) The following persons are subject to the Code of Service Discipline:	**60.** (1) Sont seuls justiciables du code de discipline militaire :
(*a*) an officer or non-commissioned member of the regular force;	*a*) les officiers ou militaires du rang de la force régulière;
(*b*) an officer or non-commissioned member of the special force;	*b*) les officiers ou militaires du rang de la force spéciale;
(*c*) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is (i) undergoing drill or training, whether in uniform or not, (ii) in uniform, (iii) on duty, (iv) [Repealed, 1998, c. 35, s. 19] (v) called out under Part VI in aid of the civil power, (vi) called out on service, (vii) placed on active service, (viii) in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence, (ix) serving with any unit or other element of the regular force or the special force, or (x) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;	*c*) les officiers ou militaires du rang de la force de réserve se trouvant dans l'une ou l'autre des situations suivantes : (i) en période d'exercice ou d'instruction, qu'ils soient en uniforme ou non, (ii) en uniforme, (iii) de service, (iv) [Abrogé, 1998, ch. 35, art. 19] (v) appelés, dans le cadre de la partie VI, pour prêter main-forte au pouvoir civil, (vi) appelés en service, (vii) en service actif, (viii) à bord d'un navire, véhicule ou aéronef des Forces canadiennes ou dans — ou sur — tout établissement de défense ou ouvrage pour la défense, (ix) en service dans une unité ou un autre élément de la force régulière ou de la force spéciale, (x) présents, en uniforme ou non, à l'exercice ou l'instruction d'une unité ou d'un autre élément des Forces canadiennes;
(*d*) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Canadian Forces;	*d*) sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes qui, d'après la loi ou un accord entre le Canada et l'État dans les forces armées duquel elles servent, sont affectées comme officiers ou militaires du rang aux Forces canadiennes ou détachées auprès de celles-ci;

(*e*) a person, not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces;

e) les personnes qui, normalement non assujetties au code de discipline militaire, servent comme officiers ou militaires du rang dans toute force levée et entretenue à l'étranger par Sa Majesté du chef du Canada et commandée par un officier des Forces canadiennes;

(*f*) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;

f) les personnes qui, normalement non assujetties au code de discipline militaire, accompagnent quelque unité ou autre élément des Forces canadiennes en service, actif ou non, dans un lieu quelconque;

(*g*) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;

g) sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes fréquentant un établissement créé aux termes de l'article 47;

(*h*) an alleged spy for the enemy;

h) les présumés espions pour le compte de l'ennemi;

(*i*) a person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody; and

i) les personnes qui, normalement non assujetties au code de discipline militaire, sont sous garde civile ou militaire pour quelque infraction d'ordre militaire qu'elles ont — ou auraient — commise;

(*j*) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to that Code.

j) les personnes qui, normalement non assujetties au code de discipline militaire, servent auprès des Forces canadiennes aux termes d'un engagement passé avec le ministre par lequel elles consentent à relever de ce code.

(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

(2) Quiconque était justiciable du code de discipline militaire au moment où il aurait commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé pour cette infraction sous le régime du code de discipline militaire, même s'il a cessé, depuis que l'infraction a été commise, d'appartenir à l'une des catégories énumérées au paragraphe (1).

(3) Every person who, since allegedly committing a service offence, has ceased to be a person described in subsection (1), shall for the purposes of the Code of Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).	(3) Quiconque a cessé, depuis la présumée perpétration d'une infraction d'ordre militaire, d'appartenir à l'une des catégories énumérées au paragraphe (1) est réputé, pour l'application du code de discipline militaire, avoir le statut et le grade qu'il détenait immédiatement avant de ne plus en relever, et ce tant qu'il peut, aux termes de ce code, être accusé, poursuivi et jugé.

[Emphasis added]

[32] "The reach of the Code extends to civilians, who normally would not be subject to the military regime, but who become so because they accompany a unit or another element of the Canadian Forces that is on service or active service in any place": see Létourneau and Drapeau, *Canadian Military Law Annotated*, Thomson/Carswell, Toronto, 2006, at page 294.

The consequences and derogations resulting from the transformation of *Criminal Code* offences into military offences

[33] The transformation of *Criminal Code* offences into military offences by making them service offences through sections 2 and 130 of the NDA is not without consequences for a person accused before a military tribunal. A number of derogations and loss of rights and benefits ensues.

[34] For example, a great many offences under the *Criminal Code* are hybrid offences, that is to say, that they can be prosecuted either by indictment or summary conviction. In enacting hybrid offences, Parliament recognized that there may be instances where the circumstances surrounding

the commission of the offence are such that a more serious prosecution by way of indictment is not warranted.

[35] In addition, in case of a prosecution by way of summary conviction, unless otherwise provided, the penalty that a summary conviction court can impose is limited to a maximum period of imprisonment of six months or to a fine of not more than $2,000 or to both: see section 787 of the *Criminal Code*. Moreover, a prosecution by way of summary conviction carries a much lighter stigma than a prosecution by way of indictment. In the military justice system, hybrid offences lose that characteristic so that the accused cannot enjoy these benefits: see *Dixon v. Her Majesty the Queen*, 2005 CMAC 2. A court martial is not a summary conviction court within the meaning of section 785 of the *Criminal Code*: see *R. v. Page* (1996), 5 C.M.A.R. 383.

[36] An accused convicted by a court martial for *Criminal Code* offences is also deprived of a variety of sentences which would be available to him if he or she were tried before a civilian court. Absolute discharge (section 730 of the *Criminal Code*), conditional discharge (*ibidem*), condition sentences whereby the sentence of imprisonment is served in the community (section 742.1 of the *Criminal Code*), conditional sentence order (section 742.3 of the *Criminal Code*), intermittent sentence (section 732 of the *Criminal Code*) and suspended sentence with probation (section 731 of the *Criminal Code*) are not part of the range of sentences that a court martial can impose pursuant to section 139 of the NDA: see *Dixon v. Her Majesty the Queen*, *supra*, at paragraphs 21 and 22.

[37] We are aware that Bill C-45 amending the NDA was tabled on March 3, 2008 and, if assented to in its actual form, would eventually provide for the possibility of granting an absolute discharge and an intermittent sentence for a period of imprisonment or detention limited to fourteen (14) days or less as opposed to ninety (90) days or less under the *Criminal Code*: see sections 22 and 62 of the Bill introducing sections 148 and 203.9 in the NDA. This, however, is the extent of the improvement and it falls short of giving the accused the benefits that he could get before a civilian court.

[38] We should add for the sake of clarity that the suspended sentence referred to in section 731 of the *Criminal Code* must not be confused with the power to suspend given to a military tribunal by section 215 of the NDA. Section 731 of the *Criminal Code* refers to a suspension of the passing of sentence while section 215 of the NDA refers to a suspension of the execution of a sentence of imprisonment or detention already imposed.

[39] As we are referring to sentences, we should mention another very significant derogation to the process that a soldier would be subject to if he or she were sentenced by a civilian court.

[40] The conditions of detention in a barrack or imprisonment in a service prison are harsh for a detainee. They bear little comparison with those which prevail for detainees in civilian prisons.

[41] The focus on detention in military detention barracks or in imprisonment in service prisons is put on discipline. Hence, follow a severe daily routine, a strict diet in case of misbehaviour with

bread and water as a regular component, no communication and smoking periods and no visits other than official visitors such as his defending counsel, members of the legal profession, police forces and Canadian Forces: see the *Regulations for service prisons and detention barracks*, P.C. 1967-1707, c. 5, Regulations 4.16 and 5.05 (Regulations).

[42] We need not go into details. Suffice it to say that a detention or imprisonment punishment is served in two stages. The first stage lasts until the inmate earns by his good conduct his promotion to the second stage. The length of that first stage cannot be less than fourteen (14) days: see Regulation 5.05.

[43] The second stage of punishment marks the restoration of privileges to the detainee as well as the possibility of earning remission of punishment. Among the privileges, one finds:

a) the right of the inmate to communicate with other inmates for a maximum period of 30 minutes each day at the times and under the conditions prescribed by the commandant;

b) the right to smoke cigarettes under similar conditions and provided the aggregate smoking time in any one day does not exceed 30 minutes;

c) the right to use the library; and

d) the right to receive visitors: see Regulation 5.06.

[44] The daily routine is a strict one and unfolds as follows:

- wake up at 06:00;
- shave, scrub rooms and barracks, clean equipment and layout from 06:00 to 07:30;
- breakfast 07:30 to 08:00;
- training period 08:00 to 11:50;
- wash up, dinner 12:00 to 13:00;

- training period 13:00 to 16:50;
- wash up, supper 17:00 to 18:00;
- shower 18:00 to 18:30;
- wash clothes, scrub equipment and perform general tasks 18:30 to 19:45;
- incidental parades and letter writing 19:45 to 20:45;
- make up beds 20:45 to 21:00; and
- lights out 21:00: see Regulation 5.02.

[45] The Sunday routine closely resembles the daily routine, except that time is allocated for Divine Service and a period for privileges, when and if applicable.

[46] The service prison or detention barrack is inspected once each day by the commanding officer and frequently by the senior non-commissioned member of a service prison or detention barrack: see Regulations 3.04 and 3.09(1).

[47] The concept of misbehaviour is very stringent. A detainee can easily find himself or herself in breach of the Regulations.

[48] The Regulations contain a list of offences against good order and discipline that amount to misbehaviour: disrespect, idleness, negligence, refusal to work, use of blasphemous words or other improper language, communication with another inmate, singing, whistling, etc.: see Regulation 6.01.

[49] An inmate found guilty of misbehaviour can be subject to the following corrective measures:

a) close confinement;

b) no. 1 Diet;

c) no. 2 Diet;

d) loss of privileges; and

e) forfeiture of marks earned for remission: see Regulation 6.11.

[50] Close confinement means confinement in the room, deprivation of all privileges, allocation of two periods of 30 minutes each day for exercise and no entitlement to marks for conduct: see Regulation 6.12.

[51] When the no. 1 Diet punishment is applied for three days or less, it consists of only 14 ounces of bread a day and unrestricted quantities of water. When the no. 1 Diet is applied for more than three days, the inmate will receive 14 ounces of bread a day and unrestricted quantities of water for the first three days. Then for the next three days, he will be put on the normal ration scale. This process will be repeated until the end of the period. Of course, while on no. 1 Diet, the inmate cannot be subjected to parades or required to perform drill or work tasks. He is not entitled to marks for conduct and he cannot leave his room, except for two exercise periods of not less than 30 minutes each day. Finally, he is deprived of privileges.

[52] The pattern for no. 2 Diet is the same as for no. 1 Diet except that the lengths of the diet periods are 21 days or less, and more than 21 days.

[53] When the period for no. 2 Diet is 21 days or less, the inmate will have:

for breakfast: seven ounces of bread and unrestricted quantities of water;

for dinner: porridge containing two ounces of oatmeal, two ounces of peas or beans, eight ounces of potatoes, the normal flavouring of salt and unrestricted quantities of water; and

for supper: seven ounces of bread and unrestricted quantities of water.

If the no. 2 Diet is for more than 21 days, the inmate will be placed on normal ration for a period of seven days before reverting to the no. 2 Diet again.

[54] In *Mackay v. The Queen*, *supra*, at pages 408 and 409, McIntyre J., supported by Dickson J. expressed concerns about the consequences of the extension of the jurisdiction of the courts martial as a result of the important derogations that they entail from the ordinary criminal law applicable to civilians and from the principle of equality before and under the law. They wrote:

> It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service. …
>
> Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the

> legitimate needs of the military extend so far. It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. It may well be said that the military courts will not, as a matter of practice, seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the *National Defence Act* so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, …
>
> [Emphasis added]

[55] Finally, the vast majority of indictable offences under the *Criminal Code* give the accused the right to elect the court before which his or her trial will be held. Minor offences are legislatively excluded from this right to elect. They fall under the absolute jurisdiction of provincial court judges and are tried summarily: see section 553 and Part XXVII of the *Criminal Code*. In the same vein, Parliament has chosen to give superior courts of criminal jurisdiction exclusive jurisdiction to try a limited number of the most serious indictable offences: see sections 468 and 469 of the *Criminal Code*. The rest of the offences are subject to an election and the choice is given to the accused: see subsection 536(2) of the *Criminal Code*.

[56] The military justice system has a complex system of four courts martial: the General Court Martial, the Disciplinary Court Martial, the Standing Court Martial and the Special General Court Martial. We will say a word later on this system when we will consider the available remedies in this case.

[57] At this time, for the purpose of stating the background relevant to the debate before us, we should say that the General Court Martial and the Disciplinary Court Martial are courts composed of a judge and a panel of military members. While there are five members on the panel in the case of the General Court Martial, the panel is composed of only three members when the court is the Disciplinary Court Martial. By contrast, the Standing Court Martial is presided over by a judge alone. I am leaving aside the Special General Court Martial because it is not relevant to the issue before us as it does not have jurisdiction over non-commissioned members or officers: see section 176 of the NDA.

[58] Non-commissioned members and officers may be tried by one of the above three courts. However, the choice of the trier of facts is not theirs as a result of section 165.14 of the NDA. It belongs to the prosecution. This is another derogation to the ordinary criminal law prosecution of *Criminal Code* offences when these offences are committed by a person subject to the *Code of Service Discipline*. It is the object of the constitutional challenge.

The *obiter dictum* of this Court in *R. v. Nystrom*

[59] For a better understanding of these reasons and those of the Chief Military judge in this case, we need to summarize the *obiter dictum* of this Court in *R. v. Nystrom*, *supra*.

[60] As previously mentioned, in a unanimous *obiter*, this Court expressed deep concerns about the fairness and validity of the impugned provisions. While it recognized the need for prosecutorial discretion in the prosecution of criminal law offences and, therefore, service offences, it expressed

the view that the decision relating to the choice of the trier of facts is not one regarding the nature and extent of the prosecution and the Director's participation in it. It is not one which partakes of prosecutorial discretion. Rather, it is one which "partakes of a benefit, an element of strategy or a tactical advantage associated with the right of an accused to present full answer and defence and control the conduct of his or her defence": see *R. v. Nystrom*, at paragraph 78. In coming to that conclusion, the Court relied upon the decisions of the Supreme Court of Canada in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, at p. 394; *R. v. Swain*, *supra*; and *R. v. Turpin et al.* (1987), 60 C.R. (3d) 63 (Ont. C.A.) affirmed by the SCC in [1989] 1 S.C.R. 1296.

[61] In addition, the Court found, at paragraph 84 of its reasons for judgment, that the statistics on the use of the prosecution's discretion to choose the trier of facts "point to the virtually inescapable conclusion that the power under section 165.14 is being abused".

[62] For the sake of convenience since we will later endorse the reasoning of the Court, we reproduce paragraphs 71 to 86 of the reasons for judgment in the *Nystrom* case which include a strong criticism of section 165.14 of the NDA by retired Chief Justice Lamer in his Report on the First Independent Review of the provisions and operation of Bill C-25 An Act to amend the *National Defence Act* and to make consequential amendments to other Acts (Report):

> [71] Exercising the power conferred by section 165.14 of the Act includes exercising the discretion regarding the court before which the trial will take place. It is undeniable that a prosecutor, exercising his or her right to prosecution, must have and does have broad discretionary authority. As La Forest J. said in *R. v. Beare*, [1988] 2 S.C.R. 387, at page 410, "Discretion is an essential feature of the criminal justice system"; see also *R. v. Cook*, [1997] 1 S.C.R. 1113; *R. v. Power*, [1994] 1 S.C.R. 601. He added:

> A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

[72] But this discretionary authority is not absolute and cannot be exercised in an incongruous or improper manner: *R. v. Cook*, *supra*, at page 1124.

[73] These decisions are relevant to the laying of the complaint, the choice of charge, and the prosecution's option to proceed by indictment or by summary conviction depending on the seriousness of the actions and the circumstances.

[74] In *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, at page 394, the Supreme Court of Canada provides a non-exhaustive list of the elements included in prosecutorial discretion. On the following page, it defines what is common to the various elements:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to <u>whether</u> a prosecution should be brought, continued or ceased, and <u>what</u> the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it.
>
> (Emphasis in original)

[75] However, decisions that govern a Crown prosecutor's tactics or conduct before the court do not fall within the scope of prosecutorial discretion. The Supreme Court of Canada addresses this necessary distinction as follows:

> <u>Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion</u>. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.
>
> (Emphasis added)

[76] The respondent's counsel submits that the power under section 165.14 of the Act to choose the mode of trial is a discretionary prosecutorial power similar to the power that exists in the civilian courts to choose between proceeding by indictment and proceeding by way of summary conviction. I am unable to accept that argument.

[77] I agree that the prosecutor's option to proceed by one mode of prosecution rather than another (indictment or summary proceeding) is an element of prosecutorial discretion. In the words of the Supreme Court of Canada, it is a decision concerning "the nature and extent of the prosecution".

[78] However, with due respect for those who hold a different view, I am of the opinion that the choice of mode of trial partakes of a benefit, an element of strategy or a tactical advantage associated with the right of an accused to present full answer and defence and control the conduct of his or her defence. This right is recognized as a principle of fundamental justice: see *R. v. Swain*, [1991] 1S.C.R. 933, at page 972. The right to elect the mode of trial is, before the civilian courts, a right extended to an accused who makes use of it according to and for the purpose of his defence. In *R. v. Turpin, Siddiqi and Clauzel* (1987), 60 C.R. (3d) 63, the Ontario Court of Appeal held that it was an advantage conferred by law. At paragraph 27, the Court writes:

> What we are faced with in this case is not so much whether one form of trial is more advantageous than another, i.e. whether a person charged with murder is better protected by a judge and jury trial or by a trial by judge alone. Rather, the question is whether having that choice is an advantage in the sense of a benefit of the law. Mr. Gold, on behalf of the respondents in this case, suggested that it is the having of the option, "the ability to elect one's mode of trial", that was a benefit which accused persons charged with murder in Alberta had over accused persons charged with murder elsewhere in Canada. We have to agree with that submission. A choice as to having or not having a jury trial (even though limited by the overriding determination by the trial judge), based upon the advantages of one mode of trial over the other because of a wide range of factors, such as the nature and circumstances of the killing, the amount of publicity, the reaction in the community, the size of the community from which the jury is being drawn, and even the preference of defence counsel with respect to trying to convince a jury or a judge of the defence version of the facts (or leave them with a reasonable doubt), indicates that having that choice must be considered a benefit. The absence of that benefit in Ontario must be considered a disadvantage.
>
> (Emphasis added)

[79] There is no doubt in my mind that the choice of mode of trial conferred by section 165.14 is an advantage conferred on the prosecution that could be abused. Cory J. states in *R. v. Bain*, [1992] 1 S.C.R. 91, at pages 103 and 104: "Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively."

[80] In the case at bar, the circumstances surrounding the exercise of the power under section 165.14 of the Act and the statistics on its use are disturbing.

[81] First, as the respondent's counsel concedes, there is no policy, nor any criteria governing the exercise of the discretion under section 165.14.

[82] Second, the statistics regarding the use of the power indicate either a discretion that is fettered in advance or a refusal to exercise it. In the period from September 1, 1999, to March 31, 2003, only four of the 220 trials were assigned to a panel assisted by a judge, as indicated in the following table taken from the report to Parliament by the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada:

Reporting Period	GCM Judge and panel	DCM Judge alone	SCM Judge alone	SGCM CM	Total
Sept. 1, 1999 to March 31, 2000	0	0	27	0	27
April 1, 2000 to March 31, 2001	0	1	62	0	63
April 1, 2001 to March 31, 2003	1	1	65	0	67
TOTAL	**1**	**3**	**216**	**0**	**220**

[83] This report, entitled The First Independent Review of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, September 3, 2003, was prepared in response to an obligation imposed by Parliament to review the operation of the Act. Regarding section 165.14 and the fact that it gives the choice of mode of trial to the prosecution, former Chief Justice Lamer writes, at page 40 of the Report:

> I have been unable to find a military justification for disallowing an accused charged with a serious offence the opportunity to choose between a military judge alone and a military judge and panel, other than expediency. When it comes to a choice between expediency on the one hand and the safety of the verdict and fairness to the accused on the other, the factors favouring the accused must prevail. The only possible exception warranting a change to this default position might be during times of war, insurrection or civil strife.
>
> It is my belief that an accused charged with a serious offence should be granted the option to choose between trial by military judge alone or military judge and panel prior to the convening of a court martial.
>
> (Emphasis added)

And this observation leads him to recommend that the Act be amended to give the accused the option as to mode of trial.

[84] From 2003 to date, there were between 120 and 125 trials before courts martial. None of these trials have taken place before a panel of members of the military assisted by a military judge. These figures, on top of the preceding statistics, point to the virtually inescapable conclusion that the power under section 165.14 is being abused.

[85] The respondent's counsel argued that giving the prosecution the power under section 165.14 was justified by the fact that the various courts martial (General Court Martial, Disciplinary Court Martial, Standing Court Martial and Special General Court

> Martial) have different limits as to the sentences that they can impose, some being more severe than others. I confess that I have some difficulty grasping the merit of this justification, especially since the power under section 165.14 to choose the court and consequently the scale of the sentences to be imposed provides the prosecutor with an additional advantage, open to abuse, that is detrimental to the accused.
>
> [86] Be that as it may, this justification does not stand since the Disciplinary Court Martial (composed of a panel of three members assisted by a military judge) and the Standing Court Martial (composed of a judge alone) – which is the option almost always favoured by the prosecution – have the same powers and the same limitations in terms of sentencing: both can impose a dismissal with disgrace from Her Majesty's service as the maximum punishment (sections 172 and 175). Yet, the accused can never elect between these two modes of trial because of section 165.14 of the Act. He therefore loses the benefit of the advantage offered by a hearing before a panel of three members assisted by a military judge.

We should add that the excerpt quoted in paragraph 78 of the *Nystrom* decision was cited with approval by the Supreme Court of Canada at pages 1329 and 1330 of its decision in *Turpin*.

Analysis of the Chief Military Judge's decision and the parties' and intervener's submissions

[63] After this long but necessary digression to explain the context surrounding the use and impact of section 165.14 of the NDA, it is now time to analyze the decision of the Chief Military Judge.

Whether the Chief Military Judge made an error in applying the decision of this Court in *R. v. Lunn*

[64] In *R. v. Lunn*, previously cited, Chief Justice Mahoney ruled that "the existence and exercise of discretion by a convening authority to order a particular mode of court martial do not

engage rights of the accused protected under sections 7, 11*d*) or 15(1) of the Charter": see paragraph 13 of the reasons of that decision.

[65] However, he found that the convening authority's decision can be reviewed and a section 24 Charter remedy devised if "the discretion has been exercised for an improper purpose or motive": *ibidem*.

[66] Counsel for the respondent relies upon the Court's finding in *Lunn* as did the Chief Military Judge who felt bound by it. Counsel for the appellant and the intervener submit that that case is distinguishable and ought to be distinguished. We agree with them for the following reasons.

[67] *In R. v. Nystrom*, 2004 CM 52, at paragraph 37, Colonel Carter, who was then the Chief Military Judge, concluded that this Court in the *Lunn* case:

> did not deal directly with the issue of whether it was a principle of fundamental justice that an accused person have the right not to have the type of court martial selected by, what the Court would describe, as the prosecuting authority. Rather, in relation to section 7 of the Charter, it took the view that a pretrial action by a prosecuting authority could not engage the accused's life, liberty, or security or persons rights, it was only the court martial itself which could deprive the accused of life, liberty or security of the person, and therefore, s. 7 rights were not invoked in that case.

[68] We agree with her. In addition, the issue before this Court in the *Lunn* case was the independence and impartiality of the court martial because of the convening authority's power to select the court martial for trial. The appellant's claim was that this power given to the convening authority, and thus to the chain of command, violated the constitutional guarantee of a trial by an

independent and impartial tribunal afforded by paragraph 11*d*) of the Charter. It was not, as in this case, a challenge based on the right to full answer and defence guaranteed by paragraph 11*d*), which includes the right for an accused to control the conduct of his or her defence: see *R. v. Swain*, *supra*, at pages 972 and 1025.

[69] There is, in our view, a third reason for distinguishing the *Lunn* case from the present instance. This Court in *Lunn* also focussed on the proper exercise of prosecutorial discretion by the prosecution and the convening authority in laying and prosecuting charges. This is apparent from the following excerpts from paragraphs 12 and 13 of Chief Justice Mahoney's decision:

> It is not the convening authority, who decides on the mode of court martial and appoints the prosecutor, that may deprive an accused of life, liberty and security of the person: the court martial itself may do that. It is likewise the court martial itself, not the convening authority, that must conduct a fair and public hearing and be independent and impartial. Persons making decisions relative to the laying and prosecution of charges must act according to the law but the law does not require their independence and impartiality. What is required of them is that they do not act in a manner that may be seen, by a reasonable and informed person, as drawing the administration of justice into disrepute.
>
> …
>
> Should, in a particular case, it be established that the discretion has been exercised for an improper purpose or motive, no doubt a remedy under section 24 can be devised.
>
> [Emphasis added]

[70] This Court did not focus, as we are now required to do, on who should be the repository of the right to choose the trier of facts. In their submissions, the appellant and the intervener referred to the Director's abuse of the power to choose the trier of facts as an additional argument to show why the power cannot and should not reside in the Director's hands. To put it in different and perhaps

simpler words, the challenge in the present instance is not about how the impugned power should be exercised, rather it is about who should exercise it.

[71] In following the decision in *Lunn* and discarding the *obiter* in *Nystrom*, the Chief Military Judge found comfort in the fact that the *Lunn* decision was rendered shortly after the decisions of the Supreme Court of Canada in the cases of *Bain* and *Swain* relied upon by this Court in *Nystrom*: see his reasons for judgment on the motion at pages 132 and 133 of the appeal book.

[72] This Court in *Lunn* did not at all refer to the *Bain* and the *Swain* cases. This, we believe, is another clear indication that the claim under paragraph 11*d*) of the Charter in *Lunn* was one relating and limited to the independence and impartiality of the tribunal, not one pertaining to the right to full answer and defence. Had it been a debate about the latter, there is no doubt that the *Bain* and *Swain* decisions rendered respectively in 1991 and 1992, would have been at the core of the discussions before this Court in *Lunn* in 1993 as they were in the *Nystrom* case in 2005, especially as the Supreme Court decisions were more contemporaneous to *Lunn* than to *Nystrom*.

Whether section 165.14, subsection 165.19(1) of the NDA and article 111.02(1) of the QR&Os violate section 7 and paragraph 11*d*) of the Charter

[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.

a) History and significance of trials by jury in criminal law

[75] We think it is fair to say that the emphasis has been put in criminal law on jury trials as a mean of counterbalancing the broad powers of the King and later the State. According to Blair J.A. in *R. v. Bryant* (1984), 42 C.R. (3d) 312, historically jury trials in England can be traced more than 900 years to the time of William the Conqueror. At paragraph 46 of his reasons for judgment, he relates the evolution of jury trials in criminal cases in England and their constitutional importance. He also underlines the constitutional significance of the jury in modern times. He writes:

> The evolution of trial by jury in criminal cases in England proceeded concurrently with the development of democratic parliamentary institutions and came to be regarded as a basic right essential to the operation of a free political system. The constitutional importance of the jury was described by Blackstone in Commentaries on the Laws of England, Lewis ed. (1902), vol. 4, pp. 349-50, as follows:

> Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, despatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived that … the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.

In modern times, the constitutional significance of the jury continues to be recognized, as illustrated by Lord Devlin's description of it as the "lamp of freedom" in "Trial by Jury" at p. 164:

> Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

[76] Blair J.A. goes on to stress in strong language the importance of trial by jury in the English colonies in America. Indeed, as he puts it at paragraph 48 of his reasons for judgment, "one of the grievances against England listed in the Declaration of Independence of 1776 was that the people had been deprived 'in many cases, of the benefits of Trial by Jury' ".

[77] Of course, the history of criminal law in Canada also shows the significance attached to jury trials before and after Confederation: see paragraph 53 of Blair J.A.'s reasons for judgment. One of the objections of the loyalists who came to Canada after the American Revolution was directed to

the fact that the *Quebec Act* of 1774 was withdrawing the right of a jury trial in civil matters. This objection reinforces the importance given to jury trials, especially in the criminal context.

[78] The *Criminal Code* of Canada evidences Parliament's intention in cases of prosecution by way of indictment to privilege trials by jury. Section 471 of the *Criminal Code* states that, unless otherwise specifically provided by law, all indictable offences must be tried by a jury.

[79] In addition, paragraph 565(*c*) of the said Code stipulates that an accused is deemed to have elected to be tried by a court composed of a judge and a jury if he does not elect his mode of trial when called upon to do so.

[80] Where the Attorney General has been given by Parliament in the public interest the special power to impose a court on the accused, Parliament has required that that court be one with a jury: see sections 568, 569 and 577 of the *Criminal Code*. This now brings us to say a word about the history of courts martial within the military justice system. Then the table will be set for a discussion of the constitutional issue.

b) <u>History of courts martial in the military justice system</u>

[81] A good starting point for a review of the history of courts martial in the military justice system is the decision of this Court in *R. v. Ingebrigtson* (1990), 5 C.M.A.R. 87. In that case, the Court addressed the issue of the constitutionality of the Standing Court Martial.

[82] Chief Justice Mahoney reasserted the fact that the General and the Disciplinary Court Martial "are the traditional types of courts martial which evolved in the British Army over centuries": see pages (to be completed) of the decision. These two courts, it will be recalled, are courts composed of a military judge and a panel of five and three members respectively: see subsection 167(1) and 170(1) of the NDA. In other words, offenders were not tried by a member alone having legal qualifications until the creation of the Standing Court Martial on May 5, 1944 by Order in Council P.C. 3375 issued under the authority of the *War Measures Act*, R.S.C. 1927, c. 206.

[83] The Minister of National Defence was given the power at any time and from time to time to limit the powers, jurisdiction, duties, and functions vested in and exercised by that Court: see paragraph 17 of that Order in Council, *supra*. In this respect, Chief Justice Mahoney writes at page 92:

> Pursuant to s. 17, on May 8, 1944, by General Order 269, the Minister excluded the trial of officers and warrant officers, and of all charges except desertion, absence without leave and losing by neglect from the jurisdiction of the Standing Court Martial and further limited its jurisdiction geographically to Canada and its territorial waters. Its jurisdiction did not extend to the Navy or Air Force. By General Order 71, on February 25, 1945, the limitation on the types of charges that might be tried was revoked thus restricting the jurisdiction of the Standing Court Martial to the trial of junior non-commissioned officers and private soldiers serving within Canada and its territorial waters.

[84] The 1950 NDA, S.C. 1950, c. 43 provided in subsection 149(1) that the Governor in Council may in an emergency establish Standing Courts Martial consisting of one officer who had been a barrister or advocate for more than three years (emphasis added). Emergency was defined then as it basically still is in the NDA as "war, invasion, riot or insurrection, real or apprehended".

[85] The exceptional nature of the Standing Court Martial was underlined before a Special Committee of the House of Commons on May 30, 1950 when the Bill was discussed. In his reasons in *Ingebrigtson*, at page 93, Chief Justice Mahoney quotes the following excerpts from the testimonies of Brigadier Lawson, the Judge Advocate-General and Major McClemont, an Assistant Judge Advocate-General. They were questioned by Lt-Colonel Harkness who later became Minister of National Defence:

> Q. There is no provision here apparently for a standing court martial except in time of war or in emergency, as it states here. – A. That is correct.
>
> Q. What is the reason for that? – A. It is a procedure of an unusual nature and it has been felt a general court martial, disciplinary court martial and summary procedure is sufficient to cover all exigencies of peacetime operations but in war when you have hundreds of officers tied up with a multitude of courts martial you may have to make a special provision, which we have done here.
>
> Q. I wonder if Brigadier Lawson would tell us whether the army is particularly anxious that they should only have this power in an emergency? – A. We do not feel that we need it in peacetime. There are not enough service courts to require it. The advantage of having formal courts martial is that you train officers in military legal procedure, in addition to giving the accused a fair trial. For another thing, we have not enough lawyers in the service to set up these standing courts in peacetime.
>
> [Emphasis added]

[86] In a 1967 amendment, the requirement of emergency was deleted. In answer to questions about the deletion, Brigadier Lawson stated the following reported by Chief Justice Mahoney in the *Ingebrigston* case, at page 94:

> Mr. Lawson: This is an amendment of substance, Mr. Chairman, in that the present section provides that standing courts martial can only be set up in an emergency. We are taking out those words "in an emergency".
>
> The Chairman: Are you satisfied with clause 42?
>
> Mr. Nugent: In respect of standing courts martial, I do not know how much goes on. Is there much need for them?
>
> Mr. Lawson: Not at the present time, I would not think; but it would be useful occasionally where you have a comparatively minor offence committed by someone, we will say, serving in Cyprus, or in Egypt, where it is difficult to set up a court martial – difficult, and expensive – and if the offence is comparatively minor, it might be very convenient to have him tried by a standing court martial.
>
> Mr. Nugent: You would fly the court in, if necessary?
>
> Mr. Lawson: We could now, yes, but this is expensive and it might be a very minor offence of some kind.
>
> [Emphasis added]

[87] We think it is fair to say that the Standing Court Martial was conceived as a court of exception. In Chief Justice Mahoney's opinion, endorsed by the other two members of the Court, it is most dubious whether Standing Courts Martial "can, as a matter of fact, be characterized as integral to the otherwise "long established tradition" of a separate system of military law and tribunals": see *Ingebrigston*, *supra*. When looking at the statistics from 1998 quoted in the *Nystrom* case and above reproduced in these reasons, one sees that the Standing Court Martial has now

become the norm rather than the exception as a result of the prosecution's choice, even for very serious offences.

c) The right to choose the trier of facts

[88] Under the *Criminal Code*, the right to choose the trier of facts is generally referred to as the right to choose the mode of trial. Counsel for the intervener submits that this right is constitutionally bound to the right to trial by jury. This, he says, appears from the history of the development of criminal prosecutions in England and Canada and from the structure of the *Criminal Code* of Canada going back to the enactment of the Code in 1892. That structure, he emphasizes, has not changed.

[89] He then goes on to set out ten (10) "constitutional Rules" that, he submits, together establish the accused's right to choose the mode of trier of facts. From these Rules, he concludes that the accused has always had the right to choose his mode of trial when Parliament did not impose one. We reproduce them as they appear at paragraph 59 of his memorandum of facts and law:

> **Rule 1:** There are only two modes of criminal prosecution in Canada: summary conviction or indictable proceedings.
>
> **Rule 2:** Where the prosecutor proceeds summarily the only mode of trial available, as established by Parliament, is provincial court trial or its equivalent.
>
> **Rule 3:** Where the prosecutor has a choice as to the mode of prosecution and elects to proceed by indictment, then unless otherwise specifically stated by Parliament all indictable offences are presumptively to be tried by a jury, (s. 471 of the Code).

Rule 4: Certain indictable offences specified by Parliament can only be tried by a jury unless *both* the accused and the Attorney General agree that the trial may proceed before a single judge, (s. 469 and 473).

Rule 5: Certain indictable offences (absolute jurisdiction) can only be tried by a provincial court judge or equivalent (s. 553).

Rule 6: With the exception of offences falling within #4 or #5 above, in all matters proceeded with by indictment, the accused has the right to choose his or her mode of trial – judge and jury, judge alone or provincial court or its equivalent.

Rule 7: In all cases where there is *no* choice as to the mode of trial, Parliament and not the prosecutor determines what the mode of trier of fact will be.

Rule 8: In all cases prosecuted on indictment where there is a choice of mode of trial the accused and not the prosecutor makes the decision as to the mode of trier of fact.

Rule 9: The only exceptions to the above are specific to the special public interest prerogatives of the office of the Attorney General, ss. 568-569 (the Attorney General can require a trial by jury even if the accused has elected otherwise) and s. 577 (direct indictment),
those exceptional powers are a common law prerogative of the Attorney General now codified and may only be exercised by the Attorney General as specifically defined by the sections themselves,
even in those instances, the Attorney General has no constitutional ability to require a trial by provincial court or superior court judge alone, but may require a trial by jury.

Rule 10: All of the rules set out above reflect the common law, and the constitutional right of an accused to a trial by jury. They do not depend for their validity on s. 11*(f)* of the Charter but rather the authority of Parliament and the division of powers pursuant to ss. 91 and 92 of the *Constitution Act*, 1867.

[90] We think it is difficult to quarrel with the content of these Rules. As a matter of fact, counsel for the respondent does not take issue with them. Rather her answer is that the military justice system is a *sui generis* system. While we agree with her that it is a *sui generis* system, the fact remains that that system is subject to the constitutional law of the land.

[91] The intervener's Rules govern the prosecution of offences before civilian courts. Counsel for the intervener did not claim that they apply to prosecutions before military tribunals. Rather, he submitted them as an illustration of how they reflect section 7 Charter-protected fundamental principles of justice in the criminal process. The Rules certainly assist in understanding the extent of the encroachment on a serviceman's rights when prosecuted before courts martial for *Criminal Code* offences, including serious ones. In addition, they help to better define the constitutional right and the principle of fundamental justice at play here.

[92] Counsel for the respondent argued that a person charged under the *Criminal Code* has the right to elect his mode of trial only when the law gives him that right. Parliament can abolish that right and indeed has done so with respect to minor offences, the most serious offences, when a hybrid offence is prosecuted by way of summary conviction, and when the Attorney General proceeds by way of preferred indictment pursuant to section 577 of the *Criminal Code*. Consequently, she says, the right to elect is not a right required by the principles of fundamental justice.

[93] With respect, the right at play here is not the right to elect but the right for a person charged to make a full answer and defence and to control the conduct of his or her defence. This right to full answer and defence and control thereof is guaranteed by paragraph 11*d*) of the Charter as part of the right to a fair hearing. As previously mentioned, it is a constitutional right which has been found by the Supreme Court of Canada to be required by the principles of fundamental justice in the *Swain* case. The respondent acknowledges that: see paragraph 48 of the respondent's memorandum of fact

and law. It is at this juncture, however, that the right to choose the trier of facts may so interfere with the accused's constitutional right to a full defence and to control the conduct of that defence as to deprive him or her of that constitutional right in violation of the principles of fundamental justice.

[94] Counsel for the respondent, in our respectful view, takes too narrow a view of the constitutional right to full answer and defence when she asserts that that right refers to decisions made by an accused at his trial, such as whether to call witnesses, take the stand, choose one type of defence over another, etc.: see paragraph 59 of the respondent's memorandum of fact and law. We need only say in this respect that, for example, disclosure of the prosecution's case to the defence is part of the accused's right to full answer and defence and should occur before the accused is called upon to elect the mode of trial or to plead. The accused has to seek disclosure and it is a decision regarding his full answer and defence that he makes well before trial: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[95] Thus, the question becomes, as a result of section 165.14 and subsection 165.19(1) of the NDA, the following: does the fact of giving the choice of the trier of facts to the prosecution unjustifiably violate or compromise the accused's constitutional right to full answer and defence and to control that defence which is required by the principles of fundamental justice? We think so for the reasons given by this Court in its unanimous opinion in *Nystrom*, at paragraphs 71 to 86. We have summarized them and reproduced the paragraphs in the present reasons under the heading: The *obiter dictum* of this Court in *R. v. Nystrom*: see paragraphs 59 to 62.

[96] We also want to answer some of the counter arguments raised by counsel for the respondent in this case. We have alluded to them earlier on. They center around the prosecution's right to choose to proceed by way of indictment or summary conviction, the Attorney General's right to prefer an indictment, and the fact that, for some categories of offences, the accused has no right to choose.

[97] The election as to the mode of prosecution given to the prosecutor in criminal law, i.e. prosecution by way of indictment or by way of summary conviction, is of a nature different from the election as to the trier of fact. The first election is an element of the prosecutorial discretion exercised by the Attorney General and his representatives in enforcing the criminal law in the public interest: see *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, at page 395. At the risk of repeating ourselves and what this Court said in the *Nystrom* case, the second election "partakes of a benefit, an element of strategy or a tactical advantage associated with the right of an accused to present full answer and defence and control the conduct of his or her defence: see paragraph 78 of the *Nystrom* decision reproduced in these reasons in paragraph 62.

[98] The Attorney General's right to prefer an indictment also sits at the core of the exercise of prosecutorial discretion. As counsel for the intervener rightly puts it in his Rule 9, it is a prerogative of the Attorney General conferred upon him in the public interest. The Attorney General is the Chief Law Enforcement Officer and the ultimate keeper of the public peace. In passing, we agree with the intervener's submission that the Director is a recent statutory creation and that, unlike the Attorney

General of Canada and the provincial Attorney Generals, he possesses none of the historical common law prerogatives and privileges held and exercised by the Attorney General of England.

[99] It is worth mentioning that when the Attorney General prefers an indictment, the trial is to be held before a jury because the accused is deemed to have so elected: see subsection 565(2) of the *Criminal Code*. The accused keeps a power to re-elect to be tried by a judge without a jury although in this case the consent of the Attorney General is needed. The right to re-elect belongs to the accused, not the prosecution.

[100] It is true that, for minor offences and some limited serious offences, the accused has no right to elect his mode of trial. However, the choice in these instances has been made in a neutral fashion by Parliament for policy reasons. It has not been left to the prosecution for tactical reasons or advantages.

[101] It is undeniable that when Parliament saw fit in the criminal process to give a right to elect as to the mode of trial, it has given it to the accused, never to the prosecution, in order to ensure fairness of the trial and provide better protection to an accused.

[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 11*f*) of the Charter, of 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.

d) Conclusion on the constitutionality of the impugned provisions

[103] For the reasons given, we believe that section 165.14, subsection 165.19(1) and article 111.02(1) of the QR&Os violate section 7 and paragraph 11*d*) of the Charter. In our view, to give the prosecution, in the military justice system, the right to choose the trier of facts before whom the trial of a person charged with serious *Criminal Code* offences will be held, as do section 165.14 and subsection 165.19(1) of the NDA, is to deprive that person, in violation of the principles of fundamental justice, of the constitutional protection given to offenders in the criminal process to ensure the fairness of their trial. Unless a justification can be provided under section 1 of the Charter, these provisions violate section 7 and paragraph 11*d*) of the Charter and are of no force and no effect.

Whether section 165.14, subsection 165.19(1) and article 111.02(1) of the QR&Os can be saved by section 1 of the Charter

[104] Counsel for the respondent has conceded that if the above provisions are found to be unconstitutional by this Court, they cannot be saved under section 1 of the Charter. This approach is consistent with the finding of retired Chief Justice Lamer in his Report that he has "been unable to find a military justification for disallowing an accused charged with a serious offence the opportunity to choose between a military judge alone and a military judge and panel, other than expediency". He went on to add "When it comes to a choice between expediency on the one hand and the safety of the verdict and fairness to the accused on the other, the factors favouring the accused must prevail".

[105] As Lamer J. once said in *R. v. Brouillard*, [1985] 1 S.C.R. 39, at paragraph 24, where fairness of the process appeared to have been compromised by the judge's numerous interventions when the accused testified, it should be borne in mind that at the end of the day the accused is the only one who may be leaving the court in handcuffs. At the end of a trial before a court martial, it is also the accused, not the prosecutor, who will be escorted to his or her harsh conditions of detention or imprisonment.

The remedies

[106] We now have to determine the appropriate remedies in this case. The appellant seeks a declaration of unconstitutionality. He does not ask for a personal remedy in the nature of a new trial.

[107] Counsel for the intervener also demands a declaration of constitutional invalidity of the provisions under attack and the quashing of the convening order in his case. He wants his client to be put to an election as to his trier of facts, failing which he seeks an order that the proceedings in his case be stayed until the legal issue is finally decided and appropriate corrective measures are enacted. He opposes a suspension of our decision. If one is ordered, he submits that it should be for a very short period of time.

[108] Counsel for the respondent argues that a suspension of our decision for one year is necessary in order to allow the authorities to determine their future course of action and have remedial legislation enacted if necessary.

[109] In coming to the conclusion that the impugned provisions are unconstitutional, we are aware that the structure of the courts martial may require a legislative reform of more or less depth, depending on the approach that Parliament may wish to take.

[110] Retired Chief Justice Lamer in his Report commented on the actual organization of the courts martial and recommended changes to the structure and jurisdiction of these courts. In recommendation 23 found at page 37 of the Report, he writes:

> I recommend that the working group convened to consider the creation of a permanent Military Court also be charged with modernizing the types and jurisdiction of courts martial provided for under the *National Defence Act*. The goal of the working group would be the creation of a two-tiered system whereby the General Court Martial would try serious offences and the Standing Court Martial would try minor offences, with no distinction made

> on the basis of rank. Necessary further consideration should be given to the offences listed in the *Code of Service Discipline*, and a scheme must be developed that will define what constitutes a serious offence as opposed to a minor offence.

We would like to add the voice of this Court to these comments as we think the actual system is in dire need of a change and modernization to improve its fairness and meet the constitutional standards.

[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: see section 167 of the NDA. Status and rank also play a role in the composition of the panel if the accused is a simple non-commissioned member as opposed to an officer: *ibidem*, subsection 167(7). The same pattern applies to the composition of a Disciplinary Court Martial which cannot try an officer above the rank of major: see section 169 of the NDA.

[112] The equivalent scheme in a criminal prosecution before civilian courts would be one in which an accused, whose status and rank are those of a member of the upper class in our society, would be tried by a jury of twelve (12) persons selected among members of that status and rank in that class while, for the same offence, members of the middle or lower class would be tried by a mixed jury of six (6) persons of relative status and rank.

[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.

[114] We also know that the Disciplinary Court Martial and the Standing Court Martial possess the same powers of punishment although they are more limited than those of the General Court Martial: see sections 172 and 175 which state that the Disciplinary Court Martial and the Standing Court Martial cannot impose a punishment higher than dismissal with disgrace from Her Majesty's service while sections 166 to 168 of the NDA contain no such restriction with respect to the General Court Martial. Simplification of the court system could eliminate the difficulty resulting from that difference in powers. In the actual state of the law, if the accused were given the right to choose the trier of facts, he would run the risk of receiving a greater punishment if he chose a trial by the General Court Martial which, on the other hand, with a panel of five, would offer him the best protection. Conversely, he could avoid that possibility of a more severe punishment by choosing a Disciplinary Court Martial which has more limited powers of punishment, while the offence is a serious one that the prosecution would like to see punished more severely than what a Disciplinary Court Martial can impose.

[115] This is one reason why counsel for the respondent seeks a suspension of one year of our decision regarding the unconstitutionality of the impugned provisions. Another may be the desire to appeal the decision of this Court to the Supreme Court of Canada, in which case the respondent may seek a stay of execution from that Court. The difficulty with this demand resides in the fact that this Court is invited to authorize unfair trials to proceed and to condone violations of a principle of fundamental justice when there is a simpler solution compliant with the Charter and no excuse for the predicament in which the military justice system finds itself today.

[116] Let us start first with the lack of excuse. The unanimous concern of this Court in *Nystrom* about the fairness of section 165.14 was expressed more than two years ago, i.e. on December 20, 2005. Since then, there have been five new constitutional challenges to that provision and appeals before this Court are pending. Retired Chief Justice Lamer made a recommendation as early as September 3, 2003 that section 165.14 be amended to give the accused the option to choose his or her trier of facts. As previously mentioned, he also made a recommendation that a working group reviewed the reorganization of the courts martial with a view to improving the fairness of the trial, at the center of which, as an important element of that reorganization, is the right for an accused to choose the trier of facts. Yet, Bill C-45 has been tabled before Parliament and it contains no remedial provision. The authorities have been given more than four and a half (4½) years to address the problem. The Bill already pending before Parliament can be used to quickly remedy the situation.

[117] In any event, there is also an available interim practical solution which can easily be implemented. For all charges under section 130 of the NDA, the accused can be offered an election as to his or her trier of facts. There will be no legal impediment to that course of conduct since section 165.14 which gives the right to the prosecution is no force and effect with respect to these offences.

[118] There are only between 50 and 60 courts martial a year. In some cases, the charges have already been preferred and the prosecution has selected the court. The prosecution need simply offer the accused a choice. We think it is reasonable to assume that not every accused will want to reverse the choice initially made by the prosecution. Where charges have not been preferred yet, implementation of the interim solution is even easier: just put the accused to his election when the charge is preferred.

[119] The respondent has nothing to lose by taking this approach. On the contrary, if the decision of this Court is right and maintained, justice and fairness will not have been denied to the accused while legislative remedial measures are devised and enacted. Nor will military justice have been brought to a halt in the meantime. If the decision of this Court is overturned, better and fairer justice will have been offered to those who faced trial during the interim period. The experiment may reveal that there is nothing dramatic in, and to be feared from, giving the accused an election as to his trier of facts.

[120] We should also add that there is, in the interim period, no possibility of a legal vacuum being created which would result in a lack of enforcement of the law because of a lack of prosecution. The offences referred to in section 130 of the NDA can also be prosecuted before the civilian courts, even if they were committed outside Canada: see section 273 of the NDA.

[121] Finally, we need to consider an argument of the respondent based both on a Policy Directive issued by the Director and the decision of the Standing Court Martial in *R. v. Chisholm*, 2006 CM 7.

[122] On May 5, 2006, pursuant to the *Nystrom* decision, the Director issued Policy Directive #: 016/06 on the issue of "Determining the Type of Court Martial to Try an Accused Person". For ease of reference, we attach it at the end of these reasons.

[123] A reading of that Directive, especially paragraph 7 and some of the factors enumerated in paragraph 8, confirms that the focus of the Director in determining the type of court martial to try an accused is almost exclusively on the prosecutorial interest in ensuring a choice of "the type of court martial that best serve(s) the interest of military justice and discipline": see paragraph 7 of the Directive. The choice of the trier of facts is made through the lens and the eyes of the beholder, i.e. the Director. None of the considerations relating to an accused's rights to a fair trial and full answer and defence and the control of the conduct of that defence appears in the document.

[124] Paragraph 10 of the Directive is the tail that wags the dog. It reads:

Representations of the Accused Person	**Observations de l'accusé**
10. Representations of the accused person will not ordinarily be sought in determining the type of court martial to try the accused person. However, if the accused person or their legal counsel wishes to make representations concerning the type of court martial at any time before the trial has commenced, the person making the determination will consider those representations. Representations should be made as soon as is practicable and submitted to DDMP in writing.	10. Normalement, on ne demande pas à l'accusé de présenter des observations avant de déterminer le type de cour martiale devant laquelle il sera jugé. Toutefois, si l'accusé ou son avocat souhaitent faire, en tout temps avant le début du procès, des observations au sujet du type de cour martiale, la personne prenant la décision les examinera. Ces observations doivent être faites par écrit et être communiquées dès que possible au DAPM.

[Emphasis added]

[125] A reading of that paragraph gives a pretty good flavour of the prosecution's perception and understanding of the accused's right to full answer and defence and to control the conduct of that defence. In footnote 2 of the Directive, persons subject to the *Code of Service Discipline* are reminded that "the safety and the wellbeing of Canadians depend considerably on the readiness of the C.F. To maintain readiness, discipline must be enforced effectively and efficiently". We agree, but the Charter also says that enforcement of the law, including discipline, must be done fairly.

[126] Counsel for the respondent suggested, as the appropriate remedy, the approach taken by the Standing Court Martial in *R. v. Chisholm*, 2006 CM 7. In that case, the learned judge concluded that the issue of the election should be dealt with and "resolved on a case-by-case basis in the context of the constitutional guarantee to a fair trial contained in section 11*d*) of the Charter": see paragraph 26 of his reasons for judgment.

[127] The judge recognized that there was a tactical choice involved in the right to elect and that it could affect the fairness of the trial. But he preferred an *ad hoc* judicial to a broader legislative solution. In this way, he says, abuses by the prosecution of its statutory right to choose the mode of trial by court martial could be controlled by way of pre-trial motion. At paragraph 26 of his reasons for judgment be writes:

> [26] An accused is always at liberty to request of the prosecution that his or her court martial proceed as a panel court. Where an issue arises between the accused and the prosecution as to the mode of trial, a pre-trial application can be made to the military judge. On such an application, the burden would be upon the accused to demonstrate that the exercise of discretion by the prosecution to determine the mode of trial by court martial should be reviewed because constitutional considerations are engaged, as where the discretion has been exercised arbitrarily, capriciously, or for some improper purpose or motive, or for an abuse of process.
>
> [Emphasis added]

[128] We see two series of difficulties with this approach, one conceptual, the other practical.

[129] The Standing Court Martial judge's approach assumes that the choice of the trier of facts is properly and constitutionally put in the hands of the prosecution. Then, the only possible constitutional problem arising is one involving an abuse of discretion in the exercise of that power, which abuse the court martial is in a position to remedy. However, as previously stated, the constitutional issue is primarily the situs of that power.

[130] In addition, when we read the Directive, the objectives sought by the prosecution and the factors mentioned therein, we think that an accused is facing an almost impossible task of establishing in his case an abuse on the part of the prosecution.

[131] Section 165.14 of the NDA is cast in terms of duty. It imposes upon the Director the duty to determine the type of court martial which is to try the accused. It is in performing that duty that the Director is given discretion as to the choice to make. It is the exercise of that discretion that the Standing Court Martial said it can control. The judge relied for his conclusion on the decision of the Ontario Superior Court of Justice in *R. v. Nosworthy*, [2002] O.J. No. 4048, 55 W.C.B. (2d) 546, 169 C.C.C. (3d) 552.

[132] What was at issue in that case was not the accused's right to elect, but the prosecutor's right to withhold consent to a re-election under paragraph 561(1)(*c*) of the *Criminal Code*. This is conceptually, and practically as we shall see, a situation quite different from the one which prevails in our case where no accused is even given the right to choose the trier of facts.

[133] That the prosecution be given some element of control over a re-election intended by an accused is understandable because considerations of public interest in the administration of justice may come into play at stage. This after all occurs after an accused has already made an informed initial election. Yet, the prosecutor's right to withhold consent may result in an infringement of rights guaranteed by section 7 and paragraph 11*d*) of the Charter: see *R. v. McGregor* (1999), 43 O.R. (3d) 455 where the Ontario Court of Appeal approved the remedy granted by the Trial judge, namely that the Crown's consent be dispensed with.

[134] From a practical point of view, the case-by-case approach suggested by the Standing Court Martial carries the potential for delaying trials. Assuming that a review of the prosecutor's choice can be made by way of a pre-trial motion, the issue raised is a fundamental one, i.e. the right to liberty and security of the person, the fairness of the trial and the right to a full answer and defence, which, as the judge says, involves constitutional considerations. There is bound to be an appeal from the decision dismissing the pre-trial motion. What is the point and fairness of subjecting an accused to an unfair trial? In the meantime, the trial on the merits will be delayed, thereby compromising the efficient enforcement of discipline.

[135] Moreover, the accused will bear the burden and the costs in each case of seeking enforcement of his constitutional right to a fair trial when, in fact, fairness of a trial should be offered rather than denied by the statutory provision in contravention of paragraph 11*d*) of the Charter.

[136] In our respectful view, the approach suggested by the Standing Court Martial and endorsed by counsel for the respondent does not address the problem on its merits and provide a fair and practical remedy.

Conclusion

[137] For these reasons, we will allow the appellant's appeal in part and, as requested, declare that section 165.14, subsection 165.19(1) of the NDA and article 111.02(1) of the QR&Os violate

section 7 and the right to a fair trial guaranteed by paragraph 11*d*) of the Charter and are of no force and effect.

[138] We will deny the respondent's request for a one-year suspension of the execution of this decision.

[139] We have heard representations from the intervener about general and specific remedies. We understand that our decision will be binding on the parties and the intervener with respect to the constitutional issue.

[140] However, we are not the panel assigned to render judgment in the intervener's case. Therefore, for the benefits of the parties in that case since we heard their arguments on the remedies, we would like to indicate how we believe the appeal should be disposed of after giving them, if needed or appropriate, an opportunity to be heard. We leave it to the Chief Justice to finalize the process. Needless to say that we express ourselves in terms of a recommendation which is not binding on the members of the Court who will render judgment in that instance.

[141] We believe that a recommendation which best reconciles the interests of justice, the accused and the prosecution as well as respects and promotes the Charter is to give the accused a right to choose his trier of facts. Therefore, we would quash the conviction, the sentence and the convening order issued in file 200532. We would order a new trial and give Ex-Corporal Beek the right to an election as to the choice of the trier of facts before whom that new trial will be held.

[142] Copy of the judgment and the reasons in this case will be placed in file *Beek v. The Queen*, CMAC-504 in support of the judgment to be rendered in that case.

"Gilles Létourneau"
J.A.

"Simon Noël"
J.A.

"Yves de Montigny"
J.A.

Director of Military Prosecutions
Directeur des poursuites militaires

Policy Directive
Directive en matière de politique

Directive #: 016/06 **Directive n° : 016/06**	**Original Date: 5 May 06** **Date originate : 5 *mai* 06**	**Update:** **Mise a jour :**
Subject: ***Determining the Type of Court Martial to Try an Accused Person*** ***Sujet : Déterminer le type de cour martiale devant juger l'accusé***	**Cross Reference:** ***Prosecutorial Discretion and Post-Charge Screening*** **Renvoi :** ***Pouvoir discrétionnaire de poursuivre et vérification postérieure à la mise en accusation***	

1. Section 165.14 of the *National Defence Act* requires the Director of Military Prosecutions (DMP), when a charge is preferred, to determine whether the accused will be tried by a Standing Court Martial, Special General Court Martial, Disciplinary Court Martial or General Court Martial and to inform the Court Martial Administrator. The determination of the type of court martial to try the accused is an important exercise of DMP discretion, the purpose of which is to ensure that the

1. L'article 165.14 de la *Loi sur la défense nationale* prévoit que, dans la mise en accusation, le directeur des poursuites militaires (DPM) décide si ('accusé sera jugé par la Cour martiale permanente, par une cour martiale générale spéciale, par une cour martiale disciplinaire ou par une cour martiale générale et informe l'administrateur de la cour martiale de sa décision. Cette décision au sujet du type de cour martiale devant laquelle ('accusé sera jugé est un aspect important du pouvoir discrétionnaire du DPM, dont (l'objet

interests of military justice and discipline are served through a fair trial on the merits before a court martial with the appropriate jurisdiction and powers of punishment.[1]

2. This directive identifies who will determine the type of court martial that will try an accused person against whom a charge is preferred and the factors that will, as a minimum, be considered in making that determination.

Background

3. As a matter of context, it is useful to recall that Canada, and the nations that passed on their legal traditions and principles to Canada, have long recognized that the unique disciplinary concerns of the military necessitate a separate and parallel system of military justice.[2] Paragraph 11(*f*) of the *Canadian Charter of Rights and Freedoms* and section 5 of the *Criminal Code of Canada* contemplate a separate and parallel system of military justice that exists along side the ordinary criminal courts.[3]

4. The principal function of the Code of Service Discipline (CSD) is to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale of the organization. In addition and like the ordinary criminal court system, it punishes conduct of persons subject to the CSD that threatens public order and welfare.[4]

5. Since the first Canadian military force was organized one year after confederation, military officers have played a judicial role in the administration of military justice. This was, and

et de la discipline grâce à un procès équitable sur le fond devant une cour martiale dotée de la compétence et des pouvoirs de punition appropriés.[9]

2. La présente directive indique qui décide du type de cour martiale devant laquelle sera jugé un accusé faisant ('objet dune mise en accusation et précise quels sont les facteurs dont il faut, au moins, tenir compte en prenant cette décision.

Contexte

3. En contexte, il est utile de rappeler que le Canada et les nations dont il a hérité des traditions et des principes juridiques reconnaissent depuis longtemps que les préoccupations exceptionnelles des Forces armées en matière de discipline commandent un système de justice militaire parallèle et distinct[10]. L'alinéa 11*f*) de la *Charte canadienne des droits et libertés* et l'article 5 du *Code criminel* du Canada envisagent un système de justice militaire parallèle et distinct qui existe parallèlement à celui des cours criminelles ordinaires.[11]

4. Le rôle principal du Code de discipline militaire (CDM) est de promouvoir l'efficacité opérationnelle des Forces canadiennes en contribuant au maintien de la discipline, de l'efficacité et du moral au sein de l'organisation. De plus, comme dans le système de justice pénale ordinaire, la conduite menaçant l'ordre et le bien-être publics par ceux qui y sont assujetties.[12]

est de veiller à servir les intérêts de la justice militaire

5. Depuis la formation de la première force militaire canadienne un an après la Confédération, les officiers militaires ont toujours joué une fonction judiciaire dans l'administration de la justice militaire. II en fût ainsi et il continue

remains, a practical necessity. Their training is designed to ensure that they are sensitive to the need for discipline, efficiency, obedience and duty on the part of Canadian Forces members. The entire chain of command is, in varying degrees, responsible for maintaining military discipline, efficiency and morale and, inevitably, a court martial represents to some extent its professional concerns.[5]

d'en être ainsi par nécessité pratique. Leur formation vise à assurer qu'ils sont sensibles à la nécessité de la discipline, de l'efficacité, de l'obéissance et du sens du devoir de la part des Forces armées. Toute la chaine de commandement, à des degrés divers, est responsable du maintien de la discipline, de l'efficacité et du moral des troupes et la cour martiale traduit inévitablement, dans une certaine mesure, ses préoccupations professionnelles.[13]

6. DMP responsibilities and authorities under Division 6 of the NDA are consolidated and continued from those exercised by individual convening authorities since the enactment of the original CSD.[6] Division 6 gives DMP broad responsibilities and discretion similar to the Heads of the Provincial and Federal Prosecution Services, but tailored to the needs of the military justice system.

la codification et la prorogation de ceux qu'ont exercé les autorités convocatrices individuelles depuis l'adoption du premier CDM.[14] La section 6 confère au DPM des responsabilités et un pouvoir discrétionnaire dont l'envergure est semblable à ceux des chefs des services de poursuites des provinces ou du fédéral mais qui sont adaptés aux besoins du système de justice militaire.

Prosecutorial Discretion

Pouvoir discrétionnaire du poursuivant

7. The independence of the prosecution is a basic element in protecting the integrity of the military charging and trial processes. DMP's function is a public one that must be discharged fairly, dispassionately and free of partisan concerns.[7] The framework of Division 6, calling for the appointment as DMP of a legally trained senior officer independent of the chain of command and with security of tenure, is designed to provide objective assurance that conflicts of interest in the convening process will be avoided and that prosecution discretion will be exercised free of inappropriate influences. The fact that DMP is responsible for all charges preferred and the conduct of all prosecutions before courts martial positions DMP, with the recommendations of the

7. L'indépendance de la fonction du poursuivant est un élément essentiel de la protection de l'intégrité de la procédure de mise en accusation et du procès. Le DPM assume une fonction publique, dont il doit s'acquitter d'une façon sereine et juste, en dehors de toute considération partisane.[15] L'organisation de la Section 6, qui exige la nomination comme DPM d'un officier supérieur ayant une formation en droit, qui est indépendant de la chaîne de commandement et nomme à titre inamovible, vise à garantir de façon objective que les conflits d'intérêts dans la procédure de convocation seront évités et que l'exercice du pouvoir discrétionnaire du poursuivant sera à I'abri de toute influence inappropriée. Le fait que le DPM soit responsable de toutes les mises en accusation et de la conduite de toutes les

6. Les responsabilités et les pouvoirs du DPM prévus à la Section 6 de la LDN représentent

chain of command through the referral authority, to determine in each case the charges and the type of court martial that best serve the interests of military justice and discipline.

Factors

8. The factors that will be considered in determining the type of court martial to try an accused person against whom a charge has been preferred will include the following:

a. the rank and status of the accused person;

b. the nature of the offence charged and the circumstances alleged;

c. the appropriate sentence to be sought in the event of conviction;

d. the jurisdiction of each type of court martial and the adequacy of its powers of punishment;

e. the representations provided by the referral authority and the accused person's chain of command;

f. the need for and value of the participation of Canadian Forces leaders at the court martial having regard to:

i. the responsibility of the

poursuites devant les cours martiales permet à celui-ci, avec les recommandations de la chaîne de commandement transmises par l'intermédiaire de l'autorité de renvoi, d'être en mesure de déterminer dans chaque cas les accusations à porter et le type de cour martiale à saisir afin de servir le mieux possible les intérêts de la justice et de la discipline militaires.

Facteurs

8. Les facteurs pris en compte pour déterminer le type de cour martiale devant juger l'accusé mis en accusation comprennent, notamment :

a. le rang et le statut de l'accusé;

b. la nature de l'infraction reprochée et les circonstances de celle-ci;

c. la peine à infliger en cas de déclaration de culpabilité;

d. la compétence de chaque type de cour martiale et la question de savoir si elle possède des pouvoirs de punition adéquats;

e. les observations transmises par l'autorité de renvoi et par la chaîne de commandement de la personne;

f. la nécessité ou l'utilité de la participation des leaders des Forces canadiennes à la cour martiale compte tenu de :

i. la mesure dans laquelle les

leadership cadre for the maintenance of military discipline, efficiency and morale;

ii. the need for the professional knowledge, skill or experience of senior members of the Canadian Forces;

iii. the value of reinforcing the military hierarchy upon which discipline depends; and

iv. the value of developing familiarity with courts martial on the part of Canadian Forces leaders.

leaders sont responsables du maintien de la discipline, de l'efficacité et du moral des troupes;

ii. la nécessité de profiter des connaissances, de la compétence ou de ('expérience professionnelles des membres seniors des Forces canadiennes;

iii. l'utilité de renforcer la hiérarchie militaire sur laquelle repose la discipline;

iv. l'utilité d'acquérir des connaissances des cours martiales de la part des leaders des Forces canadiennes.

The Determination

9. In all cases where a prosecutor conducts a post-charge review and concludes that a charge should be tried by court martial, the prosecutor shall, as part of the prosecutor's legal opinion, provide a recommendation as to the appropriate court martial to be convened and the reasons for that recommendation. The type of court martial indicated on the proposed charge sheet forwarded by the prosecutor shall reflect the prosecutor's recommendation. Following review of the charge sheet drafted by the prosecutor, DMP or DDMP[8] will – once a decision is made to prefer a charge – determine the type of court martial that is to try the accused person.

La décision

9. Dans tous les cas ou il mène une vérification postérieure à la mise en accusation et conclut qu'une cour martiale devrait être saisie de l'accusation, un procureur inclut, dans l'avis juridique qu'il fournit, une recommandation précisant quelle cour martiale devrait être convoquée et les motifs justifiant cette recommandation. Le type de cour martiale indiquée sur l'acte d'accusation proposée par le procureur doit correspondre à la recommandation du procureur. Après avoir examiné l'acte d'accusation présenté par le procureur, le DPM ou le DAPM[16] – s'il décide de procéder à une mise en accusation – déterminera le type de cour martiale devant juger l'accusé.

Representations of the Accused Person

10. Representations of the accused person will not ordinarily be sought in determining the type of court martial to try the accused person. However, if the accused person or their legal counsel wishes to make representations concerning the type of court martial at any time before the trial has commenced, the person making the determination will consider those representations. Representations should be made as soon as is practicable and submitted to DDMP in writing.

Observations de l'accusé

10. Normalement, on ne demande pas a l'accusé de présenter des observations avant de déterminer le type de cour martiale devant laquelle il sera jugé. Toutefois, si l'accusé ou son avocat souhaitent faire, en tout temps avant le début du procès, des observations au sujet du type de cour martiale, la personne prenant la décision les examinera. Ces observations doivent être faites par écrit et être communiquées dès que possible au DAPM.

Distribution

11. This policy statement is a public document.

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Endnotes/Notes de fin de texte

[1] See, for example, paragraph 28 of the Alberta Code of Professional Conduct cited in *Krieger v. Law Society of Alberta,* [2002] 3 S.C.R. 372 at p. 381. It characterizes prosecution as a public function. It describes the prime duty of a lawyer when exercising the function of prosecutor as "not to seek to convict but to see that justice is done through a fair trial on the merits and to act "fairly and dispassionately." See also p. 389 of the *Krieger* decision emphasizing that it is a constitutional principle that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. This duty necessarily generalizes to agents of an Attorney General and others performing a prosecution function.

[2] *MacKay v. The Queen,* [1980] 2 S.C.R. 370. (Per Ritchie J. at p.398 and McIntyre J. at p. 402.) See also *R. v. Généreux,* [1992] 1 S.C.R. 259. Chief Justice Lamer for the majority observes at p.293 that without a code of service discipline the CF could not perform the role for which it was created. The safety and the wellbeing of Canadians depends considerably on the readiness of the CF. To maintain readiness, discipline must be enforced effectively and efficiently.

[3] The predecessors of section 5 can be traced back to the original *Criminal Code of Canada* enacted in 1892. See Rodrigues, Gary P., *Crankshaw's Criminal Code of Canada, 8th Edition.* (Release 2005-7), p.1-13.

[4] *Généreux,* p.281. Per Chief Justice Lamer.

[5] *MacKay,* p.398. *Généreux,* p. 295, per Chief Justice Lamer.

6 Section 165.11 of the *NDA* places upon DMP the responsibility for preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. Section 165.12 gives DMP the discretion to prefer a charge as referred and any other charge in addition to or in substitution. DMP may withdraw any charge preferred prior to a trial commencing and, with the permission of the court, after the trial has commenced. Under section 165.13, if DMP is satisfied that a charge should not be proceeded with by court martial, DMP has the discretion to return the charge to an officer with summary trial jurisdiction. Finally, section 165.14 imposes on DMP the duty to determine, when preferring a charge, the type of court martial that is to try the accused and to inform the Court Martial Administrator. Section 165.19 requires the Court Martial Administrator to convene courts martial in accordance with the DMP determination.

7 *Supra*, Footnote 1.

8 Ordinarily, this decision will be made by DDMP.

9 Voir, par exemple, le paragraphe 28 de l'Alberta *Code of Professional Conduct* cité dans l'arrêt *Krieger* c. *Law Society of Alberta,* [2002] 3 R.C.S. 372, a la p. 381. Selon ce paragraphe, un procureur du ministère public exerce des fonctions publiques. II indique l'avocat engagé comme procureur du ministère public « doit non pas simplement rechercher une condamnation, mais veiller à ce que justice soit rendue grâce à un procès équitable sur le fond » et « agir de façon sereine et juste ». Voir aussi, à la p. 389 de l'arrêt *Krieger,* ou la Cour insiste sur le fait qu'un principe constitutionnel veut que le procureur général agisse indépendamment de toute considération partisane lorsqu'il supervise les décisions d'un procureur du ministère public. Ce devoir s'applique nécessairement aux mandataires d'un procureur général et aux autres personnes qui exercent des fonctions de poursuivant.

10 *MacKay* c. *La Reine* [1980] 2 R.C.S. 370. (Le juge Ritchie, à la p. 398 et le juge McIntyre à la p. 402.) Voir aussi l'arrêt *R. c. Généreux,* [1992] 1 R.C.S. 259. Le juge en chef Lamer, se prononçant au nom de la majorité, fait observer, à la p. 293 que sans code de discipline militaire, les Forces armées ne pourraient accomplir la fonction pour laquelle elles ont été créées. La sécurité et le bien-être des Canadiens dépendent dans une large mesure de l'état de préparation des FC. Pour que celles-ci soient prêtes à intervenir, il faut que les autorités militaires soient en mesure de faire respecter la discipline interne de manière efficace.

11 II est possible de retrouver les versions antérieures de l'article 5 et de remonter jusqu'au premier *Code criminel* du Canada, édicté en 1892. Voir I'ouvrage de Rodrigues, Gary P., *Crankshaw's Criminal Code of Canada, 8th Edition.* (Release 2005-7), aux p.1 a 13.

12 *Généreux,* p. 281. Le juge en chef Lamer.

13 *MacKay,* p. 398. *Généreux,* p. 295, le juge en chef Lamer.

14 Selon l'article 165.11 de la LDN, il incombe au DPM de prononcer toutes les mises en accusation des personnes jugées par les cours martiales et de mener les poursuites devant celles-ci. L'article 165.12 confère au DPM le pouvoir discrétionnaire de donner suite à toute accusation qui lui est transmise en prononçant la mise en accusation d'un accusé ou d'ajouter ou de substituer une autre accusation à celle-ci. Le DPM peut retirer une mise en accusation déjà prononcée; toutefois, le retrait de la mise en accusation après le début du procès en cour martiale est subordonné à l'autorisation de celle-ci. Selon l'article 165.13, s'il estime que la cour martiale ne devrait pas être saisie de l'accusation, le DPM peut déférer celle-ci à un officier ayant le pouvoir de juger sommairement l'accusé. Enfin, l'article 165.14 impose au DPM de déterminer, dans la mise en accusation, le type de cour martiale devant juger l'accusé et d'informer l'administrateur de la cour martiale de sa décision. L'article 165.19 exige que l'administrateur de la cour martiale convoque la cour martiale sélectionnée conformément à la décision du DPM.

15 Voir supra, la note 1.

16 Cette décision devrais normalement être prise par le DAPM.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-498
STYLE OF CAUSE:	JOSEPH SIMON KEVIN TRÉPANIER v. HER MAJESTY THE QUEEN and EX-CORPORAL BEEK, D.D.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 28, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	S. NOËL J.A. DE MONTIGNY J.A.
DATED:	April 24, 2008

APPEARANCES:

Lieutenant-Colonel Denis Couture	FOR THE APPELLANT
Major Marylène Trudel	FOR THE RESPONDENT
Marvin Bloos, Q.C.	FOR THE INTERVENER

SOLICITORS OF RECORD:

Directorate of Defence Counsel Services Gatineau, Quebec	FOR THE APPELLANT
Canadian Military Prosecution Services Ottawa, Ontario	FOR THE RESPONDENT
Beresh Cunningham Aloneissi O'Neill Hurley Edmonton, Alberta	FOR THE INTERVENER