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SUI NOT-SO-GENEROUS:
THE UNCONSTITUTIONALITY OF CANADIAN COURT MARTIAL JURY TRIALS

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I. INTRODUCTION

The Canadian military justice system is rarely the subject of academic study, and is therefore unfortunately deprived of beneficial input from many well-qualified sources. However, the realities of contemporary times, including the annually increasing number of courts martial,1 the annually increasing number of constitutional challenges heard at courts martial,2 and the tendency for courts martial to hear increasingly serious charges,3 all suggest that the military justice system is one that deserves careful critical scrutiny.

The constitutionality of certain court martial “jury”4 procedures is now a particularly appropriate topic of study in light of the major amendments to the National Defence Act5 (“NDA”)...
that were enacted with the passing of Bill C-60 on 18 June 2008. Prior to the amendments, courts martial could be heard by either a judge sitting alone or a judge with a panel of factfinders, although the mode of trial was selected by the Director of Military Prosecutions (“DMP”), rather than by the accused. Since the DMP historically elected Standing Courts Martial (“SCM”), which are trials by judge alone, on almost every occasion, there was little need or opportunity to consider the fairness of jury procedures within the military justice system. However, in April 2008, the Court Martial Appeal Court (“CMAC”) decided that DMP’s authority to elect mode of trial denied an accused Canadian Forces (“CF”) member his right to a fair trial contrary to ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

The CMAC therefore declared s. 165.14 of the NDA to be of no force or effect, and read into the NDA a requirement for accused members to be offered elections as to their modes of trial. Consequently, Parliament amended the NDA through Bill C-60 such that accused members are now offered the ability to elect a General Court Martial (“GCM”), which is a trial by way of panel, under most circumstances. This choice is deemed to have been made when an accused fails to make an election, and a GCM is required for the most serious charges. In other words, Bill C-60 has created an environment in which military jury trials may become much more prevalent, so all stakeholders within the military justice system now have a renewed incentive to satisfy themselves that such trials adhere to the constitutional principles of fundamental justice, independence, and fairness articulated within ss. 7 and 11(d) of the Charter.

Although the primary functions of a GCM panel—determining questions of fact and arriving at a finding—are identical to those of a civilian jury, GCMs are nonetheless distinct from jury trials in a number of ways: the panel comprises only five members as opposed to twelve jurors; the panel composition varies with the rank of the accused; members of the panel cannot be peremptorily challenged; and certain decisions of the panel are made by majority vote, and in the event of a tie, the senior ranking member of the panel casts a second and deciding vote. These important differences between military tribunals and

6 An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act, S.C. 2008, c. 29 (Bill C-60).
7 Section 165.14 of the NDA was repealed by Bill C-60 (supra note 6 at s. 6), but stipulated that “when the Director of Military Prosecutions prefers a charge, the Director of Military Prosecutions shall also determine the type of court martial that is to try the accused person and inform the Court Martial Administrator of that determination.”
8 The Court Martial Appeal Court, in R. v. Nystrom, 2005 CMAC 7, pointed out that, between 1 September 1999 and 20 December 2005, only 4 of the 345 trials at courts martial were heard by a judge sitting with a panel.
10 See Joseph Simon Kevin Trépanier v. Her Majesty the Queen, 2008 CMAC 3 [Trépanier].
11 NDA, supra note 5 at s. 165.193(1).
12 ibid. at s. 165.193(3).
13 ibid. at s. 165.191(1).
14 ibid. at s. 167(1).
15 ibid. at ss. 167(2) - (7).
16 ibid. at s. 192(2).  
17 A tie could occur in a variety of situations. For instance, if a single member of the panel dies then the court martial is not dissolved, and the remaining four members could find themselves divided on a matter requiring a majority vote. See NDA, supra note 5 at s. 196.1(1). Likewise, if a panel member is challenged for cause, the issue is heard and determined by the remaining four panel members by majority vote. See ibid. at s. 186.
18 Queen’s Regulations and Orders for the Canadian Forces, (Ottawa: Queen’s Printer) [QR&O] at s. 112.14.
civilian criminal courts have led the Supreme Court of Canada ("SCC") to recognize that "a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by ... compelling principles." In a subsequent decision, the CMAC likewise suggested that "it would be sterile [sic] to attempt an exhaustive catalogue of the similarities and dissimilarities [between military and civilian criminal trials]. Courts martial are sui generis."  

The phrase "sui generis" is Latin and means "of its own kind." In Canadian jurisprudence, for instance, the term is often used to describe Aboriginal title as an interest in land that is distinct from all other proprietary interests known to the common law—Aboriginal title is something less than ownership in fee simple, but it still encompasses the right to exclusive use and occupation of a tract of land. Courts martial are similarly sui generis, in that they seek to uphold values of order and discipline in a manner that serves the military's unique needs. Notwithstanding any justifications for a separate tribunals structure under military law, however, the SCC has made it clear that "any such parallel system is itself subject to Charter scrutiny, and if its structure violates the basic principles of s. 11(d) it cannot survive unless the infringements can be justified under s. 1."  

As the ensuing discussion will demonstrate, current NDA provisions for military jury trials specifically relating to panel composition fail to respect rights and freedoms guaranteed by the Charter. I intend to show that military trials by rank-influenced and unrepresentative GCM panels violate accused CF members' rights to "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." My analysis will further point to the conclusion that such Charter violations cannot be saved under s. 1 as "reasonable limits prescribed by law" that "can be demonstrably justified in a free and democratic society."

II. APPLICATION OF THE CHARTER TO MILITARY TRIBUNALS

Before embarking on a discussion of the constitutionality of court martial jury procedures, it is first necessary to consider the extent of the Charter's application to courts martial. The manner in which the Charter applies to military tribunals is not intuitive, nor has the subject been frequently discussed in Canadian jurisprudence. One would begin a constitutional analysis by looking to s. 52(1) of the Constitution Act, 1982, which states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Since courts martial are only convened under the authority of the NDA, a Canadian statute, it seems self-evident at this stage that court martial procedures must abide by the Canadian Constitution, and must respect the rights and freedoms guaranteed within the Charter.

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21 Black's Law Dictionary, 8th ed., s.v. "sui generis".
23 Généréux, supra note 19 at para. 65.
24 Charter, supra note 9 at s. 11(d).
25 Ibid. at s. 1.
The next step of the constitutional analysis would lead to the provisions of section 11(f) of the Charter:

11. Any person charged with an offence has the right

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

It is clear that the above provision guarantees civilians in Canada the right to a trial by jury under certain circumstances, but what does it really mean to military personnel? In R. v. Généreux, the SCC held that s. 11(f) of the Charter “does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law,” but I would suggest that this statement is incomplete: the section does more than simply “contemplate”—it creates substantive rights for civilians that are not afforded to military members.

As a result of the unique s. 11(f) rights that are conferred only upon civilians in Canada, the CMAC in Trépanier v. R. was unable to conclude that CF members have the right to elect trial by a panel under s. 11(f) of the Charter, in spite of the Court’s obvious determination to somehow reach that conclusion. Instead, the Court relied upon a hybrid reading of ss. 7 and 11(d) to determine that, where a choice exists as to the mode of trial, that choice must rest with the accused as part of his or her constitutional right to make a full answer and defence. To be more precise, the CMAC concluded that the existing NDA provisions empowering the DMP to select mode of trial violated Trepanier’s right to make a full answer and defence, and therefore denied him of his s. 11(d) right to a fair trial in a way that was not in accordance with principles of fundamental justice.

In the wake of the Trépanier decision, I believe it is possible to summarize certain propositions about the way in which the Charter applies to military tribunals. First, the only effect of s. 11(f) is that military members have no freestanding constitutional rights to be tried by panels. However, since this type of court martial exists, and since the NDA has not specified all circumstances under which a GCM must or must not be convened, an accused military member has a constitutional right to elect a GCM whenever an SCM has not been legislatively imposed. Second, all other Charter rights apply equally in the contexts of the military and civilian justice systems. In other words, the military justice system need not be identical to the civilian criminal justice system, but it must conform to the same underlying values, including those of independence, fairness, and fundamental justice, that are articulated within the Charter. As one commentator has suggested: “[O]nce a hearing before a de facto jury has been extended to an individual, there is no basis for denying that accused the same procedural safeguards as those that guarantee civilians a fair trial.” Thus, where the NDA has provided for courts martial with panels, we can conclude that

27 Généreux, supra note 19 at para. 65.
28 The CMAC’s inter-reliance on ss. 7 & 11(d) in Trépanier seems unnecessary in the context of a “full answer and defence” claim. The SCC has inferred that, where an accused is denied the ability to make a full answer and defence, both the principles of fundamental justice and the right to a fair trial are independently violated (see generally R. v. Rose, [1998] 3 S.C.R. 262).
29 See generally Trépanier, supra note 10.
the procedures followed by such courts martial must conform to the Charter.

III. THE PROBLEMATIC COMPOSITION OF GENERAL COURT MARTIAL PANELS

Turning to a substantive assessment of the constitutionality of NDA jury provisions, I will now summarize the law regarding membership and composition of GCM panels in an effort to determine whether such panels conform to requirements set forth in s. 11(d) of the Charter. As indicated above, a GCM panel consists of five members. The senior member must be an officer of at least the rank of colonel; however, if the accused is a general officer, then the senior member must be of at least equivalent rank. If the accused is an officer, then all panel members must also be officers. If the accused is a colonel or general officer, then all panel members must be of at least the rank of lieutenant colonel. If the accused is a non-commissioned member (“NCM”), then two panel members must be senior NCMs, but the other three must be officers. More junior NCMs (ranked sergeant and below) and officers (ranked lieutenant and below) cannot serve as GCM panel members.

A GCM panel is remarkably distinct in its composition from a civilian jury. While the latter is generally accepted to be a set of fact-triers selected from among the accused’s “peers” in society, the former explicitly requires or precludes the inclusion of fact-triers who are “peers,” in the cases of officers and junior NCMs, respectively. As the CMAC pointed out in Trépanier (where the Court voiced its concerns on this subject in obiter),

[...] 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 [...], 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 [...], relative status and rank.

However, while the NDA jury provisions are unique, the mere fact that they place restrictions on the composition of a panel does not, in itself, make them unconstitutional: Canadian provinces have also placed limitations on the type of people who are qualified to serve as jurors, and these legislative provisions have apparently not offended the Charter. It is therefore necessary to look more closely at the likely effects of the NDA provisions in order to ascertain whether or not they conform to the Charter.

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31 Henceforth, any reference in this paper to NDA “jury” or “panel” provisions, or later to “impugned” provisions, should be taken to refer to the sections of the NDA discussed in this paragraph.

32 See attached Rank Chart at Annex A for an explanation of CF rank structure.

33 NDA, supra note 5 at s. 167.

34 Ibid. at ss. 167, 168(e).

35 Trépanier, supra note 10 at para. 112.

36 See Juries Act, S.N.S. 1998, c. 16, s. 4, for an example of the type of people who are disqualified from serving as jurors, including barristers, police officers, and persons who have been convicted of serious criminal offences.
A. The Undue Influence of Rank within a GCM Panel

It is common knowledge that militaries are hierarchical organizations, and the Canadian Forces are no exception to this tradition. Rank within the CF is not merely influential, it is absolutely authoritative; in fact, the NDA makes it an offence, carrying a maximum sentence of imprisonment for life, for a service member to disobey a lawful order of a superior officer. The concepts of deference to and respect for rank within the military are also somewhat inescapable, particularly when service members interact with one another in uniform, but also in other contexts. For instance, ceremonial protocol within the CF requires subordinate members to pay marks of respect to superior commissioned officers even when both parties are out of uniform, by either removing civilian headdress or by coming to the position of attention. The hierarchical nature of superior-subordinate relations is further reinforced when members interact with one another in uniform, since their ranks are prominently displayed on their epaulettes as reminders of their relative places within the leadership structure of the organization. In other words, the Canadian military’s rank hierarchy persistently guides almost all dealings among service members.

As a result of the pervasive influence of rank within the CF, one could infer that a GCM panel that is legislatively structured so as to preserve rank distinctions cannot guarantee an accused a fair hearing—where fact-tries are not unduly influenced in their decision-making processes—by an independent tribunal, that is, a tribunal structured so as to prevent the possibility of undue influence on the fact-tries as required by s. 11(d) of the Charter. Although it is difficult to prove this point without empirical evidence, it seems obvious that a warrant officer sitting on a GCM panel could be influenced by the opinions of the colonel who is designated as the panel’s “senior member” and who is nine ranks senior to the warrant officer, and that this influence could stem as much from the colonel’s rank as from the persuasive force of his or her argument. Similarly, it has been suggested that “more obsequious low ranking officers will be very deferential to the opinions of the higher ranking officers.” Such junior officers would be inclined to accept the opinion of the colonel on the panel either out of habitual obedience or out of fear for the perceived consequences of disagreement with a superior officer.

Several mechanisms are already in place in order to combat these possible sources of undue influence on GCM panel members, although it is unlikely that they could be eliminated altogether. First, military judges provide lengthy instructions to each GCM panel prior to its deliberations, about the duties and roles of panel members, presumably reinforcing individual obligations to “make true findings according to the evidence” in accordance with the oaths sworn by the panel members. Second, members of the panel vote on a finding in reverse order of rank from lowest to highest, but only after deliberations are complete and each panel member, including the most senior member, is likely to have made his or her position well known. Finally, a panel member’s chain of command is prohibited from considering the individual’s performance as part of a GCM in any promotion or posting decisions relating to that member. In theory, then, there should be no reason for an accused to doubt the independence of a GCM panel by which he or she is tried, irrespective of the

37 NDA, supra note 5 at s. 83.
38 Ho, “World that has Walls”, supra note 30 at para. 94.
39 See QR&O, supra note 18 at s. 112.17 for the full text of the oath sworn by panel members.
40 Ibid. at s. 112.41(2).
41 Ibid. at s. 26.11.
ranks held by various members on the panel, since each panel member is expected to individually evaluate the evidence and arrive at a finding, and since each member is protected from discriminatory treatment as a result of his or her involvement on the panel.

Notwithstanding these safeguards, the independence of a GCM panel is questionable. In reality, all military members undergo extensive indoctrination processes that take place over the course of their uniformed careers, often involving intense training and operations, in order to help them internalize and give effect to the values of discipline and obedience that are essential to the function of the CF. In short, military members are perpetually trained to respect the authority of those superior to them in rank. Thus, even if GCM panel members were to consciously recognize the need to disregard the ranks of their colleagues on the panel during the deliberation process, it is conceivable, even probable, that their entrenched indoctrination experiences would still cause them to subconsciously respect and defer to the opinions of higher-ranking panel members. It is almost farcical to suggest that the habit of obedience, built up in a military member over the course of his or her career, can be negated, or even temporarily suspended, by the act of uttering a brief oath at the start of a court martial, or by hearing a few words from a military judge on the subject of impartiality prior to the commencement of GCM panel deliberations. In light of the above realities of military life, it is reasonable to conclude that members of a GCM panel could be unduly influenced by the ranks of their colleagues on the panel.

Is the possibility that the fairness of a hearing could be compromised by the NDA’s rank-based jury provisions sufficient grounds for a finding that GCM panels do not meet the independence requirements of s. 11(d) of the Charter? The dicta of the SCC in Généreux, a case relating to the independence of military “judges” who were at that time appointed from among the ranks of general military lawyers on ad hoc bases for individual trials, are instructive in answering this question:

I emphasize, however, that the independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal’s constitution and proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition, as mentioned by this Court in Valente (p. 702), is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding.42

This leading decision suggests that neither the historic, sui generis roots of the court martial system, nor the fact that many, perhaps most, GCM panels will perform their functions without their members being unduly influenced by one another’s ranks, can save the fact that the NDA jury provisions admit the reasonable possibility that such undue influence will affect the outcomes of at least some courts martial. The NDA provisions therefore fail to guarantee GCMs the minimum level of independence required by s. 11(d) of the Charter.

B. The Denial of a “Representative” Panel

As I have suggested above, a GCM panel is far from representative of the military community at large: non-commissioned members of or below the rank of sergeant and officers

42 Généreux, supra note 19 at para. 87.
below the rank of lieutenant are always excluded from service on a panel; all NCMs are excluded from panels that try officers, and an accused NCM will always be tried by a panel consisting of a majority of officers. In other words, the military “jury pool,” or the group of service personnel eligible to be appointed as GCM panel members by the Court Martial Administrator, is significantly restricted by provisions of the NDA. However, the value of a set of fact-triers who are representative of the accused’s broad community has long been recognized in Canada. As Justice L’Heureux-Dubé pointed out in R. v. Sherrat,

[A] jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place.43

The concept of representativeness was further expanded upon by Justice McLachlin, as she then was, in R. v. Williams, where she determined that “a representative jury pool” was an “essential safeguard of the accused’s s. 11(d) Charter right to a fair trial and an impartial jury.”44 More recently, in R. v. Gayle,45 the Ontario Court of Appeal affirmed that representativeness is a crucial characteristic of Canadian juries.

The rationale behind the ideal of a representative jury is two-fold: first, “jurors from dominant groups will confront ... biases and prejudices more readily if deliberations are conducted among a ... diverse group,”46 and second, “representativeness is essential to the appearance of impartiality.”47 Although both of the above justifications were advanced in the context of the Gayle case about racial prejudice, the rationales apply equally in a military setting. The “dominant” group in the CF, while the numerical minority, is the group that holds the power—the officers, and particularly the senior officers. It stands to reason that this group, which now legislatively makes up the majority of every GCM panel, would benefit as much from a diversity of perspectives from those of all ranks as would white jurors in the criminal trial of a black accused, as in Gayle. Furthermore, the appearance of impartiality is just as essential to the military justice system as to the civilian justice system, especially in light of the fact that “breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.”48 In other words, the stricter sentences to which military personnel are necessarily subject49 must be meted out by a justice system that is considered to be transparent and fair by all stakeholders if that system is to effectively achieve its purposes within the military.

47 Ibid. at para. 50.
48 Génèreux, supra note 19 at para. 60.
49 As I have argued elsewhere, military sentencing principles are unique and must not be diluted by incorrect applications of civilian principles in military cases. See Mike Madden, “First Principles and Last Resorts: Complications of Civilian Influences on the Military Justice System” Canadian Military Journal (forthcoming in Vol. 9, No. 3, March 2009).
As the above arguments indicate, a representative jury has a value that transcends the border between military and civilian criminal jurisdictions, so there is no prima facie reason why a military tribunal such as a GCM should be exempt from the constitutional requirement of “representativeness” within its pool of fact-tries. NDA jury provisions therefore violate s. 11(d) of the Charter not only because they fail to guarantee “independent” tribunals, but also because they fail to guarantee “fair” hearings by representative sets of panel members.

IV. GENERAL COURT MARTIAL PANEL PROVISIONS DISPROPORTIONATELY IMPAIR CHARTER RIGHTS

Despite the above violations of s. 11(d), it would still be possible for the NDA provisions to be found constitutional if they could be saved under s. 1 of the Charter. Since the transgressions of s. 11(d) stem from legislative provisions within the NDA, any limits on Charter rights that result from those provisions are clearly “prescribed by law.” In order for the impugned provisions to be demonstrably justified as reasonable limits on Charter rights within our free and democratic society, they must pass the two-stage test from R. v. Oakes50 (“Oakes”) as described by the SCC in R. v. Chaulk.51 Under the Oakes test, the impugned provisions must relate to a Parliamentary objective that is pressing and substantial, and they must represent a proportional means of achieving the objective.

A. Pressing and Substantial Objective

Let us now look more closely at ss. 167 and 168(e) of the NDA in order to ascertain Parliament’s objective in enacting those provisions. First, the impugned sections of the Act exclude junior NCMs and officers from GCM panels. Based on the minimum time requirements for promotion to the ranks of warrant officer and captain, this exclusion means that only NCMs with at least eleven years of service can sit on a GCM panel,52 while officers must have completed at least three years of commissioned service to be eligible for panel duty.53 The inference that can be drawn from this information is that Parliament intended for GCM panel members to be sufficiently experienced in the military. A related inference may be that Parliament intended for GCM panel members to have specific experience with the military justice system, since NCMs above the rank of sergeant and officers above the rank of lieutenant also typically have numerous subordinates, for whom they are administratively and disciplinarily responsible. The inference stems from the fact that, unless they have been charged themselves, NCMs below the rank of warrant officer and officers below the rank of captain are much less likely to have been involved in investigatory or adjudicative proceedings as part of their duties.

The impugned provisions of the NDA also prevent senior leaders in the CF from being tried by panel members who are significantly junior to them. One inference that can be

51 R. v. Chaulk, [1990] 3 S.C.R. 1303 at paras. 50-75 (Q.L) [Chaulk]. This case outlined the Oakes test for the purposes of s. 11(d) challenges.
52 Canadian Forces Administrative Order 49-4, Annex A [CFAO]. In practice, it would be exceedingly unlikely for most NCMs to reach the rank of Warrant Officer in such a short time.
53 CFAO 11-6.
drawn from this information is that Parliament wanted GCM panels to have an understanding of the responsibilities and professional circumstances of all accused members, including those of very senior rank. The inference can be supported on the arguable presumption that high-echelon leaders understand all levels of an organization beneath them, but low-echelon workers do not necessarily understand work performed at levels above them. Another possible inference is that Parliament wanted to ensure that the military’s hierarchical chain of command was not subverted by granting junior members adjudicative authority over senior members.

On the whole, one can gather that Parliament’s objective in enacting ss. 167 and 168(e) of the NDA was to ensure that GCM panels were staffed with competent and experienced fact-triers who would not subvert respect for the military’s rank hierarchy. I believe that this objective is sufficiently “pressing and substantial” to warrant limiting constitutionally protected rights. The impugned NDA provisions therefore pass the first stage of the Oakes test.

B. Proportionality Analysis

The second stage of the Oakes test requires a proportionality analysis that enquires into the following matters: first, whether the means enacted to advance Parliament’s objective is “rationally connected” to the objective; second, whether the Charter right is impaired “as little as possible;” and, third, whether the effects of the limitation are “proportional to the objective.”

1. Rational Connection Requirement

An analysis of the “rational connection” requirement of the Oakes test essentially tries to ensure that Parliament’s chosen means of achieving its objective are not arbitrary, unfair, or based on irrational considerations. In the present case, advocates of the status quo within the military justice system might argue that NDA panel provisions necessarily exclude junior NCMs and officers because a jury must be competent, and these personnel lack the experience or the education required to perform as panel members. While I acknowledge the requirement for a competent panel, any such argument against expanding the pool of panel members would nonetheless fail. The suggestion that a junior NCM or officer would be an incompetent panel member is both unfair and incorrect.

The threshold ability required of a juror is quite low, and is certainly met by service members who are trusted to handle dangerous weaponry and sensitive equipment in the performance of their duties. As the SCC has pointed out, “most trials require the same competence as is involved in the daily pursuit of one’s affairs, and the ability to speak and understand one of the official languages will suffice.” In this respect, certain NDA jury provisions would fail the “rational connection” element of the Oakes test because they are unfair and are based on irrational considerations. However, if the legislation were challenged,
I do not anticipate that a final decision would turn on this fact, since the impugned sections also fail subsequent branches of the Oakes test in more clear and explicit ways.

2. Minimum Impairment Requirement

An analysis of the "minimal impairment" requirement of the Oakes test seeks to establish whether or not Parliament could achieve the same objective by some means that is less intrusive to the accused. Although Parliament is not required to "search out and to adopt the absolutely least intrusive means of attaining its objective," the existence of reasonable alternatives to the impugned measures will suggest that the minimum impairment requirement has not been met.

In the present case, obvious solutions come to mind that could guarantee the accused a representative panel that would be free from the undue influence of rank while still meeting Parliament's objective of providing for a competent, experienced panel that respects the military's hierarchical structure: simply remove all identifiers of rank from the identities of panel members. Parliament could easily have enacted legislation requiring panel members' ranks to remain confidential. Such legislation might allow members to dress in civilian attire for the duration of a hearing, or might provide for some distinct form of "panel uniform," devoid of all rank insignia, for the members to wear at trial. Parliament could equally make it an offence for a panel member to disclose any information about his or her rank, position, or occupation, in order to preserve individual anonymity during the proceedings. In concert with these measures, Parliament could legislate that only "trained" members of the CF are eligible to serve on GCM panels, so that a certain baseline of experience would be possessed by all fact-tryers while still expanding the jury pool to include all ranks. Although training periods vary by occupation, most CF members are considered formally trained within their first three years of service, so such an enactment would generally eliminate the eight-year gap in "length of service" that currently exists between the respective times when officers and NCMs qualify for panel duty.

In the face of such simple and effective means of achieving Parliament's "pressing and substantial" objective with virtually no impairment of accused members' Charter rights, one must conclude that the impugned provisions of the NDA do not pass the minimal impairment requirement of the Oakes test.

3. Proportionality of Effects Analysis

The final "proportional effects" element of the Oakes test seeks to weigh the importance of Parliament's pressing and substantial objective against the magnitude of the Charter violation created by the impugned legislation, recognizing the fact that some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures that impose the limit intrude upon the integral principles of a free and dem-

57 Chaulk, supra note 51 at para. 65.
58 Although this suggestion might sound unusual, CF members of the National Investigation Service (military police special investigators) wear civilian clothing in the normal performance of their duties, and Joint Task Force 2 personnel are seldom seen in uniform, presumably to assist them in protecting their identities.
ocratic society.59

In the present case, the s. 11(d) right at issue is one that must be regarded as extremely important, since it relates to the life, liberty, and security of the person of anyone tried by GCM. The violation of this right under current NDA legislation is also very severe, since it exposes CF members to trials that may be manifestly unfair, and that may result in punishments of up to life imprisonment. As one commentator has observed about existing NDA provisions:

Senior officers are responsible for maintaining discipline among their troops, and as a result, they may be more likely to apply a stricter standard of conduct in determining the guilt ... of the accused. Such a situation is analogous to having a panel of police officers act as triers of fact in prosecuting street criminals; there is no separation between the role of enforcing discipline and the role of penalizing breaches of discipline.60

When current NDA jury provisions that stack GCM panels with senior officers are considered in the context of the above analysis, can it really be said that they “proportionally” deny Charter rights to those standing trial by GCM? Could any government objective be so pressing and substantial as to permit an accused to be tried in such an unfair way, by such an inappropriately composed panel? I think these questions must obviously be answered in the negative, which leads to the inevitable conclusion that the impugned provisions fail the final element of the Oakes proportionality test.

V. CONCLUSION

Although General Courts Martial are recognized as part of a legitimately distinct military justice system that has jurisdiction over elements of Canadian criminal law, the tribunals fail to respect certain rights that are constitutionally guaranteed by the Charter. The composition of GCM panels under current NDA provisions allows for panel members to be unduly influenced by the ranks of their colleagues in contravention of the s. 11(d) guarantee of an “independent” tribunal, and fails to provide for a representative set of fact-triers in contravention of the s. 11(d) guarantee of a “fair” hearing. These Charter violations are not reasonable limits that can be demonstrably justified in a free and democratic society. They are, however, easily correctable. Parliament proved that it has the ability to quickly and effectively remedy unconstitutional elements of the NDA when it passed Bill C-60 a short two months after the CMAC, in Trépanier, struck down different provisions of the Act after finding unjustified ss. 7 and 11(d) Charter violations in that case. In the present case, Parliament could take similar action to enact modifications to the NDA that would allow for GCM panels that are truly representative of the military population and that are not susceptible to undue rank-influence. Such legislative action would help to ensure that military members gain the full benefit of the rights guaranteed to them under the Charter, while still respecting the unique needs and objectives of Canada’s sui generis military justice system.

59 Oakes, supra note 50 at para. 71.
60 “World that has Walls”, supra note 30 at para. 94.
# ANNEX A

## CANADIAN FORCES RANK CHART

<table>
<thead>
<tr>
<th>Ranks</th>
<th>Navy</th>
<th>Army / Air Force</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Officers</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admiral (Adm)</td>
<td>General (Gen)</td>
<td></td>
</tr>
<tr>
<td>Vice Admiral (VAdm)</td>
<td>Lieutenant-General (LGen)</td>
<td></td>
</tr>
<tr>
<td>Rear Admiral (RAdm)</td>
<td>Major-General (MGen)</td>
<td></td>
</tr>
<tr>
<td>Commodore (Cmdre)</td>
<td>Bridgadier-General (BGen)</td>
<td></td>
</tr>
<tr>
<td><strong>Senior Officers</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Captain (Capt(N))</td>
<td>Colonel (Col)</td>
<td></td>
</tr>
<tr>
<td>Commander (Cdr)</td>
<td>Lieutenant-Colonel (LCol)</td>
<td></td>
</tr>
<tr>
<td>Lieutenant-Commander (LCdr)</td>
<td></td>
<td>Major (Maj)</td>
</tr>
<tr>
<td><strong>Junior Officers</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lieutenant (Lt(N))</td>
<td>Captain (Capt)</td>
<td></td>
</tr>
<tr>
<td>Sub-Lieutenant (SLt)</td>
<td>Lieutenant (Lt)</td>
<td></td>
</tr>
<tr>
<td>Acting Sub-Lieutenant (A/SLt)</td>
<td></td>
<td>Second Lieutenant (2Lt)</td>
</tr>
<tr>
<td><strong>Subordinate Officer</strong></td>
<td>Naval Cadet (NCdt)</td>
<td>Officer Cadet (OCdt)</td>
</tr>
<tr>
<td><strong>Senior Non-Commissioned Members</strong></td>
<td>Chief Petty Officer 1st Class (CPO 1)</td>
<td>Chief Warrant Officer (CWO)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Chief Petty Officer 2nd Class (CPO 2)</td>
<td>Master Warrant Officer (MWO)</td>
</tr>
<tr>
<td></td>
<td>Petty Officer 1st Class (PO 1)</td>
<td>Warrant Officer (WO)</td>
</tr>
<tr>
<td></td>
<td>Petty Officer 2nd Class (PO 2)</td>
<td>Sergeant (Sgt)</td>
</tr>
<tr>
<td><strong>Junior Non-Commissioned Members</strong></td>
<td>Master Seaman (MS)</td>
<td>Master Corporal (MCpl)</td>
</tr>
<tr>
<td></td>
<td>Leading Seaman (LS)</td>
<td>Corporal (Cpl)</td>
</tr>
<tr>
<td></td>
<td>Able Seaman (AS)</td>
<td>Private (Pte)</td>
</tr>
<tr>
<td></td>
<td>Ordinary Seaman (OS)</td>
<td>Private Recruit (Pte (Recruit))</td>
</tr>
</tbody>
</table>