Canada (Military Prosecutions) v. Canada (Chief Military Judge), 2007 FCA 390 (CanLII)

Date: 2007-12-10
Docket: A-53-07
URL: http://www.canlii.org/en/ca/fca/doc/2007/2007fca390/2007fca390.html

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CORAM: **NOËL J.A.**
SEXTON J.A.
TRUDEL J.A.

BETWEEN:

DIRECTOR OF MILITARY PROSECUTIONS

Appellant

and

CHIEF MILITARY JUDGE
and COURT MARTIAL ADMINISTRATOR

Respondents

Heard at Ottawa, Ontario, on November 13, 2007.
Judgment delivered at Ottawa, Ontario, on December 10, 2007.

REASONS FOR JUDGMENT BY: NOËL J.A.
CONCURRED IN BY: SEXTON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by the Director of Military Prosecutions ("DMP") from a decision of the Federal Court whereby Snider J. (the "Applications Judge") refused to compel the Chief Military Judge ("CMJ") to assign a military judge and require the Court Martial Administrator ("CMA") to issue the order convening a court martial. The DMP asks that this decision be set aside and that an order be issued compelling the CMJ to assign a military judge to preside at a Standing Court Martial and compelling the CMA to convene a Standing Court Martial forthwith.

[2] For ease of reference, the statutory and regulatory regime relevant to the disposition of this appeal is set out in Annex I to these reasons.

RELEVANT FACTS

[3] The Canadian Forces have created a special operations unit, whose function is the conduct of counter-terrorism operations, Joint Task Force 2 ("JTF2"). Information concerning the identity of JTF2 members as well as their movement or deployment is protected from public release, to avoid injury to Canada's national defence (National Defence Security Instruction number 27 ("NDSI 27"); NDHQ Instruction DCDS 05/1993, *Security and Public Affairs Policy – Joint Task Force Two* ("DCDS 05/1993"). This policy provides that information such as names, addresses and specific employment of Canadian Forces personnel cannot be publicly associated with JTF2. Also protected from public disclosure is information concerning the movement or deployment of unit personnel for a particular operation (Affidavit of Major Cloutier, Appeal Book, p. 74, para. 6).

[4] The accused is a warrant officer serving in JTF2. It is alleged that on August 10 2005, while serving in Afghanistan with his unit he committed aggravated assault and ill-treated a subordinate, who was also a member of JTF2. The first offence is said to have been committed contrary to section 130 of the *National Defence Act*, R.S. 1985, c. N-5 (the "*National Defence Act*") and section 268 of the *Criminal Code* and the second, contrary to section 95 of the *National Defence Act* (Affidavit of Major Cloutier, Appeal Book, p. 73, para. 3 and p. 75, para. 10).

[5] In order to bring the accused to justice, recourse was had to the military justice system. The military justice system is a two-tiered tribunal structure that includes a summary trial system and, the more formal court

martial system. There is no permanent court martial. Rather, it functions through an *ad hoc* court martial that is constituted as and when it is convened to address specific charges. A court martial can sit within or outside of Canada wherever it can conveniently be convened.

[6] Pursuant to this scheme, the charges were referred to the commanding officer of the accused who then referred them to the Deputy Chief of the Defence staff who in turn referred them to the DMP, together with the Record of Disciplinary Proceedings, the Report of Investigation and the evidence, all of which were classified SECRET (Affidavit of Major Cloutier, Appeal Book,
p. 74, para. 8). A recommendation that a court martial dispose of the charges also accompanied the referral.

[7] The DMP, who by virtue of sections 165 and 165.11 of the *National Defence Act*, is responsible for the preferring of all charges to be tried by court martial – as well as the conduct of all prosecutions (section 165.11 of the *National Defence Act*), the determination of the type of court martial that is to try the accused and for informing the CMA of that determination (section 165.14 of the *National Defence Act*) – preferred the charges for trial by a Standing Court Martial and her delegate completed a charge sheet.

[8] Given the nature of the information which had to be reflected in the charge sheet pursuant to subsection 110.06(2) of the *Queen's Regulations & Orders for the Canadian Forces (*the "QR&Os"), including in particular the name of the accused together with his unit of operation, the name of the alleged victim as well as the precise location in Afghanistan where the offences are alleged to have been committed, the charge sheet was classified SECRET pursuant to
DCDS 05/1993 (Affidavit of Major Cloutier, Appeal Book, p. 75, para. 11; Cross-examination of Major Cloutier, Appeal Book, pp.203, 204). Pursuant to the legislative scheme, the DMP forwarded the classified charge sheet to the CMA, in order for the CMJ to assign a military judge to the case, pursuant to section 165.25 of the *National Defence Act*, and for the CMA to issue an order convening a Standing Court Martial, pursuant to subsection 165.19(1) of the *National Defence Act*.

[9] The CMJ refused to assign a military judge because, in her opinion, doing so in circumstances where the charge sheet and the accompanying documentation is classified SECRET would contravene the *Canadian Charter of Rights and Freedoms* and the open court principle, as codified by section 180 of the *National Defence Act*. Given this refusal, the CMA has been unable to fulfill her duty to issue a convening order since she could not identify the military judge whose name is to appear on that order pursuant to subsection 111.02(2) of the QR&Os.

[10] Upon being notified of the CMJ's decision, the DMP took steps to alleviate the concerns of the CMJ. The DMP advised both the CMJ and the CMA that, although the charge sheet would initially have to be sealed, the prosecutor would, upon the court martial being convened, make an application before the military judge assigned to preside for an order limiting public access to the classified information to be disclosed during the trial.

[11] The solution proposed by the DMP is set out in the following passage quoted by the Applications Judge at paragraph 26 of her reasons:

> Indeed, the straightforward, practical and lawful solution to address the legitimate concern raised by the CMJ with respect to [how] the classified information contained in a charge sheet can be protected would be for her to assign a military judge to permit the CMA to convene a court martial. This military judge would then have jurisdiction to determine the DMP's preliminary application brought pursuant to s. 180 of the *National Defence Act* to protect the information in issue from public disclosure. In this manner, a full and frank debate could be held with respect to this issue before the military judge who will then apply the "*Dagenais/Mentuck*" approach in determining whether or not to grant the request of the prosecution.

[12] The immediate problem sought to be resolved by the DMP in advancing this proposal was to prevent classified information from being disclosed before a ruling could be rendered on the matter. Although, subsection 180(2) of the *National Defence Act* allows proceedings to be held *in camera* (in whole or in part), and subsection 112.03(2) of the QR&Os authorizes a Standing Court Martial, once convened, to deal with preliminary motions, no such motion can be addressed until a military judge is assigned and takes the oath, an event which, according to the prescribed procedure, only takes place at the commencement of the court martial proceedings for which the military judge is assigned (paragraph 112.05(4)(*a*) of the QR&Os). The solution proposed by the DMP requires that the charge be sealed until such time as a military judge is assigned and is in a position to rule on the issue of disclosure. (The complete process in sequence is set out in Annex II to these reasons.)

[13] Despite repeated requests that the matter be reconsidered, the CMJ maintained her decision not to assign a military judge. Faced with this continued refusal, the DMP brought applications before the Federal Court to compel the CMJ and the CMA to perform their respective duty to assign a military judge and to convene a Standing Court Martial.

[14] The application against the CMA (Court file No. T-1967-05) and the one against the CMJ (Court File No. T-1968-05) came before the Applications Judge, who dismissed both in a single set of reasons. This is the decision under appeal. Before turning to this decision, it is useful to first review the decision of the CMJ.

CHIEF MILITARY JUDGE DECISION

[15] In a memorandum to the CMA, (also sent to the DMP), the CMJ sets out her reasons for refusing to assign a military judge (CMJ's Reasons, Appeal Book, p. 147). The reasons begin with the following (CMJ's Reasons, para. 1):

> You have asked me to assign a military judge to a matter where the charge sheet and accompanying documentation is classified secret in its entirety. I have considered this matter carefully and have come to the conclusion that I cannot assign a military judge to a proposed court martial in such a circumstance. I would direct you to advise the prosecution and defence involved of my decision and provide them a copy of this letter.

[16] The CMJ then sets out the statutory framework within which she is making her decision (CMJ's Reasons, para. 2):

> One of the statutory duties of the Chief Military Judge, pursuant to section 165.25 of the *National Defence Act*, is to assign military judges to preside at courts martial and to perform other judicial duties under the *National Defence Act.* In exercising this function, as with any other judicial function, the Chief Military Judge must comply with the laws of Canada and more specifically the *Canadian Charter of Rights and Freedoms*, the decisions of the Supreme Court of Canada, the Court Martial Appeal Court and, where applicable, the Federal Court of Canada.

[17] The CMJ outlines at paragraph 3 the usual process followed in convening a court martial and writes, "The usual process followed in convening a court martial is that a charge sheet, without any classification on its face is received at the Office of the Chief Military Judge". Subsequently, a military judge is assigned, who can then consider issues of confidentiality as per subsection 180(2) of the *National Defence Act.*

[18] However, where the charge sheet is classified, assigning a judge "would be to accept a presumption of secrecy" (CMJ's Reasons, para. 6):

> No public notification could be made of the fact the court martial was taking place as all relevant information such as the nature of the charges, the identity of the accused and the time, date and place the court martial is to be held would all be covered by the classification imposed by the prosecution and could not be made public. The accused would be in the position of having to make an application if he or she wished to have her or his trial open. No other interested parties could or would be informed of the

> existence of the charges or of any such application. Any such application would be made in the context of an existing presumption of secrecy. If no such application is made, then the court martial is not open to the public.

[19] The CMJ goes on to explain some of the practical difficulties which this would entail (CMJ's Reasons, para. 7):

> Indeed, on a very practical level, this approach would raise issues such as how a court martial could begin, given that *Queen's Regulations and Orders for the Canadian Forces*, subsection 112.05(2), elaborating on section 180 of the *National Defence Act*, states that at the beginning of court martial proceedings, members of the public shall be admitted? How could the accused be brought before a court martial that is open to the public and identify him or herself as the accused person when his or her identity is classified by the charge sheet? How could the prosecutor comply with the regulatory requirement at the beginning of a court martial to read the charge sheet?

[20] At the close of her reasons, the CMJ reiterates her view that assigning a judge where a charge sheet is classified would be tantamount to sanctioning a closed trial (CMJ's Reasons, para. 9):

> It may be possible to provide an unclassified charge sheet to permit the assignment of a military judge. I do not know. In this case however, the effect of assigning a military judge to a court martial, which the government has designated as classified, is to accept and to follow a presumption of secrecy.

FEDERAL COURT DECISION

[21] The Applications Judge begins her reasons by indicating that in order for a writ of *mandamus* to issue, there must be a duty to act. She goes on to examine the question whether in the absence of a judicial determination that a charge be kept confidential, there is a legal duty for the CMJ to assign a military judge (Reasons, para. 7).

[22] Before examining this question, the Applications Judge observes that while subsection 180(2) of the *National Defence Act* allows a military judge to order that proceedings be held *in camera* where this is necessary in the interests of public safety or defence, no such order can issue until a military judge is actually assigned. According to the Applications Judge (Reasons, para. 18):

> As the *National Defence Act* exists today, preliminary matters may be heard and determined only after a military judge is assigned to preside over the court martial and the court martial is convened. There is nothing in the *National Defence Act* that allows for the appointment of a military judge to consider preliminary matters such as the sealing of a charge.

[23] The Applications Judge then points to a proposed amendment to the *National Defence Act* which died on the order paper of the last Parliament (section 50 of *Bill C-7, An Act to amend the National Defence Act*, 1st sess., 39th Parl., 2006):

187. At any time after a charge has been preferred but before the commencement of the trial, any question, matter or objection in respect of a charge may, on application, be heard and determined by any military judge or, if the court martial has been convened, the judge assigned to preside at the court martial.	**187.** À tout moment après le prononcé d'une mise en accusation et avant l'ouverture du procès de l'accusé, tout juge militaire ou, si la cour martiale a déjà été convoquée, le juge militaire la présidant peut, sur demande, juger toute question ou objection à l'égard de l'accusation.

According to the Applications Judge this provision, if enacted, would have provided a complete answer to the problem with which she was confronted. However, the amendment did not pass and her task therefore was to

determine whether, in the absence of a legislative process by which preliminary matters of confidentiality can be addressed, the CMJ had the duty to assign a military judge (Reasons, para. 20).

[24] Dealing with this question, the Applications Judge said (Reasons, para. 27):

> I do not dispute that, once assigned, a military judge would have jurisdiction to consider an application for confidentiality (s. 180, s. 187, *National Defence Act*). However, the question before me arises prior to the assignment of the military judge. What is obvious is that there is no possibility, within the ambit of the *National Defence Act* or its regulations, of dealing judicially with confidentiality matters prior to the assignment of a judge. Until that time, there is no court. The question is not whether the court martial judge can consider these matters; he or she can. Rather, the relevant question is: can the Administrator and the CMJ take the steps to convene a court martial without judicial consideration of whether certain information (the name, service number and rank of the Accused) may be withheld at that stage?

[25] According to the Applications Judge, the open court principle extends to every stage of a proceeding including the one which follows the preferment of the charge and precedes the assignment of a military judge. She writes at paragraph 39:

> What is evident is that, at this preliminary stage, all of the parties involved are subject to DCDS 05/1993. That is, the DMP, the Administrator and the CMJ are bound to keep confidential certain information contained in the charge; they must obey military orders. This, in my view, creates a very real apprehension that none of the three decision-makers can bring an unfettered discretion to the question of disclosure at this preliminary stage. (As an aside, I assume that a military judge assigned to the court martial would not be bound to follow such orders where they conflict with his or her judicial duties.) Without a separate, independent review of the question of secrecy at this stage, how can we be satisfied that the need for confidentiality outweighs the need for full and immediate disclosure?

[26] She goes on to conclude in the next paragraph that the unilateral decision by the DMP to seal the charge pending review by the military judge violates the open court principle (Reasons, para. 40):

> Given the nature of the charges and the possible impact on the Accused and others who may have an interest in the proceedings, I see no reason why the same constitutional protections afforded at the preliminary stages of criminal proceedings, should not apply to all stages of proceedings involving the Accused. In my view, it offends the underlying principles for the DMP to unilaterally seal the charge or for the CMJ to accept this decision of the DMP.

Because the decision of the DMP offended the open court principle, the CMJ did not have to perform her statutory duty to assign a military judge, and therefore, a *mandamus* could not issue.

[27] The Applications Judge then addressed the question whether in any event the DMP had met the burden demonstrating that there were no adequate alternative remedies for addressing the problem (*Apotex Inc. v. Canada (Attorney General)*, 1993 CanLII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100). According to the Applications Judge, the DMP had two alternatives to sealing the charges, i.e., obtaining an administrative accommodation or acting pursuant to section 38 of the *Canada Evidence Act*, R.S.C. 1985, c, C-5 (the "*Canada Evidence Act*") (Reasons, paras. 45-72). The existence of these alternatives was sufficient in itself to justify her refusal to issue a writ of *mandamus* (Reasons, para. 73).

POSITION OF THE PARTIES

[28] The DMP submits that under section 165.25 of the *National Defence Act*, the CMJ had a legal duty to assign a military judge and that the DMP's proposal that the charge be sealed and a military judge be assigned so that an application under subsection 112.03(2) of the QR&Os and subsection 180(2) of the *National Defence Act* can be brought to deal with the issue of confidentiality, is the only viable solution. The DMP submits that the same process had successfully been employed in a nearly identical situation in the past (Affidavit of Major Cloutier, Appeal Book, p.75, para. 9).

[29] According to the DMP, the Applications Judge erroneously accepted the conclusion by the CMJ that a classified charge sheet would somehow render the entire trial presumptively secret and that, therefore, she was required to consider the constitutionality of a secret court martial. The proper presumption, according to the DMP is that the trial would be "presumptively open" (DMP's Memorandum of Fact and Law, paras. 35, 39).

[30] Furthermore, the Applications Judge erred in finding that the open court principle applied at the stage where the CMJ assigns a military judge. According to the DMP, the CMJ's duty to assign a judge is an administrative task to which the open court principle does not apply (DMP's Memorandum of Fact and Law, paras. 44, 45).

[31] Finally, the Applications Judge failed to recognize that the open court principle is not absolute. As the Supreme Court of Canada explains in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (CanLII), [2005] 2 S.C.R. 188 (" *Toronto Star*"), the interlocutory protection of sensitive information, even if by unilateral action of one of the parties, is constitutionally permissible. This action in this case (i.e., the unilateral sealing of the charge) will allow the assigned military judge to hear and decide the extent to which the classified information can be protected from public disclosure (DMP's Memorandum of Fact and Law, paras. 47-49).

[32] With respect to the question whether there are adequate alternative remedies, the DMP submits that the Applications Judge erred in suggesting that an administrative accommodation might have been available. The DMP further submits that section 38 of the *Canada Evidence Act* cannot possibly apply. According to the DMP, there is no reasonable alternative to the solution that she proposes. (DMP's Memorandum of Fact and Law, paras. 55, 56 and 62-68).

[33] The CMJ supports the decision of the Applications Judge essentially for the reasons that she gave. The CMJ insists in particular on the Applications Judge's conclusion that the CMJ has no duty to proceed with the assignment of a military judge in the absence of a legislative process by which preliminary matters of confidentiality can be addressed. According to the CMJ all the issues raised in this appeal should be analyzed with this legislative gap in mind (CMJ's Memorandum of Fact and Law, para. 34).

[34] The CMA for her part adopts a neutral position. She maintains that the CMA has the duty to issue a convening order only to the extent that the CMJ has a duty to appoint a military judge. Accordingly, the critical issue is whether the CMJ has this duty (CMA's Memorandum of Fact and Law, para. 22).

ANALYSIS AND DECISION

[35] The parties did not make elaborate submissions on the applicable standard of review. I accept, as the CMJ suggested at paragraph 38 of her Memorandum of Fact and Law, that the decision to grant relief in the nature of a *mandamus* is discretionary in nature. However, the issue whether the solution proposed by the DMP offends the open court principle such that the CMJ no longer must perform her statutory duty to assign a military judge, raises a question of law which must be assessed on a standard of correctness.

[36] The DMP submits that the Applications Judge and the CMJ committed a fundamental error by conducting their analysis on the basis that the trial of the accused would be presumptively secret, if allowed to proceed on the basis of a classified charge. According to the DMP, had they conducted their analysis on the basis that the trial of the accused would be open, they would have reached a different conclusion.

[37] In this respect, I note that although the CMJ did hold that "… the effect of assigning a military judge to a court martial; which the government has designated as classified, is to accept and to follow a presumption of secrecy" (Reasons of the CMJ, para. 9), the Applications Judge did not accept that the trial of the accused, would be presumptively secret. Her assumption was that a military judge would act in accordance with his or her

judicial duties (Reasons, para. 39).

[38] The position taken by the Applications Judge is the correct one. By their oath of office, taken at the commencement of the proceeding to which they are assigned, military judges swear that they will exercise their judicial functions with impartiality (section 112.16 of the QR&Os). Like any other judge, the military judge assigned to the present case would be called upon to weight any claim for non disclosure against the open court principle, and determine the extent to which, if any, information should not be made public.

[39] The Applications Judge's problem with the solution proposed by the DMP is not based on concerns about the military judge's capacity to address the issue of disclosure once a court martial has been convened (Reasons, para. 27). It rests entirely with the fact that at the pre-assignment stage, none of the actors (the DMP, the CMJ or the CMA) can bring an unfettered discretion to the question of disclosure (Reasons, paras. 35, 39). According to the Applications Judge, the presumption of openness of court proceedings must also be observed at that stage, and the sealing of the charge by the DMP before a judge is assigned offends the open court principle (Reasons,
para. 40).

[40] In my respectful view, this gives the open court principle an effect which it does not have. The open court principle is not absolute. As was stated in *Toronto Star, supra*, (para. 3):

> The freedoms I have mentioned [freedom of communication and freedom of expression], though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some case suffice; in others, permanent protection is warranted.

[41] Where information is sought to be protected from disclosure in a court proceeding, a balancing exercise must be conducted by an independent decision maker in order to determine whether the open court principle outweighs the interests sought to be protected by preventing the information from being disclosed (*Toronto Star, supra*, at paras. 7, 8). In this case, the decision by the DMP to seal the classified charge was taken in order to allow a military judge to rule on the question of disclosure.

[42] The Applications Judge insists on the fact that at the particular stage when the charge was sealed (i.e., after it was preferred but before a judge was assigned), neither the DMP, the CMJ or the CMA could "bring an unfettered discretion to the question of disclosure" since they were all bound by the policy reflected in DCDS 05/1993 (Reasons, para. 39). No doubt this is so, but that it seems is why the DMP had to take steps to allow a military judge to bring an independent view on the matter. The decision under appeal holds that the DMP lacks the necessary independence to decide the matter of disclosure and yet prevents the DMP from taking the only step which could be taken in order to bring the matter before a decision maker whose discretion is unfettered.

[43] In my respectful view, the solution proposed by the DMP is both necessary and legal. It allows for the charge to be brought before a military judge in circumstances where he or she will be in position to assess and decide the question of disclosure. Although the proposed amendment to section 187 of the *National Defence Act* would assist in resolving the problem (see paragraph 23, *supra*), the legality of the solution proposed by the DMP is not dependent on this amendment. (I question the saving effect which the Applications Judge appears to be willing to give to this amendment because pursuant to it, the DMP would still have to unilaterally decide, for a time at least, that information be sealed before the issue could be decided by a military judge. Furthermore in terms of the timing of this decision, the situation would remain the same as it is now, unless provision was also made for military judges to take their oath immediately upon being appointed for their fixed term or to accelerate the time when a military judge assigned to a particular case takes the oath. No amendment other than the one proposed with respect to section 187 of the *National Defence Act* was brought to our attention).

[44] The existing legislation allows a court martial to hold *in camera* hearings where public safety or defence concerns makes this necessary (subsection 180(2) of the *National Defence Act*), and subsection 112.03(2) of the QR&Os as it presently reads provides a military judge with the authority to hear and determine any question, matter or objection "[a]t any time after a Standing Court Martial … has been convened". It follows that a military judge, after a Standing Court Martial is convened, and upon being sworn at the commencement of the proceeding, would have the authority to address the question of disclosure *in camera* upon the appropriate motion being brought. I note in this regard that the military judge is sworn before the rules require that the charge be read.

[45] The Applications Judge did express the concern that DCDS 05/1993 would prevent the convening order – which must be read at the commencement of the proceedings – from making any reference to the named accused (Reasons, para. 22). However, the identity of the accused, without association with JTF2, is not classified information (see Affidavit of Major Cloutier, Appeal Book, p. 74, para. 6), and there is nothing in the information which must be contained in the convening order that could result in such an association being made (see subsection 111.02(2) of the QR&Os). Although, in some instances the place where the Court is to be convened may itself constitute classified information, this issue does not arise in this case given that the DMP has advised that the trial will take place in Canada (Memo from DMP to CMA, Appeal Book, p. 157 at para. 12).

[46] The CMJ also suggested that the sealing of the charge by the DMP would prevent the CMA from providing proper instructions with respect to the publication of the notice of the court martial as required by paragraph 111.13(2)(*e*) of the QR&Os (CMJ's Memorandum of Fact and Law, paras. 52-58). However, there is no requirement that the charge sheet be included in the notice of hearing and nothing prevents adequate public notice from being given in the present case, i.e., that a court martial will convene at a particular date, time and place to try the named accused, on charges of aggravated assault and ill-treatment of a subordinate alleged to have been committed by the accused on a specified date, while serving in Afghanistan.

[47] Applying the prescribed procedure to the present case – on the assumption that the CMJ fulfils her statutory duty to assign a judge – the accused would be brought before the court at the commencement of the proceeding (paragraph 112.05(2)(*d*) of the QR&Os), the convening order would be read (paragraph 112.05(3)(*a*) of the QR&Os), the judge would take the oath (paragraph 112.05(4)(*a*)) and the DMP would then be in a position to bring an application that the charge be kept confidential by order of the Court before the rules require that it be read (paragraph 112.05(5)(*e)*).

[48] The only thing that needs to happen in order to reach that stage, is that the charge be sealed for a time.

[49] In my respectful view, this way of proceeding does not offend the open court principle. As noted in *Toronto Star, supra*, (at para. 3) there may be instances where public access to sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice and where sealing information for a brief period of time is necessary to achieve this end. In this case, no one takes issue with the fact that the DMP must abide by the policy set out in DCDS 05/1993. The result therefore is that unless the matter of disclosure can be brought before an independent decision maker in the manner suggested by the DMP, the accused will likely never be brought before justice.

[50] I respectfully conclude that allowing the charge to be sealed by the DMP for the brief period required to allow a military judge to assess the issue of confidentiality in accordance with the "*Dagenais*/*Mentuck*" approach, does not offend the open court principle, and that the Applications Judge erred in holding otherwise. (The extended time period during which the charge has remained sealed in this case is attributable to the CMJ's refusal to assign a military judge and the ensuing proceedings).

[51] The Applications Judge went on to hold that in any event a *mandamus* could not issue since there were equally effective means of protecting the classified information from public disclosure. She first observed (Reasons, para. 48):

> While it was not fully argued before me, I wonder whether the DMP has done everything possible to solve this issue prior to preferring the classified charge. There may be administrative steps that could avoid the problem of a classified charge sheet, thereby providing an effective alternative remedy. The DMP did not present any evidence that any other options had been explored. During cross-examination on his affidavit, Major Jean-Bruno Cloutier was asked what other options were considered. He was prevented from answering the questions by the DMP's counsel.

[52] I agree that if there were administrative steps that could be used to avoid the problem with which the DMP was confronted, they should have been pursued. However, the question which the Applications Judge should have asked is whether the DMP had any alternative means to sealing the charge sheet pending the assignment of a military judge in order to have the issue of confidentiality decided. Based on this record, I am of the respectful view that no alternate avenue was open to the DMP.

[53] The suggestion by the Applications Judge that the accused be removed from the JTF2 unit so as to allow the charge to proceed unsealed is not a solution. For an alternative remedy to be adequate, it must resolve the issue with which the DMP was confronted. On the record before us, the DMP had no authority to affect such a posting, nor can it be suggested that the assignment of personnel in the Canadian Forces should be based on considerations other than operational ones.

[54] The Applications Judge went on to consider the possible application of sections 37 and 38 of the *Canada Evidence Act*. She held that, for purposes of the test for *mandamus*, section 37 is not an effective alternative remedy (Reasons, para. 71). With respect to section 38, the Applications Judge held that there was a reasonable possibility that this provision could properly be invoked in order to prevent the classified information from being disclosed at the preliminary stage and therefore serve as an effective alternative to the solution proposed by the DMP (Reasons, paras.
60-68). She concludes that part of her reasons by suggesting that “the DMP should explore that possibility” (Reasons, para. 60).

[55] In order to bar the issuance of an order of *mandamus*, it is not sufficient to advance hypothetical or speculative solutions. The alternative must be “sufficient and convenient in the true legal sense of the words” (*British Columbia v. British Columbia (Minister of Finance)*,
[1935] S.C.R. 70 at p. 86). Section 38 of the *Canada Evidence Act* has not been shown to meet that test in this case since it does not address the fundamental problem, i.e., the assignment of a military judge and the convening of a court martial to rule on the question of disclosure and try a service charge.

[56] Section 38 applies when a participant to a proceeding notifies the Attorney General (and the Minister of National Defence in the case of proceedings before a service tribunal) that he or she expects that “sensitive information” or “potentially injurious information” will be disclosed to the public (subsection 38.01(1) of the *Canada Evidence Act*). No such issue can arise before a military judge is assigned (subsections 38.01(2) and (4) of the *Canada Evidence Act*). At that stage, the only persons by whom and to whom classified information may be disclosed are the DMP, the CMJ and the CMA, each being authorized to receive the classified information (paragraph 38.01(6)(*c*) of the *Canada Evidence Act*).

[57] Furthermore, the obligation to notify only arises if there is an underlying “proceeding”, which the *Canada Evidence Act* defines as a “proceeding before a court, person or body with jurisdiction to compel the production of information” (definition of “proceeding” section 38 of the *Canada Evidence Act*). Only a court

martial once convened has this jurisdiction (subsections 179(1) and (2) of the *National Defence Act*). At the stage we are at, there is no underlying proceeding.

[58] I therefore conclude that there was no effective alternative to the solution proposed by the DMP. It follows that the CMJ had the duty to assign a military judge and the CMA had the corresponding duty to convene a Standing Court Martial.

[59] For these reasons, I would allow the appeal, set aside the decision of the Applications Judge and rendering the decision which she ought to have rendered, I would order the CMJ to

assign a military judge to preside at the Standing Court Martial of the accused and the CMA to convene a Standing Court Martial forthwith. As no costs were sought by the DMP, I would make no award.

"Marc Noël"

J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
Johanne Trudel J.A."

ANNEX I

- The relevant provisions of the *National Defence Act*:

Admission to Courts Martial	***Admission en cour martiale***
Trials public	Procès publics
180. (1) Subject to subsections (2) and (3), courts martial shall be public and, to the extent that accommodation permits, the public shall be admitted to the proceedings.	**180.** (1) Sous réserve des paragraphes (2) et (3), les débats de la cour martiale sont publics, dans la mesure où la salle d'audience le permet.
Exception	Exception
(2) A court martial may order that the public be excluded during the whole or any part of its proceedings if the court martial considers that it is necessary	(2) Lorsqu'elle le juge nécessaire soit dans l'intérêt de la sécurité publique, de la défense ou de la moralité publique, soit dans l'intérêt du maintien de l'ordre ou de la bonne administration de la justice militaire, soit pour éviter toute atteinte aux relations internationales, la cour martiale peut ordonner le huis clos total ou partiel.
(*a*) in the interests of public safety, defence or public morals;	
(*b*) for the maintenance of order or the proper administration of military justice; or	
(*c*) to prevent injury to international relations.	
Witnesses	Témoins
(3) Witnesses are not to be admitted to the proceedings of a court martial except when under examination or by specific leave of the court martial.	(3) Les témoins ne sont admis en cour martiale que pour interrogatoire ou avec sa permission expresse.
Clearing court	Évacuation de la salle
(4) For the purpose of any deliberation, a court martial may cause the place where the proceedings are being held to be cleared.	(4) La cour martiale peut ordonner l'évacuation de la salle d'audience pour ses délibérations.
Preliminary Proceedings	***Procédures préliminaires***
Preliminary proceedings	Procédures préliminaires

187. At any time after a General Court Martial or Disciplinary Court Martial is convened but before the panel of the court martial assembles, the military judge assigned to preside over the court martial may, on application,

(*a*) hear and determine any question, matter or objection for which the presence of the panel of the court martial is not required; and

(*b*) receive the accused person's plea of guilty in respect of any charge and, if there are no other charges remaining before the court martial to which pleas of not guilty have been recorded, determine the sentence.

187. À tout moment après la convocation de la cour martiale générale ou la cour martiale disciplinaire et avant que le comité de la cour martiale ne commence à siéger, le juge militaire la présidant peut, sur demande :

a) entendre et statuer sur toute question ou objection pour laquelle il a le pouvoir d'entendre seul;

b) accepter le plaidoyer de culpabilité de l'accusé à l'égard d'une accusation et, lorsque celui-ci n'a pas plaidé non coupable à l'égard d'autres accusations, décider de la sentence.

Charge must be Preferred

Charge must be preferred

165. (1) A person may be tried by court martial only if a charge against the person is preferred by the Director of Military Prosecutions.

Meaning of "prefer"

(2) For the purposes of this Act, a charge is preferred when the charge sheet in respect of the charge is signed by the Director of Military Prosecutions, or an officer authorized by the Director of Military Prosecutions to do so, and referred to the Court Martial Administrator.

Mise en accusation nécessaire

Mise en accusation nécessaire

165. (1) La cour martiale ne peut juger une personne sans une mise en accusation formelle de celle-ci par le directeur des poursuites militaires.

Dépôt de l'acte d'accusation

(2) Pour l'application de la présente loi, la mise en accusation est prononcée lorsque est déposé auprès de l'administrateur de la cour martiale un acte d'accusation signé par le directeur des poursuites militaires ou un officier dûment autorisé par lui à le faire.

Duties and functions

165.11 The Director of Military Prosecutions is responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The Director of Military Prosecutions also acts as counsel for the Minister in respect of appeals when instructed to do so.

Fonctions

165.11 Le directeur des poursuites militaires prononce les mises en accusation des personnes jugées par les cours martiales et mène les poursuites devant celles-ci; en outre, il représente le ministre dans les appels lorsqu'il reçoit des instructions à cette fin.

Director to determine type of court martial

165.14 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.

Type de cour martiale

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.

Duties and functions

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.

Other duties

(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.

Relationship to Chief Military Judge

(3) The Court Martial Administrator acts under the general supervision of the Chief Military Judge.

Fonctions

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.

Fonctions additionnelles

(2) Il exerce toute autre fonction qui lui est conférée par la présente loi ou que lui confie par règlement le gouverneur en conseil.

Subordination

(3) Il exerce ses fonctions sous la direction générale du juge militaire en chef.

Duties and functions	Attributions
165.25 The Chief Military Judge assigns military judges to preside at courts martial and to perform other judicial duties under this Act.	**165.25** Le juge militaire en chef désigne un juge militaire pour chaque cour martiale et lui confie les fonctions judiciaires prévues sous le régime de la présente loi.

- Relevant provision of the *Queen's Regulations and Orders for the Canadian Forces:*

110.06 – PREPARATION OF CHARGE SHEET	**110.06 – PRÉPARATION DE L'ACTE D'ACCUSATION**
(1) A charge sheet shall be prepared by the Director of Military Prosecutions when it is proposed to prefer a charge.	(1) Le directeur des poursuites militaires prépare l'acte d'accusation lorsqu'il entend prononcer une mise en accusation.
(2) The charge sheet shall contain:	(2) L'acte d'accusation contient les éléments suivants :
(*a*) at the commencement, the name of the accused and, if the accused is a member of the Canadian Forces, the accused's service number, rank, unit and component of the Canadian Forces;	*a*) au début de celui-ci, le nom de l'accusé, et si l'accusé est membre des Forces canadiennes, son numéro matricule, son grade, son unité et l'élément constitutif des Forces canadiennes de celui-ci;
(*b*) a statement of the offence and a statement of the particulars of the act, omission, conduct, disorder or neglect constituting the offence, with sufficient details to enable the accused to be reasonably informed of the offence alleged; and	*b*) un énoncé de l'infraction et un exposé des détails de l'acte, l'omission, la conduite, le désordre ou la négligence constituant l'infraction, de même que suffisamment de précisions pour permettre à l'accusé d'être raisonnablement informé de l'infraction reprochée;
(*c*) the determination by the Director of Military Prosecutions as to the type of court martial to try the accused.	*c*) la détermination du directeur des poursuites militaires relativement au type de cour martiale devant juger l'accusé.
(3) Where the accused is a civilian, the charge sheet shall reflect the accused's status under the Code of Service Discipline.	(3) Lorsque l'accusé est civil, l'acte d'accusation indique le statut de l'accusé sous le régime du code de discipline militaire.
(4) A charge sheet shall be signed by the Director of Military Prosecutions.	(4) L'acte d'accusation est signé par le directeur des poursuites militaires.
(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)	**(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)**

110.07 – DISTRIBUTION OF CHARGE SHEET

The Director of Military Prosecutions shall cause the charge sheet to be forwarded to the Court Martial Administrator and a copy of the charge sheet forwarded to the accused, the accused's commanding officer and the referral authority.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

110.07 – DISTRIBUTION DE L'ACTE D'ACCUSATION

Le directeur des poursuites militaires fait parvenir l'acte d'accusation à l'administrateur de la cour martiale. Il fait aussi parvenir une copie de l'acte d'accusation à l'accusé, au commandant de l'accusé et à l'autorité de renvoi.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

111.02 – CONVENING OF COURTS MARTIAL

(1) Subsection 165.19(1) of the *National Defence Act* provides:

"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."

(2) The order convening a court martial shall:

(*a*) state the date the Director of Military Prosecutions or other authorized officer preferred charges against the accused;

(*b*) state the type of court martial convened, the date and time proceedings commence, the place where it will be held and the language of proceedings chosen by the accused;

(*c*) identify by name, service number and rank if applicable, the accused, the military judge assigned to preside at the court martial and, in the case of a General

111.02 – CONVOCATION DES COURS MARTIALES

(1) Le paragraphe 165.19(1) de la *Loi sur la défense nationale* prescrit :

«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) L'ordre de convocation d'une cour martiale :

a) indique la date à laquelle le directeur des poursuites militaires ou un officier dûment autorisé a prononcé la mise en accusation;

b) indique le type de cour martiale, la date et l'heure du début de celle-ci, l'endroit où elle sera tenue et la langue du procès choisie par l'accusé;

c) mentionne le nom, le numéro matricule et le grade le cas échéant de l'accusé, du juge militaire désigné pour présider la cour martiale et dans le cas d'une cour martiale générale ou d'une cour

Court Martial or Disciplinary Court Martial, the members and alternate members; and

(*d*) require the members and alternate members to assemble on the date, time and place specified in the convening order subject to any direction by the military judge assigned to preside at the court martial.

(3) A court may be convened to try more than one accused, but the trial of each of the accused shall be separate unless the accused are to be tried jointly (*see article 110.09 – Joint Trials*).

111.05 – DUTY OF COURT MARTIAL ADMINISTRATOR

When the Court Martial Administrator convenes a court martial, the Court Martial Administrator shall provide:

(*a*) the convening order and the charge sheet to the military judge assigned to preside at the court martial;

(*b*) a copy of the convening order and charge sheet to the Director of Military Prosecutions and the commanding officer of the unit in which the accused is present; and

(*c*) a copy of the convening order to the members of the court martial panel.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

martiale disciplinaire, des membres et des substituts;

d) ordonne aux membres et aux substituts de se réunir à la date, l'heure et l'endroit précisé dans l'ordre de convocation, sous réserve de toute directive du juge militaire désigné pour présider la cour martiale.

(3) Une cour peut être convoquée pour juger plus d'un accusé, mais le procès de chaque accusé est tenu séparément à moins que les accusés ne soient jugés ensemble (*voir l'article 110.09 – Procès conjoints*).

111.05 – FONCTIONS DE L'ADMINISTRATEUR DE LA COUR MARTIALE

Lorsque l'administrateur de la cour martiale convoque une cour martiale, il transmet :

a) l'ordre de convocation et l'acte d'accusation au juge militaire désigné pour présider la cour martiale;

b) une copie de l'ordre de convocation et de l'acte d'accusation au directeur des poursuites militaires et au commandant de l'unité où se trouve l'accusé;

c) une copie de l'ordre de convocation aux membres du comité de la cour martiale.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

Section 5 – Pre-Trial Administrative Support

111.13 – ADMINISTRATIVE INSTRUCTIONS

Section 5 – Soutien administratif préliminaire au procès

111.13 – DIRECTIVES ADMINISTRATIVES

(1) The Court Martial Administrator shall determine, in consultation with unit authorities, the administrative requirements for each court martial convened and shall issue administrative instructions required for the proper administration of the court martial.

(2) The administrative instructions shall:

(*a*) state the type of court martial convened, the date and time proceedings commence, the place where it will be held and the language of proceedings chosen by the accused;

(*b*) identify by name, service number and rank if applicable, the accused, the military judge assigned to preside at the court martial, the prosecutor, the accused's legal counsel, the court reporter and, in the case of a General Court Martial or Disciplinary Court Martial, the members and alternate members of the court martial panel;

(*c*) specify the charges preferred by the Director of Military Prosecutions;

(*d*) specify the dress for military members and members of the public;

(*e*) state the requirement for publication of notice of the court martial;

(*f*) state the requirement for the appointment of an officer of the court and escort; and

(*g*) specify the financial authorities and limitations that apply in respect of the conduct of the court martial.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

112.03 – PRELIMINARY PROCEEDINGS

(1) Section 187 of the *National Defence Act* provides:

(1) L'administrateur de la cour martiale détermine, en consultant les autorités de l'unité, les besoins administratifs de chaque cour martiale qui a été convoquée et émet les directives administratives nécessaires à la bonne administration de la cour martiale.

(2) Les directives administratives doivent :

a) indiquer le type de cour martiale, la date et l'heure du début de celle-ci, l'endroit où elle sera tenue et la langue du procès choisie par l'accusé;

b) mentionner le nom, le numéro matricule et le grade le cas échéant, de l'accusé, du juge militaire désigné pour présider la cour martiale, du procureur de la poursuite, de l'avocat de l'accusé, du sténographe judiciaire et, dans le cas d'une cour martiale générale ou d'une cour martiale disciplinaire, des membres et des substituts du comité de la cour martiale;

c) préciser les mises en accusation prononcées par le directeur des poursuites militaires;

d) préciser la tenue vestimentaire des militaires et du public;

e) indiquer les exigences relatives à la publication d'un avis pour la cour martiale;

f) indiquer les exigences relatives à la nomination d'un officier de la cour et d'une escorte;

g) préciser les pouvoirs et les restrictions financiers qui s'appliquent à la tenue de la cour martiale.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

112.03 – PROCÉDURES PRÉLIMINAIRES

(1) L'article 187 de la *Loi sur la défense nationale* prescrit :

"187. At any time after a General Court Martial or Disciplinary Court Martial is convened but before the panel of the court martial assembles, the military judge assigned to preside over the court martial may, on application,

(*a*) hear and determine any question, matter or objection for which the presence of the panel of the court martial is not required; and

(*b*) receive the accused person's plea of guilty in respect of any charge and, if there are no other charges remaining before the court martial to which pleas of not guilty have been recorded, determine the sentence."

(2) At any time after a Standing Court Martial or Special General Court Martial has been convened, the military judge assigned to preside at the court martial may, on application, hear and determine any question, matter or objection.

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

«187. À tout moment après la convocation de la cour martiale générale ou la cour martiale disciplinaire et avant que le comité de la cour martiale ne commence à siéger, le juge militaire la présidant peut, sur demande :

a) entendre et statuer sur toute question ou objection pour laquelle il a le pouvoir d'entendre seul;

b) accepter le plaidoyer de culpabilité de l'accusé à l'égard d'une accusation et, lorsque celui-ci n'a pas plaidé non coupable à l'égard d'autres accusations, décider de la sentence.»

(2) À tout moment après la convocation de la cour martiale permanente ou de la cour martiale générale spéciale, le juge militaire désigné pour présider la cour martiale peut, sur demande, entendre et statuer sur toute question ou objection.

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

Section 2 – Order of Procedure

112.05 – PROCEDURE TO BE FOLLOWED AT A COURT MARTIAL

(1) The procedure at a court martial shall be in the order set out in this article.

(2) At the beginning of court martial proceedings:

(*a*) members of the public shall be admitted;

(*b*) the prosecutor and the legal counsel and the adviser, if any, of the accused, shall take their places;

(*c*) the military judge assigned to preside at the court martial shall open the

Section 2 – Ordre de la procédure

112.05 – PROCÉDURE À SUIVRE EN COUR MARTIALE

(1) L'ordre indiqué au présent article est suivi pour la procédure d'une cour martiale.

(2) Au début d'une poursuite en cour martiale:

a) le public est admis;

b) le procureur de la poursuite, l'avocat et le conseiller de l'accusé, s'il y en a un, prennent place;

c) le juge militaire désigné pour présider la cour martiale ouvre l'audience;

d) l'accusé est amené devant la cour.

court; and

(*d*) the accused shall be brought before the court.

(3) When paragraph (2) has been complied with, the judge:

(*a*) shall read the convening order of the court martial; and

(*b*) shall ask the prosecutor and the accused whether they object to the judge assigned to preside at the court martial and, where there is an objection, the procedure described in article 112.14 (*Objections to the Constitution of the Court Martial*) shall be followed.

(4) After any objection to the judge has been disposed of, the judge shall:

(*a*) take the oath prescribed in article 112.16 (*Oath to be Taken by Judge Presiding at Court Martial*);

(*b*) swear the court reporter (*see article 112.18 – Oath to be Taken by Court Reporter*); and

(*c*) if it is proposed to have an interpreter and if there is no objection to the interpreter (*see article 112.15 – Objection to Interpreter*), swear the interpreter (*see article 112.19 – Oath to be Taken by Interpreter*).

(5) After the oaths have been taken:

(*a*) the prosecutor shall read the charge sheet;

(*b*) the accused may object to the trial being proceeded with (*see article 112.24 – Pleas in Bar of Trial*);

(*c*) the accused may apply for further particulars on the ground that the accused is unable to properly prepare a defence because the particulars of a charge are inadequate or are not set out with sufficient clarity and the judge, if satisfied that the further particulars are necessary to ensure a fair trial, may so order;

(3) Lorsqu'on s'est conformé aux dispositions de l'alinéa (2), le juge prend les mesures suivantes :

a) il donne lecture de l'ordre de convocation de la cour martiale;

b) il demande au procureur de la poursuite et à l'accusé s'ils récusent le juge désigné pour présider la cour martiale et, le cas échéant, la procédure prévue à l'article 112.14 (*Opposition au juge militaire ou aux membres du comité de la cour martiale*) est suivie.

(4) Après avoir statué sur toute demande de récusation du juge, celui-ci :

a) prête le serment prescrit à l'article 112.16 (*Serment à prêter par le juge qui préside la cour martiale*);

b) assermente le sténographe judiciaire (*voir l'article 112.18 – Serment à prêter par le sténographe judiciaire*);

c) le cas échéant, assermente l'interprète (*voir l'article 112.19 – Serment à prêter par l'interprète*) s'il n'a pas été récusé (*voir l'article 112.15 – Récusation de l'interprète*).

(5) Lorsque les serments ont été prêtés :

a) le procureur de la poursuite donne lecture de l'acte d'accusation;

b) l'accusé peut s'opposer à l'instruction du procès (*voir l'article 112.24 – Fins de non-recevoir*);

c) l'accusé peut demander des détails complémentaires en alléguant qu'il est incapable de préparer sa défense adéquatement parce que les détails de l'accusation manquent de précision ou de clarté et le juge, s'il estime qu'ils sont nécessaires à la tenue d'un procès équitable, ordonne que des détails complémentaires soient fournis;

(*d*) where a charge sheet contains more than one charge, the court may, if it considers the interests of justice require it, proceed with separate trials and direct the order in which those trials shall be held; and

(*e*) the judge may, on application by the prosecutor or the accused, hear and determine any questions of law or mixed law and fact (*in the case of a General Court Martial or Disciplinary Court Martial, see paragraph* (*1*) *of article 112.07 – Questions of Law or Mixed Law and Fact – General Court Martial and Disciplinary Court Martial*).

(6) The judge shall ask the accused to plead guilty or not guilty to each charge and, where the accused refuses to plead, a plea of not guilty shall be recorded.

(7) Where the accused pleads guilty to any charge, the procedure prescribed in article 112.25 (*Acceptance of Plea of Guilty*) shall be followed before that plea is accepted.

(8) After all pleas have been recorded:

(*a*) where offences have been charged in the alternative and a plea of guilty has been accepted to any one of the alternative charges, the judge shall direct that the proceedings on the alternative charge be stayed (*see article 112.80 – Effect of a Stay of Proceedings*), and the trial shall proceed in accordance with subparagraph (*b*) or (*c*), as applicable;

(*b*) where pleas of guilty have been accepted to all charges before the court, the judge shall discharge the members of the court martial panel and determine the sentence in accordance with Section 9 (*Sentence*); and

(*c*) where the accused has pleaded not guilty to any charge before the court, the trial in respect of the charge shall be proceeded with, before proceeding on any charge to which a plea of guilty has been accepted.

d) si l'acte d'accusation contient plus d'un chef d'accusation, la cour, si elle considère que l'intérêt de la justice l'exige, peut procéder par procès distincts et fixer l'ordre dans lequel ces procès auront lieu;

e) le juge peut, sur demande du procureur de la poursuite ou de l'accusé, connaître de toute question de droit ou de toute question mixte de droit et de fait et statuer sur celle-ci (*dans le cas d'une cour martiale générale ou disciplinaire, voir l'alinéa* (*1*) *de l'article 112.07 – Questions de droit ou questions mixtes de droit et de fait – cour martiale générale et disciplinaire*).

(6) Le juge demande à l'accusé d'avouer ou de nier sa culpabilité à l'égard de chaque chef d'accusation et s'il refuse de plaider, un aveu de non-culpabilité est enregistré.

(7) Si l'accusé a avoué sa culpabilité à l'égard de tout chef d'accusation, la procédure prescrite à l'article 112.25 (*Acceptation d'un aveu de culpabilité*) est suivie avant d'accepter cet aveu.

(8) Lorsqu'on a enregistré les plaidoyers de l'accusé :

a) s'il y a des chefs d'accusation subsidiaires et qu'on a accepté un aveu de culpabilité à l'égard de l'un d'entre eux, le juge ordonne que l'examen du chef d'accusation subsidiaire soit remis (*voir l'article 112.80 – Effet d'une suspension d'instance*) et le procès se poursuit conformément aux sous-alinéas *b*) ou c), selon le cas;

b) si la cour a accepté un aveu de culpabilité à l'égard de tous les chefs d'accusation dont elle est saisie, le juge libère les membres du comité de la cour martiale et fixe la sentence conformément à la section 9 (*Sentence*);

c) si l'accusé a nié sa culpabilité à l'égard d'un des chefs d'accusation dont la cour est saisie, ce chef d'accusation est considéré avant tout autre pour lequel un aveu de culpabilité a été accepté.

(9) In the case of a General Court Martial or Disciplinary Court Martial, the members of the court martial panel shall assemble when requested to do so by the judge and:

(*a*) the judge shall identify the members of the court martial panel;

(*b*) the judge shall ask the prosecutor and the accused whether they object to any of the members and, where there is an objection, the procedure described in article 112.14 shall be followed;

(*c*) the members shall take the oath prescribed in article 112.17 (*Oath to be Taken by Members of Court Martial Panel*);

(*d*) the judge shall advise the members on the charges in respect of which the accused has pleaded not guilty; and

(*e*) the judge shall address the members on such matters including the law relating to any charge before the court, that the judge considers necessary or desirable.

(10) The prosecutor may make an opening address (*see article 112.28 – Opening Address by Prosecutor*).

(11) The prosecutor shall proceed with the case for the prosecution.

(12) The prosecutor shall inform the court when the case for the prosecution is closed.

(13) When the case for the prosecution is closed, the judge may, of the judge's own motion or upon the motion of the accused, hear arguments as to whether a *prima facie* case has been made out against the accused, and:

(*a*) if the judge decides that no *prima facie* case has been made out in respect of a charge, the judge shall pronounce the accused not guilty on that charge; or

(*b*) if the judge decides that a *prima*

(9) Lorsqu'il s'agit d'une cour martiale générale ou disciplinaire, les membres du comité de la cour martiale se réunissent à la demande du juge et :

a) le juge identifie les membres du comité de la cour martiale;

b) le juge demande au procureur de la poursuite et à l'accusé s'ils récusent un ou plusieurs membres du comité; le cas échéant, la procédure prévue à l'article 112.14 est suivie;

c) les membres du comité prêtent le serment prescrit à l'article 112.17 (*Serment à prêter par les membres du comité de la cour martiale*);

d) le juge indique aux membres du comité les chefs d'accusation à l'égard desquelles l'accusé a nié sa culpabilité;

e) le juge explique aux membres du comité toute question qu'il peut lui sembler nécessaire ou souhaitable de traiter, y compris le droit applicable à toute accusation dont ils sont saisis.

(10) Le procureur de la poursuite peut faire un exposé d'ouverture (*voir l'article 112.28 – Exposé d'ouverture du procureur de la poursuite*).

(11) Le procureur de la poursuite présente sa preuve.

(12) Lorsque le procureur de la poursuite a terminé la présentation de sa preuve, il en informe la cour.

(13) Lorsque le procureur de la poursuite a terminé la présentation de sa preuve, le juge peut, d'office ou à la demande de l'accusé, entendre les plaidoiries sur la question de savoir si une preuve *prima facie* a été établie contre l'accusé et :

a) si le juge décide qu'aucune preuve *prima facie* n'a pas été établie à l'égard d'un chef d'accusation, il déclare l'accusé non coupable sous ce chef d'accusation;

b) si le juge décide qu'une preuve *prima*

facie case has been made out in respect of a charge, the judge shall direct that the trial proceed on that charge

(14) The accused may make an opening address (*see article 112.29 – Opening Address by Accused*).

(15) The accused shall proceed with the case for the defence.

(16) If the accused desires to testify, the accused shall be sworn by the judge and shall testify either with or without being examined by the accused's legal counsel. If the accused has been cross-examined, the accused may be re-examined or give further evidence as if the accused were a witness being re-examined (*see article 112.31 – Examination of Witnesses*).

(17) The accused shall inform the court when the case for the defence is closed.

(18) When the case for the defence is closed, the prosecutor may, with the permission of the judge, call evidence in rebuttal.

(19) When the case for the defence has been closed or the prosecutor has called evidence, if any, in rebuttal:

(*a*) the prosecutor may address the court as to finding;

(*b*) the accused may address the court as to finding;

(*c*) in the case of a General Court Martial or Disciplinary Court Martial, the judge shall

(i) instruct the members of the court martial panel on the law relating to the case,

(ii) sum up the evidence, and

facie a été établie à l'égard d'un chef d'accusation, il ordonne que le procès se poursuive sous ce chef d'accusation.

(14) L'accusé peut présenter un exposé d'ouverture *(voir l'article 112.29 – Exposé d'ouverture de l'accusé*).

(15) L'accusé présente sa preuve en défense.

(16) Si l'accusé désire témoigner, il est assermenté par le juge et rend témoignage; il peut être interrogé ou non par son avocat. Si l'accusé a été contre-interrogé, il peut être interrogé de nouveau ou déposer de nouveau comme s'il s'agissait d'un témoin que l'on interroge de nouveau (*voir l'article 112.31 – Interrogatoire des témoins*).

(17) L'accusé informe la cour que la présentation de sa preuve est terminée.

(18) Lorsque la défense a terminé la présentation de sa preuve, le procureur de la poursuite peut, avec la permission du juge, présenter des éléments de preuve en réfutation.

(19) Lorsque la défense a terminé la présentation de sa preuve ou, le cas échéant, lorsque la poursuite a terminé la présentation de sa preuve en réfutation :

a) le procureur de la poursuite peut faire sa plaidoirie sur les verdicts susceptibles d'être rendus;

b) l'accusé peut faire sa plaidoirie sur les verdicts susceptibles d'être rendus;

c) s'il s'agit d'une cour martiale générale ou disciplinaire, le juge :

(i) instruit les membres du comité de la cour martiale des points de droit qui concernent la cause;

(ii) résume la preuve,

(iii) instruit les membres du comité de la cour martiale quant aux verdicts qu'ils peuvent rendre, y compris tout verdict annoté (*voir l'article 112.42 – Verdicts annotés*);

(iii) instruct the members of the court martial panel as to any findings they may make, including special findings (*see article 112.42 – Special Findings*);

(*d*) the court shall close to determine its finding (*in the case of General Courts Martial and Disciplinary Courts Martial, see article 112.41 – Determination of Finding – General Court Martial or Disciplinary Court Martial*);

(*e*) the court shall reopen and, where applicable, the legality of each finding made by the members of the court martial panel shall be verified by the judge (*see article 112.43 – Verification by Military Judge of Legality of Proposed Finding by Court Martial Panel*); and

(*f*) subject to the introduction of evidence pursuant to article 119.35 (*Evidence of Mental Disorder Where Accused Does Not Raise the Issue*) and the decision of the court in respect of that evidence, the judge, or in the case of a General Court Martial or Disciplinary Court Martial, the senior member, shall

(i) where offences have been charged in the alternative and the accused has been found guilty of one of the alternative charges, pronounce the finding of guilty on the charge and

(A) if, on any other alternative charge, the evidence proved the offence, direct that the proceedings be stayed on the charge (*see article 112.80*), or

(B) if, on any other alternative charge, the evidence does not prove the offence, pronounce a finding of not guilty on the charge, and

(ii) in respect of all other charges, pronounce the finding on each charge.

(20) Where the accused has been found not guilty of all the charges before the court, the court shall terminate the proceedings in respect of the accused.

d) la cour se retire pour délibérer sur son verdict (*dans le cas d'une cour martiale générale ou disciplinaire, voir l'article 112.41 – Délibération sur le verdict – Cour martiale générale ou disciplinaire*);

e) la cour reprend l'audience et, le cas échéant, le juge vérifie la légalité de chacun des verdicts rendus par les membres du comité de la cour martiale (*voir l'article 112.43 – Vérification par le juge militaire de la légalité du verdict proposé par le comité de la cour martiale*);

f) sous réserve de la présentation d'éléments de preuve aux termes de l'article 119.35 (*Éléments de preuve de troubles mentaux lorsque l'accusé ne soulève pas la question*) et de la décision de la cour à l'égard de cette preuve, le juge, ou s'il s'agit d'une cour martiale générale ou disciplinaire, le plus haut gradé des membres :

(i) prononce, s'il y a des chefs d'accusation subsidiaires et que l'accusé a été reconnu coupable de l'un de ces chefs d'accusation, le verdict de culpabilité à l'égard de ce chef d'accusation et, selon le cas :

(A) ordonne une suspension d'instance si la preuve à l'égard de toute autre accusation subsidiaire a été établie (*voir l'article 112.80*),

(B) prononce un verdict de non-culpabilité si la preuve à l'égard de toute autre accusation subsidiaire n'a pas été établie,

(ii) prononce le verdict sur chaque chef d'accusation à l'égard de toutes autres accusations.

(20) Si l'accusé a été reconnu non coupable à l'égard de tous les chefs d'accusation, la cour met fin à l'instance à l'égard de l'accusé.

(21) Après que la cour a prononcé son verdict à l'égard de chacune des accusations et après tout ajournement pris aux termes de

(21) After the court has pronounced its finding in respect of each charge, and after any adjournment under article 112.675 (*Trial of Several Accused by Same Court Martial*), the judge shall discharge the members of the court martial panel and determine sentence in accordance with Section 9.

(22) Subject to article 112.06 (*Termination Procedure When Sentence Includes Detention or Imprisonment*) and Section 9.1 (*DNA Orders*), the court shall terminate the proceedings in respect of the accused.
(27 July 2000)

(23) The Director of Military Prosecutions shall cause the referral authority (*see article 109.03– Application to Referral Authority for Disposal of a Charge*) and the accused's commanding officer to be informed of the outcome of the trial.

(G) (P.C. 2000-1110 of 27 July, 2000))

NOTES

(A) The appropriate form of address for a military judge presiding at a court martial is "Your Honour".

(B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

(C) (1 September 1999)

112.16 – OATH TO BE TAKEN BY

l'article 112.675 (*Procès de plusieurs accusés devant une même cour martiale*), le juge libère les membres du comité de la cour martiale et fixe la sentence conformément à la section 9.

(22) Sous réserve de l'article 112.06 (*Procédures finales lorsque la sentence comprend une peine de détention ou d'emprisonnement*) et de la section 9.1 (*Ordonnances relatives aux analyses génétiques*) des présents règlements, la cour met fin à l'instance à l'égard de l'accusé.
(27 juillet 2000)

(23) Le directeur des poursuites militaires fait informer l'autorité de renvoi (*voir l'article 109.03 – Demande à l'autorité de renvoi de connaître d'une accusation*) et le commandant de l'accusé du résultat du procès.

(G) (C.P. 2000-1110 du 27 juillet 2000)

NOTES

(A) Il convient de s'adresser au juge militaire qui préside la cour martiale en employant l'expression : «Votre Honneur».

(B) Une preuve *prima facie* est établie si la preuve, qu'on y ajoute foi ou non, suffit, en l'absence de toute autre preuve, à prouver tous les éléments essentiels de l'infraction de sorte que l'accusé pourrait raisonnablement être reconnu coupable à ce stade-ci du procès en l'absence de toute autre preuve. Il n'est tenu compte ni de la crédibilité des témoins, ni du poids accordé à la preuve pour établir une preuve *prima facie*. La doctrine du doute raisonnable ne s'applique pas lorsqu'il s'agit de décider si une preuve *prima facie* est établie.

(C) (1er septembre 1999)

112.16 – SERMENT À PRÊTER PAR

JUDGE PRESIDING AT COURT MARTIAL

The oath to be taken by the judge presiding at a court martial shall be in the following form:

"I swear that I will carry out the duties of military judge without partiality, favour or affection. So help me God."

(G) (P.C. 1999-1305 of 8 July 1999 effective 1 September 1999)

LE JUGE QUI PRÉSIDE LA COUR MARTIALE

Le serment que prête le juge qui préside la cour martiale est le suivant :

«Je jure de m'acquitter des fonctions de juge militaire sans partialité, faveur ni affection. Que Dieu me soit en aide.»

(G) (C.P. 1999-1305 du 8 juillet 1999 en vigueur le 1er septembre 1999)

- Section 37 and Section 38 of the *Canada Evidence Act*

Objection to disclosure of information

37. (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Obligation of court, person or body

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

Objection made to superior court

(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

Objection not made to superior court

(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on

Opposition à divulgation

37. (1) Sous réserve des articles 38 à 38.16, tout ministre fédéral ou tout fonctionnaire peut s'opposer à la divulgation de renseignements auprès d'un tribunal, d'un organisme ou d'une personne ayant le pouvoir de contraindre à la production de renseignements, en attestant verbalement ou par écrit devant eux que, pour des raisons d'intérêt public déterminées, ces renseignements ne devraient pas être divulgués.

Mesure intérimaire

(1.1) En cas d'opposition, le tribunal, l'organisme ou la personne veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Opposition devant une cour supérieure

(2) Si l'opposition est portée devant une cour supérieure, celle-ci peut décider la question.

Opposition devant une autre instance

(3) Si l'opposition est portée devant un tribunal, un organisme ou une personne qui ne constituent pas une cour supérieure, la

application, by

(*a*) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or

(*b*) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Limitation period

(4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.

Disclosure order

(4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.

Disclosure order

(5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts

question peut être décidée, sur demande, par :

a) la Cour fédérale, dans les cas où l'organisme ou la personne investis du pouvoir de contraindre à la production de renseignements sous le régime d'une loi fédérale ne constituent pas un tribunal régi par le droit d'une province;

b) la division ou le tribunal de première instance de la cour supérieure de la province dans le ressort de laquelle le tribunal, l'organisme ou la personne ont compétence, dans les autres cas.

Délai

(4) Le délai dans lequel la demande visée au paragraphe (3) peut être faite est de dix jours suivant l'opposition, mais le tribunal saisi peut modifier ce délai s'il l'estime indiqué dans les circonstances.

Ordonnance de divulgation

(4.1) Le tribunal saisi peut rendre une ordonnance autorisant la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1), sauf s'il conclut que leur divulgation est préjudiciable au regard des raisons d'intérêt public déterminées.

Divulgation modifiée

(5) Si le tribunal saisi conclut que la divulgation des renseignements qui ont fait l'objet d'une opposition au titre du paragraphe (1) est préjudiciable au regard des raisons d'intérêt public déterminées, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public déterminées, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice au regard des raisons d'intérêt public déterminées, autoriser, sous réserve

relating to the information.

Prohibition order

(6) If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.

Evidence

(6.1) The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.

When determination takes effect

(7) An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order, or a judgment of an appeal court that confirms the order, has expired, or no further appeal from a judgment that confirms the order is available.

Introduction into evidence

(8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

Relevant factors

(9) For the purpose of subsection (8), the

des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

Ordonnance d'interdiction

(6) Dans les cas où le tribunal n'autorise pas la divulgation au titre des paragraphes (4.1) ou (5), il rend une ordonnance interdisant la divulgation.

Preuve

(6.1) Le tribunal peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

Prise d'effet de la décision

(7) L'ordonnance de divulgation prend effet après l'expiration du délai prévu ou accordé pour en appeler ou, en cas d'appel, après sa confirmation et l'épuisement des recours en appel.

Admissibilité en preuve

(8) La personne qui veut faire admettre en preuve ce qui a fait l'objet d'une autorisation de divulgation prévue au paragraphe (5), mais qui ne pourrait peut-être pas le faire à cause des règles d'admissibilité applicables devant le tribunal, l'organisme ou la personne ayant le pouvoir de contraindre à la production de renseignements, peut demander au tribunal saisi au titre des paragraphes (2) ou (3) de rendre une ordonnance autorisant la production en preuve des renseignements, du résumé ou de l'aveu dans la forme ou aux conditions que celui-ci détermine, pourvu que telle forme ou telles conditions soient conformes à l'ordonnance rendue au titre du paragraphe (5).

court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.

Facteurs pertinents

(9) Pour l'application du paragraphe (8), le tribunal saisi au titre des paragraphes (2) ou (3) prend en compte tous les facteurs qui seraient pertinents pour statuer sur l'admissibilité en preuve devant le tribunal, l'organisme ou la personne.

INTERNATIONAL RELATIONS AND NATIONAL DEFENCE AND NATIONAL SECURITY

Definitions

38. The following definitions apply in this section and in sections 38.01 to 38.15.

"judge"
«*juge* »

"judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04.

"participant"
«*participant* »

"participant" means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information.

"potentially injurious information"
«*renseignements potentiellement préjudiciables* »

"potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

"proceeding"
«*instance* »

"proceeding" means a proceeding before a

RELATIONS INTERNATIONALES ET DÉFENSE ET SÉCURITÉ NATIONALES

Définitions

38. Les définitions qui suivent s'appliquent au présent article et aux articles 38.01 à 38.15.

«instance »
"*proceeding*"

«instance » Procédure devant un tribunal, un organisme ou une personne ayant le pouvoir de contraindre la production de renseignements.

«juge »
"*judge*"

«juge » Le juge en chef de la Cour fédérale ou le juge de ce tribunal désigné par le juge en chef pour statuer sur les questions dont est saisi le tribunal en application de l'article 38.04.

«participant »
"*participant*"

«participant » Personne qui, dans le cadre d'une instance, est tenue de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements.

«poursuivant »
"*prosecutor*"

«poursuivant » Représentant du procureur général du Canada ou du procureur général d'une province, particulier qui

court, person or body with jurisdiction to compel the production of information.

"prosecutor"
«*poursuivant* »

"prosecutor" means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the *National Defence Act* or an individual who acts as a prosecutor in a proceeding.

"sensitive information"
«*renseignements sensibles* »

"sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

agit à titre de poursuivant dans le cadre d'une instance ou le directeur des poursuites militaires, au sens de la *Loi sur la défense nationale*.

«renseignements potentiellement préjudiciables »
"*potentially injurious information*"

«renseignements potentiellement préjudiciables » Les renseignements qui, s'ils sont divulgués, sont susceptibles de porter préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

«renseignements sensibles »
"*sensitive information*"

«renseignements sensibles » Les renseignements, en provenance du Canada ou de l'étranger, qui concernent les affaires internationales ou la défense ou la sécurité nationales, qui se trouvent en la possession du gouvernement du Canada et qui sont du type des renseignements à l'égard desquels celui-ci prend des mesures de protection.

Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

Avis au procureur général du Canada

38.01 (1) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the

Au cours d'une instance

(2) Tout participant qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside

person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Exception

(6) This section does not apply when

(*a*) the information is disclosed by a person to their solicitor in connection

l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Avis par un fonctionnaire

(3) Le fonctionnaire — à l'exclusion d'un participant — qui croit que peuvent être divulgués dans le cadre d'une instance des renseignements sensibles ou des renseignements potentiellement préjudiciables peut aviser par écrit le procureur général du Canada de la possibilité de divulgation; le cas échéant, l'avis précise la nature, la date et le lieu de l'instance.

Au cours d'une instance

(4) Le fonctionnaire — à l'exclusion d'un participant — qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

Instances militaires

(5) Dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale*, les avis prévus à l'un des paragraphes (1) à (4) sont donnés à la fois au procureur général du Canada et au ministre de la Défense nationale.

with a proceeding, if the information is relevant to that proceeding;

(*b*) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

(*c*) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(*d*) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(*c*) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

Exception

(6) Le présent article ne s'applique pas :

a) à la communication de renseignements par une personne à son avocat dans le cadre d'une instance, si ceux-ci concernent l'instance;

b) aux renseignements communiqués dans le cadre de l'exercice des attributions du procureur général du Canada, du ministre de la Défense nationale, du juge ou d'un tribunal d'appel ou d'examen au titre de l'article 38, du présent article, des articles 38.02 à 38.13 ou des articles 38.15 ou 38.16;

c) aux renseignements dont la divulgation est autorisée par l'institution fédérale qui les a produits ou pour laquelle ils ont été produits ou, dans le cas où ils n'ont pas été produits par ou pour une institution fédérale, par la première institution fédérale à les avoir reçus;

d) aux renseignements divulgués auprès de toute entité mentionnée à l'annexe et, le cas échéant, à une application figurant en regard d'une telle entité.

Exception

(7) Les paragraphes (1) et (2) ne s'appliquent pas au participant si une institution gouvernementale visée à l'alinéa (6)*c*) l'informe qu'il n'est pas nécessaire, afin d'éviter la divulgation des renseignements visés à cet alinéa, de donner un avis au procureur général du Canada au titre du paragraphe (1) ou de soulever la question devant la personne présidant une instance au titre du paragraphe (2).

Annexe

(8) Le gouverneur en conseil peut, par décret, ajouter, modifier ou supprimer la mention, à l'annexe, d'une entité ou d'une application figurant en regard d'une telle entité.

ANNEX II

- This is the process outlined by the Applications Judge at paragraph 15 of her reasons with the added precision noted next to the asterix –

Court Martial Process

The steps and the relevant statutory provisions are as follows:

- A charge sheet is prepared [s. 165(2) of *NDA*; *QR&O* 110.06];
- DMP refers the charge sheet to CMA [*QR&O* 110.07];
- CMA prepares convening order [s. 165.19 of *NDA*;];
- CMA forwards the convening order and the charge sheet [*QR&O* 111.05];
- CMA determines administrative requirements and issues administration instructions including the requirement for the publication of notice of the court martial [*QR&O* 111.13];
- Preliminary proceedings open to public [s. 187 of *NDA*; *QR&O* 112.03];
- The public is admitted at the beginning of the court martial [s. 180 of *NDA*, *QR&O* 112.05(2)(a)];
- The prosecutor and legal counsel to the accused take their place [*QR&O* 112.05(2)(b)];
- The military judge opens the court [*QR&O* 112.05(2)(c)];
- The accused is brought before the court [*QR&O* 112.05(2)(d)]
- The convening order is read publicly [*QR&O* 112.05(3)(a)];
- The judge hears any objection to the constitution of the Court Martial [*QR&O* 112.05(3)(b)];
- The judge takes the oath [*QR&O* 112.05(4)(a)];
- The court reporter is sworn [*QR&O* 112.05(4)(b)];
- The interpreter is sworn [*QR&O* 112.05(4)c];
- The prosecutor reads the charge sheet [*QR&O* 112.05(5)(a)];
- The judge may hear pleas in bar of trial [*QR&O* 112.05(5)(b)];
- The accused may apply for particulars [*QR&O* 112.05(5)(c)];
- The accused may request a separate trial [*QR&O* 112.05(5)(d)];
- *The judge may on application by any of the parties hear and determine any questions of law or of mixed law and fact [*QR&O* 112.05(5)(e)];

***** Nothing prevents such an application being brought at anytime after the judge takes the oath.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-53-07
APPEAL FROM THE ORDER OF JUSTICE SNIDER, ISSUED DECEMBER 21, 2006, DISMISSING THE APPLICATION FOR A WRIT OF MANDAMUS IN T-1967-05 AND T-1968-05.	
STYLE OF CAUSE:	DIRECTOR OF MILITARY PROSECUTIONS and CHIEF MILITARY JUDGE AND COURT MARTIAL ADMINISTRATOR
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 13, 2007
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Sexton J.A. Trudel J.A.
DATED:	December 10, 2007

APPEARANCES:

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