COURT MARTIAL MILITARY PANELS AND SECTION 11(*d*) OF THE *CHARTER*: A DELICATE BALANCE

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People charged with an offence in the military justice system do not have access to a jury trial. At courts martial, accused persons will be tried by judge alone, or by judge with a military panel composed of five members. The military panel's composition and role is unique in Canada. In R v Stillman, the Supreme Court in Canada said that military panels must pass constitutional muster, and that the military panel's Charter compliance under section 11 (d) had yet to be explored. This paper explores that issue. It explains how military panels are both Charter-compliant under section 11 (d), and designed to strike the right balance between an accused's Charter rights, and the operational requirements of discipline and efficiency in the Canadian Armed Forces.

Les personnes accusées d'une infraction dans le système de justice militaire n'ont pas droit à un procès devant jury. Devant les cours martiales, ces personnes seront jugées par un juge seul ou par un juge accompagné d'un comité militaire composé de cinq membres. La composition et le rôle du comité militaire sont uniques au Canada. Dans sa décision R c. Stillman, la Cour suprême du Canada a affirmé que les comités militaires doivent satisfaire à un examen constitutionnel et que le respect de la Charte par ces derniers en vertu de l'alinéa 11d) n'avait pas encore été examiné. Le présent article porte sur cette question. Il explique comment les comités miliaires respectent l'alinéa 11d) de la Charte et sont conçus pour établir le bon équilibre entre les droits d'un accusé garantis par la Charte et les exigences opérationnelles en matière de discipline et d'efficacité dans les Forces armées canadiennes.

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1. Introduction

Members of the Canadian Armed Forces (CAF) charged with a criminal offence have no right to a jury trial. This carve-out to the typical right to a jury is explicit in section 11(*f*) of the *Charter*.[2] The Supreme Court of Canada (SCC) confirmed that this exception applies to all criminal offences over which the military justice system (MJS) has jurisdiction, even when there is a risk of imprisonment for five years or more.[3]

While a jury is unavailable, CAF members prosecuted in the MJS can elect trial by military panel in what is called a General Court Martial.[4] In some respects, a military panel is similar to a jury, but the Court Martial Appeal Court and the SCC confirmed that a military panel is *not* a jury.[5] In fact, the military panel plays a unique role, which is necessary to the proper functioning of the MJS.

To understand the military panel's role, we must first understand the purpose of the MJS. The MJS exists in parallel to the civilian criminal justice system because the military has unique objectives which are "both intentional and necessary" in order to maintain "the highest standards of discipline."[6] Specifically, the purpose of the MJS—as codified in law—is to maintain the discipline, efficiency, and morale of the Canadian Forces.[7]

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2 *Canadian Charter of Rights and Freedoms*, s 11(*f*), Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

3 *R v Stillman*, 2019 SCC 40 at para 113 [*Stillman*].

4 *Nat*ional *Defence Act,* RSC 1985, c N-5 at s 167(1) [*NDA*]. In some cases, a General Court Martial is convened by operation of law, but the accused can request trial by judge alone; see *NDA* s. 165.191(2). Since the 2019/2020 fiscal year, there have been between 7 and 12 General Courts Martial per year; see Canadian Military Prosecution Service, *Director of Military Prosecutions Annual Report 2023–2024* (Ottawa: Department of National Defence, 2024) at 11.

5 *R v Trepanier,* 2008 CMAC 3 at para 73; *Stillman*, *supra* note 3 at para 68.

6 Janet Walker, "Military Justice: From Oxymoron to Aspiration," (1994) 32:1 Osgoode Hall LJ 1 at 2 & 10 [Walker]; *R v Edwards et al.,* 2021 CMAC 2 at paras 48 & 64.

7 *NDA*, *supra* note 4 at s 55(1).

To achieve this unique legislated purpose, Parliament has created the military panel.

The military panel contains five members and is constituted under section 167 of the *National Defence Act (NDA)* when the accused is liable to punishment of two years imprisonment or greater punishment.[8] The military panel acts as trier of fact at a General Court Martial.

The military panel has unique features, no panel member can hold a rank lower than the accused. In fact, in some cases, all panel members will be senior to the accused because the minimum rank for military panel duty is sergeant or captain, regardless of the accused's rank. Additionally, the senior member of the panel must hold a certain rank to create a hierarchy within the panel.[9] Importantly, the military panel is authorized to take judicial notice of general military service knowledge, a concept not found in jury trials.[10] Finally, similar to a typical jury, the panel's verdict must be unanimous, but the voting begins with the lowest ranking member, which reduces any influence from higher ranking members.[11]

At first glance, the military panel's design raises trial fairness implications under section 11(*d*) of the *Charter* regarding its independence, impartiality, composition and representation.[12] Interestingly, courts have yet to rule on the constitutionality of military panels, but the SCC in *R v Stillman* observed:

> "We underline at this point that we would not foreclose the possibility of challenging certain aspects of the military panel system, particularly in relation to their composition and their independence from the chain of command, under other provisions of the *Charter* — for example, s. 11(*d*)."[13]

While the SCC's comments are clearly *obiter dicta* in light of the legal issues addressed in *Stillman*, they likely originate from the fact that the military panels are uniquely designed and have never faced *Charter* scrutiny. This paper attempts to answer the question raised by the SCC. Specifically,

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8 *NDA, supra* note 4 at ss 165.191–165.193.

9 The senior member of the military panel will hold the minimum rank of lieutenant-colonel or higher, depending on the rank of the accused; see *NDA, supra* note 4 at s 167.

10 *Military Rules of Evidence*, CRC, c 1049 at s 16(2)(a).

11 *NDA*, *supra* note 4 at s 192(2); T*he Queen's Regulations and Orders for the Canadian Forces, QR&O 112.413, 1998* (Canada) [*QR&O*].

12 *Charter*, *supra* note 2 at s 11(*d*) states: "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

13 *Stillman, supra* note 3 at para 86.

does the military panel infringe an accused's fair trial rights under section 11(*d*) of the *Charter*?

The military panel in its current form was codified in law in 1950.[14] The military panel has been modified slightly since its creation, but it has never faced *Charter* scrutiny. Therefore, the time is ripe to assess its *Charter* compliance, particularly if we accept that, while "the *Charter* has increased the security of fair trial rights in Canada, it may have made the demand for increased legislative and administrative protection of fair trials less pressing."[15] Since the advent of the *Charter,* there have been relatively few legislative changes to the military panel. Nevertheless, this paper examines the military panel in light of the MJS's legislated purpose and concludes that the military panel complies with fair trial rights at section 11(*d*) of the *Charter.*

Our starting point is that fair trial rights are not absolute. Admittedly, fair trial rights under section 11(*d*) of the *Charter* apply primarily to the accused, but a "fair trial" does not exist in a vacuum. Fairness implies a sense of balance between the accused's due process rights and societal interests. As we shall see, in the MJS, the societal interests are the maintenance of discipline, efficiency, and morale.[16]

This paper will examine three fair trial concerns stemming from the military panel, and balance those concerns against the MJS's legislated purpose. First, given that all members of the panel are—as a minimum—mid-range leaders in the CAF, there is a concern of partiality in favour of the institution or lack of independence from the executive. Second, there is a concern that the five-member panel comprises insufficient people to properly fulfill its role as trier of fact. Lastly, many CAF members are deliberately excluded from sitting on a military panel, which raises representativeness concerns. We address each of these concerns in turn.

2. The Military Panel is Impartial and Independent

The military panel's unique characteristics raise potential criticisms regarding independence and impartiality, but those criticisms are unwarranted in light of the MJS framework. Of course, even in the MJS, independence and impartiality are necessary elements of a fair trial

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14 *National Defence Act,* 14 George VI, Ch 43, articles 139–142 as it appeared on 30 June 1950.

15 Kent Roach & M.L. Friedland, "The Right to a Fair Trial in Canada" *online:* <https://tinyurl.com/3pkbhvds> [perma.cc/D3RD-TWTA].

16 *NDA, supra* note 4 at s 55(1).

under section 11(*d*) of the *Charter.*[17] The SCC in *R v Valente* defines "independence" and "impartiality" under section 11(*d*):

> "Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."[18]

Because all five members of a military panel are senior leaders in the CAF (i.e. members of the executive), people unfamiliar with the MJS's objectives might view the panel as susceptible to executive influence, or as being partial to the prosecuting Crown.[19] In fact, it was argued by the appellant in *R v Edwards,* 2024 SCC 14, that military panel members "may favour their duty to the military hierarchy over that owed to the persons brought before them at court martial".[20] From that perspective, there is a concern that panel members might err on the side of conviction with the aim of promoting discipline, lest they show weakness or disloyalty by acquitting.

While these concerns are natural reactions to the uniqueness of the military panel, they are both unwarranted and unsubstantiated. In fact, a similar argument challenging the independence of military judges due to their dual role as commissioned officers in the CAF (i.e. members of the executive), and as judges at courts martial was rejected by the SCC in *Edwards*.[21] In that decision, the SCC reminded us of *R v Généreux,* where Chief Justice Lamer stated that our hypotheticals about how the military status of judges *might* affect their independence are "not sufficient to constitute a violation of s. 11(*d*) of the *Charter*".[22] Accordingly, challenging the independence of military panel members simply due to their dual role as members of the executive and triers of fact at courts martial would also

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17 *R v Généreux,* (1992) 1 SCR 259 (Canada Supreme Court Reports) at 280 [*Généreux*]; *R v Edwards,* 2024 SCC 15 at paras 93–94 [*Edwards]*; *R v Oakes*, [1986] 1 SCR 103 at para 32.

18 *R v Valente*, [1985] 2 SCR 673 at para 15.

19 Mike Madden, "Sui Not-So-Generous: The Unconstitutionality of Canadian Court Martial Jury Trials" (2009) 14 Appeals 24 at 29–30 [*Madden*].

20 *Edwards, supra* note 17 at para 126.

21 *Edwards, supra* note 17 at paras 4–10 & 15.

22 *Généreux, supra* note 17 at 295.

fail. A deeper look at the military panel's role within the MJS will help us understand.

The MJS is *sui generis*: a unique system of criminal justice designed to promote discipline, efficiency, and morale within the CAF.[23] The SCC in *Généreux* provides the analytical framework when reviewing elements of the MJS:

> "The *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces […]. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11(*d*) of the *Charter*, must be interpreted in this context."[24]

It is important to keep the *Généreux* dictum front of mind as we conduct our analysis. The constitutional analysis of the military panel must be done "with an eye to the objectives of military discipline particular to this form of criminal justice."[25]

When assessing *impartiality*, we start from the premise that, like civilian jurors, military panel members are presumed to be impartial.[26] Still, "impartiality is not the same as neutrality" in that members of the military panel undertake their juridical duties with their military experience, beliefs and opinions in mind.[27] In fact, reliance on military experience is precisely what makes panel members apt to fulfill their juridical duties, because they understand the unique disciplinary needs of the CAF.

When assessing *independence*, the test is whether the military panel is "free, and reasonably seen to be free to perform its adjudicative role without interference, including interference from the executive and legislative branches of government."[28] The test is answered from the perspective of a reasonable person who is properly informed about the MJS.[29] This person is presumed to have "knowledge of all the relevant

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23 *Généreux, supra* note 17 at 26 referring to *R v Lunn*, [1993] CMAJ No 7 at para 11.

24 *Généreux*, *supra* note 17 at 295.

25 *Edwards, supra* note 17 at para 97.

26 *R v Find*, [2001] 1 SCR 863 at para 26 [*Find]*; *R v Kokopenace*, 2015 SCC 28 at para 53 [*Kokopenace*].

27 *Find, supra* note 26 at para 43.

28 *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 47.

29 *R v S (RD),* [1997] 3 SCR 484 at para 111.

circumstances" and "view the matter realistically and practically."[30] This person would be satisfied by a number of safeguards in place.

There are three broad regulatory safeguards to ensure the military panel's independence and impartiality. First, panel members receive specific instructions from the military judge, which they are to obey.[31] Second, regulations prohibit reprisals against panel members for decisions made during a court martial. In fact, panel members cannot receive any performance evaluations (positive or negative) related to court martial duty.[32] Of course, retaliatory prosecutions against military panel members would be unlawful.[33] Finally, military members receive full pay and *per diem* while on court martial duty and therefore are not financially pressured to rush through the proceedings. In essence, these regulations provide safeguards similar to those provided to military judges, which "makes it plain that they do not act as members of the executive when they perform their [juridical] duties."[34]

More important than the regulatory safeguards is the fact that panel members are equally subjected to laws, rules, and orders proclaimed by the CAF executive. Accordingly, the military panel can act as a bulwark to oppressive or unduly harsh rules or orders by refusing to convict in those circumstances.[35] In this sense, the military panel is uniquely situated to bring balance to a court martial in a way that military judges—who are immune to executive orders[36]—cannot.

Considering all these safeguards, and absent specific facts to the contrary, a broad claim that military panel members are partial against the accused cannot stand because *Charter* challenges cannot be made in the abstract.[37] That panel members, military police and prosecutors all belong to the CAF does not mean that panel members are incapable of impartially judging the facts. In *R v Find*, the SCC devised a useful test to assess the impartiality of a civilian jury. Given that there is no jurisprudence on the

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30 *Miglin v Miglin*, 2003 SCC 24 at para 26.

31 *QR&O, supra* note 11 at s 112.05.

32 *QR&O, supra* note 11 at s 26.11.

33 *Edwards, supra* note 17 at para 132.

34 *Edwards, supra* note 17 at para 123.

35 Rules and orders are not codified in law, but *NDA, supra* note 4, sections 83 and 129 enforce adherence to rules and orders. See also, *R v Sherratt,* (1991) 1 SCR 509 (Canada Supreme Court Reports) at 523–524; Christopher Nowlin, "The Real Benefit of Trial by Jury for an Accused Person in Canada: A Constitutional Right to Jury Nullification" (2008) 53 Criminal LQ 290.

36 *NDA, supra* note 4 at s 165.23.

37 *Mackay v Manitoba,* (1989) 2 SCR 357 (Canada Supreme Court Reports) at 361–362.

constitutionality of military panels, we propose that the *Find* test is both a reasonable and useful tool to assess the impartiality of military panels. Specifically, any challenge to the impartiality of the military panel requires evidence that:

(a) There exists a prejudice spread across the military community; *and*

(b) Certain members of the military panel could be incapable—despite the fair trial rules that exist at courts martial (to include judicial instructions, which panel members are presumed to follow[38])—to set aside this prejudice and render an impartial decision.[39]

The threshold is necessarily high to prevent frivolous applications, which cause undue delay, and impede the proper administration of justice.

In cases where there are legitimate concerns regarding a panel member's partiality, either the accused or the prosecution can request to have the panel member removed for cause pursuant to *NDA* section 186.[40] Additionally, a military judge has the power to remove panel members if it is in the interest of the proper administration of justice.[41]

Another critical consideration is that if the military panel was actually perceived as partial to the executive, it would undermine the entire MJS, because CAF members would lose trust in the disciplinary framework that governs them. This would have catastrophic effects on discipline in the CAF. Said otherwise:

> "Fairness and justice are indispensable. When a serviceman [sic] has confidence in his commanders and believes in the organization, there is discipline. It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. If the military law system is a just system, then it will be recognized as such by the serviceman and thus it will promote and support the discipline upon which the military organization is based."[42]

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38 *R v Cawthorne*, 2016 SCC 32 at para 41 citing *R v Khan,* 2001 SCC 86 at paras 80–82.

39 *Find*, *supra* note 26 at para 32.

40 *NDA, supra* note 4 at s 186; *QR&O, supra* note 11 at s 112.14.

41 *NDA, supra* note 4 at s 179.

42 J.B. Fay, "Canadian Military Criminal Law: An examination of Military Justice" (1975) 23 Chitty's LJ 120 at 123.

If Parliament has maintained a disciplined and effective armed force for many decades under the current system, it is evidence that CAF personnel believe in the impartiality and independence of the MJS and its components, such as the military panel.

3. The Military Panel's Composition is Appropriate

The military panel is comprised of only five people, which raises concern because civilian juries normally contain twelve people and cannot operate below ten.[43] In fact, Justice G. Létourneau suggested that "It is not unreasonable to think, on the one hand, that it is easier to obtain a unanimous verdict from only five, as opposed to twelve people."[44] The SCC echoed that statement in Stillman.[45] Also, empirical studies propose that "progressively smaller juries are less likely to foster effective deliberation" and that larger groups remember more details.[46]

Notwithstanding those claims, a military panel composed of only five people is fair, and appropriately balances the MJS's efficiency requirements against the accused's due process rights.

First, five people are not more likely to *convict* than twelve people. Such a line of thought incorrectly applies the statistical concept of "reduction to the mean". Military panel verdicts are not the aggregate of five *different* decisions. Instead, verdicts are mathematical extremes found at either end of a spectrum, and every member must come to the *same* conclusion: guilty or not guilty (the military panel's verdict must be unanimous regarding guilt or acquittal[47]). In that sense, comments made by Justice Létourneau and the SCC cut both ways. Specifically, while it may be "easier" to convince five people that the accused is guilty, it is equally easy to convince five people regarding the accused is not guilty.

Second, larger panels might collectively remember more details if they are forbidden to take notes during the trial. However, military panel members are allowed to take written notes and provided with copies of all exhibits to review, which diminishes any argument that five panel members will not remember all the relevant details. [48]

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43 *Criminal Code,* RSC, 1985, c C-46 at ss 644(2) & 651.1(2).

44 Honourable Gilles Létourneau, *Introduction to Military Justice: An Overview of Military Penal Justice System and its Evolution in Canada,* (Montreal: Wilson & Lafleur, 2012) at 6.

45 *Stillman*, *supra* note 3 at para 68.

46 Dwight Sullivan, "Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty" (1998) 158 Military L Rev at 27 [Sullivan].

47 *NDA, supra* note 4, at s 192(2).

48 *Sullivan, supra* note 46 at 28.

Third, we must measure the size of the panel against the size of the selection pool. Parliament intended panel members to come from the military, and there are fewer than 33,000 CAF members eligible for panel duty.[49] We also know this pool shrinks based on the accused's higher rank, language of trial as panel members must be fully conversant in either French or English depending on the language selected for the trial, etc.[50] Therefore, there is a practical limitation on how many members can sit on panels before the selection pool becomes excessively narrowed.

Fourth, the MJS cannot prosecute the most serious crimes (i.e. murder, manslaughter, and kidnapping) when such crimes are committed in Canada.[51] If committed domestically, those crimes are prosecuted in the civilian justice system where the military accused will have a right to a twelve-member jury. Therefore, Parliament has recognized that for the most serious crimes committed in Canada, due process requirements overtake military exigencies.

Fifth, neither the chain of command, nor the Crown prosecutor, nor a military judge can influence whether a trial proceeds as a General Court Martial (with a military panel). For certain offences, a General Court Martial is mandatory, but even in those cases the accused can request trial by judge alone if the Director of Military Prosecutions consents.[52] Conversely, for less serious offences, a Standing Court Martial (judge alone) is the only option.[53] In all other scenarios, the accused alone elects the mode of trial.[54] In sum, in the large majority of cases, the accused can elect trial by judge alone if they feel they are prejudiced by the presence of a military panel.

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49 Michelle Straver, Scientific Letter "*CAF Population Snapshot: Distribution by Rank*" *Defence Research and Development Canada, Department of National Defence,* July 2020 [Straver].

50 *QR&O, supra* note 11 at s 111.03.

51 *NDA, supra* note 4 at s 70. Readers should note that in March 2024, Parliament had introduced Bill C-66 to add sexual offences to the list of offences found at *NDA* section 70, and over which the MJS would have no jurisdiction domestically. However, Parliament was prorogued in January 2025, which meant that Bill C-66 died on the order paper: Bill C-66, *An Act to amend the National Defence Act and other Acts (Military Justice System Modernization Act),* 1st session, 44th Parliament, 2024, cl 7. At the time of this writing, it remains to be seen if the next Parliament will pursue those legislative changes. In the meantime, the Director of Military Prosecution has paused the handling of sexual offence files in the MJS: Director of Military Prosecutions, *Direction regarding the implementation of the Statement of Principles and Presumptions for the Exercise of Concurrent Jurisdiction by Canadian Prosecuting Authorities*, 29 February 2024: <https://tinyurl.com/53y9tj5a> [perma.cc/2Q6P-27JX].

52 *NDA, supra* note 4 at s 165.191.

53 *NDA, supra* note 4 at s 165.192.

54 *NDA, supra* note 4 at s 165.193.

Finally—and more importantly—Parliament designed military panels to enable the MJS to process disciplinary matters quicker than the criminal justice system, because long delays would hinder military operations.[55] The military panel is smaller and managed by a senior member to promote efficiency through structured and focused deliberations. It is worth noting that the *Jordan* timeline as applied by several courts martial is 18-months.[56] Accordingly, the MJS's need for expediency justifies a panel of five managed by a senior officer.

4. The Military Panel is Representative of the CAF Community

Parliament has excluded certain ranks from sitting on military panels.[57] This exclusion raises a concern because, as the SCC tells us in *R v Kokopenace*, when the executive specifically excludes certain groups from participating in a jury roll, there is a presumptive representativeness issue.[58]

By excluding certain ranks from sitting on military panels, Parliament has significantly reduced the pool of eligible people. There are approximately 98,000 people in the CAF,[59] but only 33,000 can serve on a military panel by virtue of rank.[60] The concern is that such a pool is insufficiently representative of the accused's peers, and that the relatively small pool creates a reasonable concern for indirect influence, bias and/or reprisals.

The observation that the military panel does not appropriately represent the accused's "peers" is correct, but it misses the mark. In the context of the MJS, we must frame "representativeness" differently. This view was endorsed in *R v Middlemiss,* where the judge found that the military panel is not designed to represent a true cross-section of the CAF. Instead, the judge found that the military panel is a tool designed to perform a legislated duty.[61] Similarly, in *Stillman* the SCC said that the MJS does not need to be identical to the civilian criminal system in order to be *Charter*-compliant.[62]

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55 Rubsun Ho, "A World That Has Walls: A Charter Analysis of Military Tribunals" (1996) 54:1 U Toronto Fac L Rev 149 at 163 [Ho].

56 For example: *R v Thiele*, 2016 CM 4015 at para 13. Note that the Court Martial Appeal Court has yet to rule regarding *Jordan* timelines in the MJS.

57 *NDA, supra* note 4 at s 167.

58 *Kokopenace, supra* note 26 at para 66.

59 Straver, *supra* note 49.

60 *Ibid.*

61 *R v Middlemiss,* 2009 CM 1001 at para 50.

62 *Stillman, supra* note 3 at para 44.

Representativeness is concerned primarily with ensuring the triers of fact represent the "conscience of the community."[63] To assess the military panel's representativeness, we must first define what is the "CAF community". First, the CAF community is structured around a rigid hierarchy. The military panel must represent this hierarchical reality as a key feature of the community. Second, as stated by the SCC in *Généreux:* "Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct".[64] Third, CAF members are subject to over fifty offences unique to the CAF that require some level of military knowledge to interpret.[65] In fact, the Court Martial Appeal Court qualified the military panel as a group of experts given their collective experience."[66] This hierarchy, combined with stricter behavioural standards, and the frequent prosecution of uniquely military offences, is why only certain ranks can sit on the panel.

Nevertheless, in 1998 Parliament realized that there was scope to increase the representativeness of the military panel, and as part of a series of legislative amendments to the *NDA*, Parliament widened the selection pool from which military panel members were selected, to include non-commissioned members when the accused was not a commissioned officer.[67] This widening of the selection pool increased the military panel's representativeness by allowing non-commissioned accused persons to be judged by other non-commissioned members. An important takeaway from this legislative amendment is that the military panel has evolved through the years to better align with *Charter* values.

Also, the argument that panel members will blindly obey the senior panel member, as suggested by some authors[68] is a Hollywood caricature that fails to recognize that the CAF is not a dictatorship. Military members are charged with obeying "lawful commands"[69], and military judges make it abundantly clear in their instructions that no one can command a panel member to vote a certain way. Doing so would be unlawful. On the contrary, CAF members, regardless of rank, are encouraged to respectfully communicate their opinions both in everyday work and during court martial deliberations. Simply put, the hierarchal structure promotes efficient deliberations without hampering the sharing of opinions.

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63 *Kokopenace*, *supra* note 26 at para 55.

64 *Généreux*, *supra* note 17 at 293; Ho, *supra* note 55 at 150.

65 *NDA, supra* note 4 at Part III.

66 *R v Cawthorne*, 2015 CMAC 1 at para 64.

67 Bill C-25, *An Act to Amend the National Defence Act,* 1st Session, 36th Parliament, CRC 1998.

68 Madden, *supra* note 19 at 29–30; Ho, *supra* note 55 at 94.

69 *NDA, supra* note 4 *at* s 83.

It is also important to note that panel members are randomly and anonymously selected from a pool of eligible CAF members based on criteria entered into a computer program, which no one can influence.[70] As the SCC stated in *R v Kokopenace*, it is not the result of that selection process that matters, but whether the selection process is truly representative.[71] There is no requirement to have a certain diversity of members on the panel.[72] The military panel selection process ensures representativeness of the CAF community's interests.

In summary, to achieve the legislated aims of the MJS, Parliament designed the military panel's representativeness with two unique objectives in mind:

(a) That an accused not be judged by subordinates, because this would have catastrophic impacts on the chain of command's ability to maintain discipline; and

(b) That an accused's alleged behaviour will be judged by CAF members with sufficient knowledge and experience to assess the offence's impact on discipline, efficiency, and morale.[73]

These objectives justify excluding personnel with insufficient rank or military experience from the selection pool.[74] None of these characteristics affect a CAF member's fair trial rights. On the contrary, most accused want experienced military personnel to act as trier of facts.[75] The military panel's representativeness appropriately balances the accused's rights with the MJS's objectives.

5. Conclusion

When studying the military panel within the context of the MJS, we see that the legislative and regulatory frameworks protect against the potential *Charter* challenge raised by the SCC in *Stillman*. The reasonably-informed observer who understands the MJS and its purpose will find that the military panel is independent, impartial, sufficiently composed,

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70 *QR&O, supra* note 11 at s 111.03.

71 *Kokopenace, supra* note 26 at paras 2 & 49.

72 Although the SCC was speaking about visible minorities, "diversity" can reasonably apply to military ranks. *R v Chouhan*, 2021 SCC 26 at para 38 [*Chouhan*].

73 Even those that find the military panel infringes *Charter* rights will concede that staffing military panels with sufficiently experienced members is "pressing and substantial" at the section 1 analysis: Madden, *supra* note 19 at 32–33.

74 *Stillman, supra* note 3 at paras 66 & 70.

75 Walker, *supra* note 6 at 25.

and appropriately representative of the military community's interests. Therefore, the military panel complies with section 11(*d*) of the *Charter.*

The military panel is uniquely designed to uphold the MJS's legislated objectives, which is to promote discipline, efficiency, and morale in the CAF. A task that a civilian jury cannot fulfill. When Parliament adopted section 11(*f*) of the *Charter* removing the right to jury trials for offences under military law, it already knew about the military panel's unique construct and its role. Therefore, Parliament's decision to remove jury trials, but allow military panels for those accused under the MJS was intentional to ensure the Canadian Armed Forces had the tools at their disposal to remain an efficient and disciplined national defence organization.[76] While there may be alternatives to military panels, the SCC tells us that this is not the measure by which to measure its *Charter* compliance.[77] Policy decisions are reserved for Parliament, and Parliament has opted for military panels.[78]

There is no doubt that the military panel is different than a jury, but it remains *Charter*-compliant when studied in the unique context of the MJS. In fact, it would be difficult to design an alternative trier of fact that is as agile, thorough, efficient, and knowledgeable as the current military panel for General Courts Martial. For such trials, the military panel is the best way to maintain the delicate balance between the MJS's legislated purpose and the accused's fair trial rights.

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76 Interestingly, Parliament did not distinguish between a wartime and peacetime military in section 11(*f*). This is likely because the drafters understood how critical it is for a military to train as it fights. It is impractical to change between legal systems depending on the status of military operations as some authors suggest. See *Ho, supra* note 55 at 181–183.

77 *Chouhan, supra* note 72 at paras 131–133.

78 *Edwards, supra* note 17 at para 80.