File No. 36466

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

ORDINARY SEAMAN W.K. CAWTHORNE

RESPONDENT
(Appellant)

- and -

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(Rule 42 of the *Rules of the Supreme Court of Canada*)

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RESPONDENT'S FACTUM

PART I – OVERVIEW OF THE POSITION AND STATEMENT OF FACTS

I – OVERVIEW OF THE POSITION

1. This appeal is about the recognition of prosecutorial independence as a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*[1] *(Charter*); and if so, whether s. 245(2) of the *National Defence Act*[2] (*NDA),* which confers the right of appeal to the Minister of National Defence (the "Minister"), is in accordance with this principle.

2. Prosecutorial independence is fundamental to the way in which the legal system ought fairly to operate. Prosecutorial independence protects prosecutorial discretion from both political interference and judicial supervision. Prosecutorial independence is thus necessary to uphold the integrity of our system of prosecution.

3. The fundamentality of prosecutorial independence requires that prosecutors be reasonably perceived as independent. We must be concerned not only with whether the prosecution is in fact acting independently but also with the perception of a reasonable person fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of prosecutorial independence is supported by this Court's jurisprudence about the central importance to the legal system of prosecutors being free from political and judicial interference in discharging their quasi-judicial duties. Reasonable perception of prosecutorial independence is necessary to ensure public confidence in the judicial system.

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, Respondent's Book of Authorities, hereinafter **"R.B.A."**, **Vol. I, Tab 3**.

2 *National Defence Act*, RSC, 1985, c. N-5. [***NDA***], **R.B.A., Vol. I, Tab 8**.

4. The Minister disagrees. He is not concerned with the perception of a reasonable person. He argues that the constitutionality of s. 245(2) of the *NDA* rests on an expectation that he will act properly. In his view, prosecutorial independence automatically flows from the prosecutorial function, regardless of any constitutional or statutory safeguards. This cannot be so.

5. Prosecutorial independence does *not* necessarily flow from the prosecutorial function. It is important not to confuse the prosecutorial function with the independence which is necessary to perform it. The caselaw on judicial independence makes this distinction between function and independence clear. Before *R. v. Généreux*, legally appointed military judges – despite their judicial function – lacked judicial independence. Similarly today, the Minister – despite his prosecutorial function – lacks prosecutorial independence.

6. In short, the Minister is arguing for near-absolute unreviewable discretion despite the fact that he may not be reasonably perceived as independent.

7. With respect, the Minister cannot have it all. To benefit from near-absolute unreviewable discretion, the prosecutor should be, in fact and in the perception of a reasonable person, independent. Prosecutorial independence and prosecutorial discretion are two sides of the same coin.

8. Both the lawyer's duty of commitment to the client's cause and judicial independence incorporate the perceptions of a reasonable person. Why not prosecutorial independence?

9. Section 245(2) violates the right to an independent prosecutor under s. 7 because it confers the right of appeal on the Minister: a political figure subject to collective ministerial responsibility. Neither the Constitution nor the law provides any guarantee of prosecutorial independence to the Minister. His quasi-judicial role is incompatible with his executive role to manage the Canadian Armed Forces (CAF). The Minister is the very antithesis of a prosecutor who is independent of political pressure. The Minister himself *is* the political pressure.

10. Section 245(2) also violates the right to be tried by an independent tribunal guaranteed under s. 11(d) of the *Charter*. Without constitutional or statutory guarantee of prosecutorial independence, the Minister's prosecutorial discretion should always be subject to judicial review. The doctrine of abuse of process should be inapplicable. Indeed, it is prosecutorial independence that legitimizes the near-absolute unreviewability of prosecutorial discretion.

11. Because the Minister has no prosecutorial independence, this Court could be called to review his prosecutorial discretion in the absence of an abuse of process. In doing so, this Court would "become a supervising prosecutor" and cease to be "an independent tribunal".[3] In this sense, prosecutorial independence is essential to preserve judicial independence.

12. The Respondent asks this Court to declare s. 245(2) of the *NDA* of no force or effect pursuant to s. 52(1) of the *Constitution Act,* 1982 and to quash the Minister's notice of appeal and dismiss the appeal.[4] If this Court declares this provision unconstitutional, no appeal lies.

13. As to the merits, the Appeal Court correctly concluded that a mistrial ought to have been granted because the inadmissible confession of the accused was not only pivotal and central to the case, but was likely to be very weighty, whether consciously or not, in the panel's assessment of the evidence. The Appeal Court correctly directed a new trial because the exposure of the panel to this inadmissible evidence could have affected the panel to the point that the entire trial was compromised and no remedy other than a new trial was available.

II – THE FACTS

14. The Respondent agrees with the facts as described by the Appellant at paragraphs 7 to18 of his factum.

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3 *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 [***Krieger***] at paras 31, 32, **R.B.A., Vol. I, Tab 17**.

4 *Constitution Act,* 1982, s. 52, **R.B.A., Vol. I, Tab 4**.

III – LEGISLATION

15. The Minister's right of appeal to this Court is provided at s. 245(2) of the *NDA*:[5]

Appeal by Minister	Appel par le ministre
245(2) The Minister, or counsel instructed by the Minister for that purpose, may appeal to the Supreme Court of Canada against a decision of the Court Martial Appeal Court:	**245(2)** Le ministre ou un avocat à qui il a donné des instructions à cette fin peut interjeter appel à la Cour suprême du Canada d'une décision de la Cour d'appel de la cour martiale sur toute question de droit, dans l'une ou l'autre des situations suivantes :
(a) on any question of law on which a judge of the Court Martial Appeal Court dissents; or	(a) un juge de la Cour d'appel de la cour martiale exprime son désaccord à cet égard;
(b) on any question of law, if leave is granted by the Supreme Court of Canada.	(b) l'autorisation d'appel est accordée par la Cour suprême.

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[5] *Legislative history* of s. 245(2) of *NDA*: Original 1950, c. 43, s 196; RSC 1952 c**.** 184, s. 196; SC 1959, c. 5, s. 6(1); SC 1969-70 c. 44, s. 10; RSC 1970 c. N-4, s. 208; RSC 1985 c. N-5, s. 245; SC 1997 c. 18, s. 134, **R.B.A., Vol. I, Tab 7**. The right of appeal to this Court was first conferred on the Minister in 1959: see Senate Debate, 9 March 1959, pp 329-30, **R.B.A., Vol. IV, Tab 52**.

PART II – RESPONDENT'S POSITIONS WITH RESPECT TO THE APPELLANT'S QUESTIONS

16. The Respondent is in agreement with the Appellant's questions which raise the following issues:

- Is prosecutorial independence a principle of fundamental justice which incorporates the perception of a reasonable person fully appraised of the relevant circumstances and having thought the matter through?
- Is the Minister an independent prosecutor?
- Does lack of prosecutorial independence undermine judicial independence?
- Did the trial judge err in denying the mistrial application?

17. In addition, it cannot be ignored that the issue concerning the Minister's right of appeal was identified in the Report on the Quasi-Judicial Role of the Minister of National Defence by the Right Honorable Brian Dickson, a member of the Canadian Forces in World War II (Second Dickson Report).[6] This report recommended abolishing the Minister's right of appeal. Recommendation 14 reads:[7]

> We recommend that the authority of the Minister of National Defence pursuant to section 230.1 and ss. 245(2) of the National Defence Act to exercise a right of appeal from appellate courts be abolished and be exercised by the independent Director of Prosecutions.[8]
>
> [Emphasis added]

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6 R. J. Sharpe and K. Roach, *Brian Dickson: A Judge's Journey* (University of Toronto Press, 2003) at pp 48 to 64, **R.B.A., Vol. IV, Tab 67.**

7 Special Advisory Group on the Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, (25 July 1997) at 15, 16 (Chair: the Right Honorable Brian Dickson) [**Second Dickson Report**], **R.B.A., Vol. IV, Tab 57.**

8 *Ibid* at 25, **R.B.A., Vol. IV, Tab 57.** For the same reasons, the Second Dickson Report also recommended abolishing the minister's right to appeal a finding that a person is not a "dangerous mentally disordered accused" at 16.

18. The Second Dickson Report provided the following rationale for abolishing the Minister's right of appeal:

- The Minister's quasi-judicial power to launch an appeal is a vestige of the British military tradition which assumed that the executive branch of government was the proper authority "to be involved in making decisions relating to individual cases."[9]
- The Minister's involvement in individual cases is contrary to the "requirements for a military judicial system which had to be and appear to be independent."[10]
- The Minister's quasi-judicial role, including his right to launch an appeal, conflicts with his executive role to manage the Canadian Forces.[11]
- "The Minister should be distanced as far as possible from the military justice system."[12]
- "… At any point, it is not appropriate that he/she should be involved in the routine decision of how a specific prosecution should be conducted."[13]
- "Indeed, the routine exercise of political judgment in individual cases appears to be neither necessary nor consistent with the establishment of an independent Director of Prosecutions pursuant to our Recommendations".[14] [Emphasis added]

In short, the Second Dickson Report concludes that "the Minister should not be involved in prosecution decisions".[15] [Emphasis added]

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9 *Second Dickson Report* at 6, 7, **R.B.A., Vol. IV, Tab 57.**
10 *Ibid* at 7, **R.B.A., Vol. IV, Tab 57.**
11 *Ibid* at 3, 7, **R.B.A., Vol. IV, Tab 57.**
12 *Ibid* at 15, **R.B.A., Vol. IV, Tab 57**.
13 *Idem*.
14 *Ibid* at 14, **R.B.A., Vol. IV, Tab 57.**
15 *Ibid* at 16, 23, **R.B.A., Vol. IV, Tab 57.**

PART III – STATEMENT OF ARGUMENT

I- THE LAW

19. Section 245(2) violates ss. 7 and 11(d) of the *Charter* and cannot be justified under s. 1. The appropriate remedy is to strike down s. 245(2) immediately.

A. THE RIGHT TO AN INDEPENDENT PROSECUTOR UNDER SECTION 7

20. Section 245(2) engages the liberty interests of the Respondent under s. 7 of the *Charter* in a manner that is inconsistent with the principles of fundamental justice. Specifically, the principle of fundamental justice that an accused has a right to be prosecuted by an independent prosecutor.

21. The Minister's exercise of his right of appeal is a prosecutorial decision.[16]

22. It is undisputed that s. 245(2), granting the right of appeal to the Minister, triggers the protection of s. 7 as it raises the possibility of imprisonment should a conviction be restored or a new trial ordered.[17] Section 7 is engaged.[18]

23. Liberty is engaged in a manner that is inconsistent with the principles of fundamental justice because:

(a) The right to an independent prosecutor is a principle of fundamental justice; and

(b) The Minister is not an independent prosecutor.

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16 *R. v. Anderson*, 2014 SCC 41 at para 44 [***Anderson***], **R.B.A., Vol. I, Tab 22**.

17 *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 69 [***Carter***], **R.B.A., Vol. I, Tab 12**; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para 71 [***Federation of Law Societies***], **R.B.A., Vol. I, Tab 10**.

18 *R. v. Gagnon*, 2015 CMAC 2 at para 89 [***Gagnon***], **R.B.A., Vol. II, Tab 27**.

(a) Prosecutorial Independence Is a Principle of Fundamental Justice

24. In *Hinse*[19] and *Miazga*[20], this Court confirmed that prosecutorial independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. Prosecutorial independence is therefore a principle of fundamental justice.

25. Furthermore, the jurisprudence referring to the doctrine of prosecutorial discretion further confirms that that prosecutorial independence is a principle of fundamental justice. Indeed, the independence of the prosecutor is essential to the state's legitimate exercise of prosecutorial authority. The doctrine of prosecutorial discretion is premised on the principle of prosecutorial independence.[21] Prosecutorial independence and prosecutorial discretion are two sides of the same coin.[22]

26. Principles of fundamental justice have three characteristics.[23] The right to an independent prosecutor meets all three:

i. The right to an independent prosecutor is a legal principle;

ii. There is sufficient consensus that an independent prosecutor is fundamental to the way in which the legal system ought fairly to operate;

iii. An independent prosecutor can be identified with sufficient precision to yield a manageable standard.

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19 *Hinse v. Canada (Attorney General)*, [2015] 2 SCR 621, 2015 SCC 35 at para 40 [***Hinse***], **R.B.A., Vol. I, Tab 15.**

20 *Miazga v. Kvello Estate*, [2009] 3 SCR 339 at para 46 [***Miazga***] **R.B.A., Vol. I, Tab 18.**

21 *Miazga* at para 47, **R.B.A., Vol. I, Tab 18**; *Henry v. British Columbia (A.G.)*, [2015] 2 SCR 214 at para 62, **R.B.A., Vol. I, Tab 14** ("…the threshold to intrude upon that core discretion [prosecutorial discretion] must be onerous, since it squarely implicates the independence of prosecutors" [Emphasis added]); *Gagnon* at para 118, **R.B.A., Vol. II, Tab 27.**

22 *Krieger* at para 31, **R.B.A., Vol. I, Tab 17.**

23 *Federation of Law Societies* at para 87, **R.B.A., Vol. I, Tab 10**.

i. Legal Principle and Sufficient Precision

27. These two elements of the test are conveniently treated together.

28. The right to an independent prosecutor is a well-established legal principle in Canada. As recognized by the Appeal Court in *Gagnon*, the principle of prosecutorial independence has crystallized in legislation with all the statutes that have created independent prosecutor positions.[24]

29. This legislated[25] principle has been reinforced through a number of legal protections such as the near-absolute unreviewability of prosecutorial discretion[26] and near-absolute crown immunity.[27]

30. However, contrary to what the Appellant suggests,[28] these legal protections (doctrine of abuse of process and tort of malicious prosecution) should not be confused with, nor limit the scope of, the legal principle of prosecutorial independence itself.

31. Several decisions of this Court confirm that prosecutorial independence is a legal principle.[29] For instance, in *Miazga*, this Court recognized that "the principle of independence requires that the Attorney General act independently of political pressures from government".[30] [Emphasis added]

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24 *Gagnon* at paras 138-141, **R.B.A., Vol. II, Tab 27**. For ex: *NDA*, ss. 165.1(2) (Director of Military Prosecution), **R.B.A., Vol. I, Tab 8**; *Director of Public Prosecutions Act*, SC 2006, c. 9, s 121 at s 5 (Director of Public Prosecutions) [***DPP Act***]; *An Act Respecting The Director Of Criminal And Penal Prosecutions*, CQLR c. D-9.1.1 (Directeur des poursuites criminelles et pénales), **R.B.A., Vol. I, Tab 1**.

25 *An Act Respecting The Director Of Criminal And Penal Prosecutions*, CQLR c. D-9.1.1, s. 29, **R.B.A., Vol. I, Tab 1**. (No prosecutor may be a member of a political party).

26 *Anderson* at para 51, **R.B.A., Vol. I, Tab 22**.

27 *Nelles v. Ontario*, [1989] 2 SCR 170 at 191-193, **R.B.A., Vol. I, Tab 19**.

28 Appellant's factum at para 54.

29 *Gagnon* at paras 92-98, **R.B.A., Vol. II, Tab 27**.

30 *Miazga* at para 46, **R.B.A., Vol. I, Tab 18**.

32. In *Anderson*, this Court approvingly cited *Krieger* stating that prosecutorial discretion is "protected from the influence of improper political and other vitiating factors by the principle of independence."[31] [Emphasis added]

33. More recently in *Hinse*, this Court declared that "the principle of independence of the prosecutor's office shields prosecutors from the influence of improper political factors."[32] [Emphasis added]

34. The right to an independent prosecutor is not only a legal principle; it is a constitutional principle. In *Krieger*, this Court declared:

> It is a constitutional principle that the Attorneys General of this country must act independently of partisan concern when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.[33]
>
> [Emphasis added]

35. The principle of prosecutorial independence is also sufficiently precise.[34] It is not vague. It protects prosecutorial discretion from political and judicial interference. Similar to the principle of judicial independence, prosecutorial independence is sufficiently precise to inform the public, the legislature and other courts on the minimum requirements for the dispensation of justice.

36. Prosecutorial independence is a sufficiently precise legal principle. It thus satisfies the first and third requirements of a principle of fundamental justice.

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31 *Anderson* at para 44, **R.B.A., Vol. I, Tab 22** citing *Krieger* at para 44, **R.B.A., Vol. I, Tab 17**.
32 *Hinse* at para 40, **R.B.A., Vol. I, Tab 15**.
33 *Krieger* at para 3, **R.B.A., Vol. I, Tab 17**.
34 *Gagnon* at para 96, **R.B.A., Vol. II, Tab 27**.

ii. Sufficient Consensus that the Right to an Independent Prosecutor Is Fundamental

37. There is a significant societal consensus that the right to an independent prosecutor is fundamental to the way in which the legal system ought fairly to operate. *It is the prosecutor's independence which protects his prosecutorial discretion from political interference or judicial supervision*.[35] It is what legitimizes near-absolute unreviewability of prosecutorial discretion. Prosecutorial independence is necessary to uphold the integrity "of our system of prosecution".[36] The fundamentality of prosecutorial independence thus incorporates the perception of a reasonable person fully apprised of the relevant circumstances and having thought the matter through. This is necessary to ensure public confidence in the judicial system.

a. The fundamentality of prosecutorial independence

38. In *Hinse*, Justice Wagner and Justice Gascon, writing for a unanimous court, confirmed that prosecutorial independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched:

> First, although it is possible, in rare cases, to hold Crown prosecutors liable for malicious prosecution, there are policy reasons that justify an extremely high threshold for success in such an action: *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 43; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, at para. 4; *Nelles v. Ontario*, [1989] 2 S.C.R. 170. As a result, an action for malicious prosecution must be based on malice or on an improper purpose: *Miazga*, at paras. 56 and 81. The decision to initiate or continue criminal proceedings lies at the core of the Crown prosecutor's powers, and the principle of independence of the prosecutor's office shields prosecutors from the influence of improper political factors: *Miazga*, at para. 45; see also *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. Prosecutors must be able to act independently of any political pressure from the government and must

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35 *Miazga* at para 47, **R.B.A., Vol. I, Tab 18**.

36 *Hinse* at para 40, **R.B.A., Vol. I, Tab 15**; *Miazga* at para 46, **R.B.A., Vol. I, Tab 18**; *Krieger* at paras 30-32, **R.B.A., Vol. I, Tab 17**.

> be beyond the reach of judicial review, except in cases of abuse of process. This independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched: *Miazga*, at para. 46; *Krieger*, at paras. 30-32.[37]
>
> [Emphasis added]

39. In *Miazga*, this Court again affirmed the fundamentality of the principle of prosecutorial independence:

> The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):
>
> > It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada [Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990)], at pp 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).
> >
> > This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process…
> >
> > …
> >
> > The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our

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[37] *Hinse* at para 40, **R.B.A., Vol. I, Tab 15**.

> Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. … The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.
>
> See also *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 166, *per* Binnie J., dissenting on another issue.
>
> [Emphasis added]

40. In finding that prosecutorial independence is fundamental to our system of prosecutions, this Court has consistently relied upon Binnie J. in *Regan* where he declared that the duty of independence of a Crown Attorney is a principle of fundamental justice.[38] He emphasized that everyone in this country is entitled to equal protection under the law and that an important element of the protection of the law is enshrined in the concept that prosecutors "stand independent"[39] between the Executive and the accused. He concluded that prosecutorial independence was "an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power" and that "it is one of the more important checks and balances of our criminal justice system".[40] [Emphasis added]

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38 *R. v. Regan*, [2002] 1 SCR 297 at paras 157, 192 [***Regan***], **R.B.A., Vol. III, Tab 39**. See *Krieger* at para 30, **R.B.A., Vol. I, Tab 17**, *Miazga* at para 46, **R.B.A., Vol. I, Tab 18**, *Hinse* at para 40, **R.B.A., Vol. I, Tab 15**.

39 *Regan* at paras 135, 156, **R.B.A., Vol. III, Tab 39**.

40 *Regan* at paras 157, 192, **R.B.A., Vol. III, Tab 39**. See also *Gagnon* at paras 114-117, **R.B.A., Vol. II, Tab 27**.

41. Justice Doherty on behalf of the Ontario Court of Appeal in *R. v. Gill* also recognized that prosecutorial independence is "itself a principle of fundamental justice."[41]

42. As prosecutorial independence and prosecutorial discretion are two sides of the same coin,[42] the case of *Anderson*[43] serves to further confirm that prosecutorial independence is a principle of fundamental justice. On prosecutorial discretion, this Court affirmed:

> This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p 410; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp 758-62; *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, "not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as 'ministers of justice'". More recently, in *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that "[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law".
>
> [Emphasis added]

43. Because the state's legitimate prosecutorial discretion can only be exercised by an independent prosecutor, the right to an independent prosecutor is fundamental to dispense justice fairly and impartially, in accordance with the rule of law.[44]

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41 *R. v. Gill*, 2012 ONCA 607, 96 CR (6th) 172, Doherty J at para 57, **R.B.A., Vol. II, Tab 29**; *Gagnon* at paras 119-121, **R.B.A., Vol. II, Tab 27**.

42 *Krieger* at para 31, **R.B.A., Vol. I, Tab 17**.

43 *Anderson* at para 37, **R.B.A., Vol. I, Tab 22**.

44 Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 Queen's LJ 813 at para 101, **R.B.A., Vol. IV, Tab 66**; James W. O'Reilly and Patrick Healy, *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion: a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Canadian Government Publishing, 1997) at 43. [**O'Reilly & Healy**], **R.B.A., Vol. IV, Tab 65**.

44. The above unequivocal and recent affirmations of this Court seem to demonstrate that there exists sufficient consensus that prosecutorial independence is fundamental to the way in which the legal system ought fairly to operate. It thus satisfies the remaining requirement of a principle of fundamental justice.

b. Public confidence in the judicial system requires reasonable perception of prosecutorial independence

45. The fundamentality of prosecutorial independence incorporates the perception of a reasonable person. This is necessary to ensure public confidence in the judicial system.

46. The Minister disagrees. In his view, prosecutorial independence should not consider the perception of a reasonable person. It should only consider prosecutorial misconduct affecting individual accused. Prosecutorial independence is not, in his view, sufficiently essential to be concerned with maintaining public confidence in the administration of justice. It is for this reason that the Minister argues that the subjective standards of the doctrine of abuse of process and malicious prosecution are sufficient to guarantee prosecutorial independence.

47. With respect, this argument ignores the fundamentality of prosecutorial independence to our criminal justice system. Prosecutorial independence is not only concerned with justice for individual accused but is also deemed essential to maintaining public confidence in the administration of justice.[45] Indeed, "fundamental justice embraces more than the rights of the accused".[46]

48. In short, the Minister is arguing for near-absolute unreviewable prosecutorial discretion despite the reasonable perception that he is not independent. With respect, the Minister cannot have it all. To benefit from near-absolute unreviewable discretion, the prosecutor should be, in fact and in the perception of a reasonable person, independent.[47]

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45 Compare *Federation of Law Societies* at para 97, **R.B.A., Vol. I, Tab 10**.
46 *R. v. Mills*, [1999] 3 SCR 668 at para 72, **R.B.A., Vol. II, Tab 35**.
47 *Krieger* at para 31, **R.B.A., Vol. I, Tab 17**.

49. The constitutionality of s. 245(2) cannot rest on an expectation that the Minister will properly exercise his right of appeal.[48]

50. Like judicial independence and the lawyer's duty of commitment to the client's cause, prosecutorial independence incorporates the perception of a reasonable person. As Lord Chief Justice Hewart said: "Justice should not only be done but should manifestly and undoubtedly be seen to be done."[49]

51. Reasonable perception of the independence of the prosecutor is essential to maintain public confidence in the administration of justice. It is consistent with this Court's warning in *Krieger* that "clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict".[50]

52. On the basis of this Court's decision in *Federation of Law Societies*, the Appeal Court in *Gagnon* recognized that the fundamentality of prosecutorial independence incorporated the perception of a reasonable person. At this point, it is helpful to quote from the reasons for judgment at length:

> [99] It is also essential that the prosecutor can be reasonably perceived as being independent.
>
> [100] Although that criteria was made with regard to judicial independence, prosecutorial independence would be a meaningless principle of fundamental justice if it did not also have to be assessed from the objective standpoint of a reasonable person fully apprised of the relevant circumstances.
>
> [101] In their study on prosecutorial independence in the Canadian Forces, Professor James W. O'Reilly and Professor Patrick Healy provided the following perspective:

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48 *R. v. Nur*, 2015 SCC 15, para 95, **R.B.A., Vol. III, Tab 36** ("the constitutionality of a statutory provision [cannot] rest on an expectation that the Crown will act properly", McLaughlin CJ.); *R. v. Appulonappa*, 2015 SCC 59, para 74, **R.B.A., Vol. II, Tab 23**; *Gagnon* at para 183, **R.B.A., Vol. II, Tab 27**.

49 *R. v. Sussex Justices Ex parte McCarthy*, 1924 1 KB 256, 1923 All ER 233, **R.B.A., Vol. III, Tab 42**.

50 *Krieger* at para 32 *in fine*, **R.B.A., Vol. I, Tab 17**.

> Also important are the characteristics of the decision maker. This means that the office held by the decision maker must permit him or her to act independently.

[102] They noted the importance of considering "the set of attributes defining the office of the person exercising the prosecution authority".

[103] The issue of whether a prosecutor can be perceived as independent requires an analysis of his or her attributes and characteristics. The prosecutor's duties must allow him or her to act independently.

[104] The criteria of the perception of a reasonable person was applied recently in another context by the Supreme Court in *Canada (Attorney General) v. Federation of Law Societies of Canada*.

[105] In that case, the constitutionality of some provisions in Canadian legislation combating money-laundering and terrorist financing was challenged. Justice Cromwell examined counsel's duty of commitment to the client's cause. He stated the following:

> [97] The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients…

[106] The criteria of the perception of a reasonable person, fully apprised of the relevant circumstances is perfectly adapted and appropriately designed to be used in the analysis of the issue of the independence of a prosecutor, like in this case, that of the Minister.

[Emphasis added]

53. Like the lawyer's duty of commitment, prosecution independence is "essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained."[51] As such, prosecutorial independence is concerned not only with whether it is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through.

54. The fundamentality of prosecutorial independence is supported by unequivocal pronouncements of this Court about the central importance to the legal system of prosecutors being free from political and judicial interference in discharging their quasi-judicial role.[52]

55. The fundamentality of prosecutorial independence is inconsistent with the Minister's argument that independence automatically flows from the prosecutorial function, regardless of any constitutional or statutory safeguards.

56. The Minister points to the *Canada Labour Code*, the *Royal Canadian Mountain Police Act* (*RCMP Act*) and the case of *Québec North Shore* to assert that prosecutorial independence flows from the prosecutorial function and that there would be no consensus that prosecutorial independence incorporates the perception of a reasonable person.

57. With respect, this argument fails. Both the *Canada Labour Code* and the *RCMP Act* do not remove the prosecutorial role from the Attorney General (or the DPP).[53] This legislation does not make a minister a prosecutor. Rather, it provides that consent by the minister is required before the Attorney General can prosecute specific strict liability offences in relation to workplace health and safety as well as to the unlawful use of the RCMP name and unlawful personation.

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51 Compare *Federation of Law Societies* at para 96, **R.B.A., Vol. I, Tab 10**.

52 *Supra* paras 38-44.

53 *DPP Act*, s. 3(3)a), **R.B.A., Vol. I, Tab 6**.

58. In *Québec North Shore*, the Court erred in equating the executive power of the minister with the quasi-judicial power of the Attorney General. The Court failed to recognize that the minister's inability to act as an "impartial arbitrator"[54] disqualifies him to play a quasi-judicial prosecutorial role.[55]

59. In other words, the Minister appears to be arguing that there is nothing offensive to the rule of law in allowing a minister the power to grant immunity from prosecutions that would otherwise be properly instituted by the Attorney General. While this situation may be justifiable in relation to the above specified regulatory offences, this certainly cannot be so for criminal offences.

60. Prosecutorial independence does *not* necessarily flow from the prosecutorial function. It is important not to confuse the prosecutorial function with the independence which is necessary to perform it. Caselaw on judicial independence make this distinction between function and independence clear. Before *R. v. Généreux*,[56] legally appointed military judges – despite their judicial function – lacked judicial independence. Similarly today, the Minister – despite his prosecutorial function – lacks prosecutorial independence.

61. At bottom, both the lawyer's duty of commitment to the client's cause and judicial independence incorporate the perception of a reasonable person.[57] Why not prosecutorial independence?

62. For all these reasons, the right to an independent prosecutor should be recognized as a principle of fundamental justice.

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54 *Québec North Shore & Labrador Railway Co. v. Canada (Minister of Labour*), [1996] FCJ No. 545 at para 3, **R.B.A., Vol. I, Tab 21**.

55 *R. v. Boucher*, [1955] SCR 16 at pp 21, 23, 24, Appellant's Book of Authorities, hereinafter **"A.B.A."**, Tab 16. See also *Regan* at para 156, **R.B.A., Vol. III, Tab 39**; *Gagnon* at paras 133, 176, 181-183, **R.B.A., Vol. II, Tab 27**.

56 *R. v. Généreux*, [1992] 1 SCR 259 [***Généreux***], **R.B.A., Vol. II, Tab 28**.

57 *Federation of Law Societies* at 97, **R.B.A. Vol. I, Tab 10**; *Généreux*, **R.B.A., Vol. II, Tab 28**.

63. We now turn to the issue of whether s. 245(2) provides for an independent prosecutor. This begs the question: Is the Minister an independent prosecutor?

(b) The Minister Is Not an Independent Prosecutor

64. The Minister cannot be an independent prosecutor for at least four reasons:

i. the Constitution and the *NDA* reveal that the Minister lacks prosecutorial independence;

ii. the Minister's quasi-judicial role is incompatible with his executive role;

iii. the Minister lacks the prosecutorial independence of the Attorney General and the Director of Public Prosecution (DPP); and,

iv. a reasonable person would conclude that the Minister is not independent.

i. The Constitution and the NDA Reveal that the Minister has No Prosecutorial Independence

65. As a matter of constitutional convention, the Minister has no prosecutorial independence. The Minister is a Cabinet Minister and "is not independent of but is rather a part of the Executive".[58] The Minister holds office during pleasure.[59] *The Minister is subject to collective ministerial responsibility*. As such, the Minister is bound to act under the supreme authority of the Cabinet and support any decision reached by the Cabinet, even if he is personally opposed to it.[60]

66. As a matter of law, the *NDA* provides the Minister with no prosecutorial independence.

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58 Compare with the comments of Lamer CJ on the role of the Judge Advocate General in *Généreux* at para 302, **R.B.A., Vol. II, Tab 28**.

59 *NDA*, s. 4, **R.B.A., Vol. I, Tab 8**.

60 Peter W. Hogg, *Constitutional Law of Canada*, "loose-leaf" (consulted on 24 September 2014), 5th ed. (Toronto: Carswell, 2007) ch. 9 at 14, **R.B.A., Vol. IV, Tab 62**.

ii. The Minister's Quasi-Judicial Role Is Incompatible with His Executive Role

67. The Minister "is responsible for the management and direction of the Canadian Forces and all matters relating to national defence".[61] The Minister "may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect".[62]

68. Under the direction of the Minister, the Chief of the Defence Staff is charged with the control and administration of the Canadian Forces.[63] Orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister are issued by or through the Chief of the Defence Staff.[64]

69. Both the Appeal Court in *Gagnon* and the Second Dickson Report recognized that the quasi-judicial role of the Minister is incompatible with his executive role to manage the Canadian Forces.[65] The Appeal Court explained the Minister's conflicting roles as follows:[66]

> [162] However one chooses to approach the issue, the control and administration of the Canadian Forces is incompatible with decision-making regarding the nature and extent of prosecutions in the military justice system that may lead to the imprisonment of an employee of the Minister.

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61 *NDA*, ss. 4, 18, **R.B.A., Vol. I, Tab 8**. See also *Halsbury's Laws of Canada - Military*, 1st ed., by Natalie Venslovaitis and Catherine Morin (eds.) with the collaboration of the Office of the Judge Advocate General for the Canadian Armed Forces (Markham, Ont.: LexisNexis Canada, 2011, updated December 15, 2013) p 321, para HMI-22, **R.B.A., Vol. IV, Tab 68** ("the Minister also plays a pivotal role in developing and articulating defense policy and is the principal spokesperson for the government on defence matters.")

62 *NDA*, s. 12(2), **R.B.A., Vol. I, Tab 8**.

63 *NDA* s. 18(1), **R.B.A., Vol. I, Tab 8**.

64 *NDA*, s. 18(2), **R.B.A., Vol. I, Tab 8**. See also O'Reilly & Healy at p 61, **R.B.A., Vol. IV, Tab 65**.

65 *Gagnon* at paras 162-188, **R.B.A., Vol. II, Tab 27**; Second Dickson Report at pp 2, 3, 7, 8, **R.B.A., Vol. IV, Tab 57**.

66 *Gagnon* at paras 162-164, **R.B.A., Vol. II, Tab 27**.

> [163] In *Larouche*, this Court noted that the DMP's discretion "must be exercised in an autonomous and independent manner that is free from any intervention from the chain of command". This conclusion conflicts with granting prosecutorial discretion, such as the power to appeal, to the Minister.
>
> [164] This incompatibility with the power to appeal against an acquittal or a stay of proceedings becomes even more apparent when we consider the power to initiate the process to release an officer or a non-commissioned member from military service for example, in a case of service misconduct. Although this power is not specifically granted to the Minister, it is ultimately under the Minister's authority that it can be exercised.
>
> [Emphasis added]

70. The Second Dickson Report also points out the incompatibility of the Minister's quasi-judicial role as prosecutor and his executive role as manager of the Canadian Forces:

- The Minister's involvement in individual cases is contrary to the "requirements for a military judicial system which had to be and appear to be independent."[67] [Emphasis added]
- The Minister's quasi-judicial role, including his right to launch an appeal, conflicts with his executive role to manage the Canadian Forces.[68]
- "The Minister should be distanced as far as possible from the military justice system."[69]
- "… At any point, it is not appropriate that he/she should be involved in the routine decision of how a specific prosecution should be conducted."[70]

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67 Second Dickson Report at 7, **R.B.A., Vol. IV, Tab 57.**
68 *Ibid* at 3, 7, **R.B.A., Vol. IV, Tab 57.**
69 *Ibid* at 15, **R.B.A., Vol. IV, Tab 57**.
70 *Idem*.

- "Indeed, the routine exercise of political judgment in individual cases appears to be neither necessary nor consistent with the establishment of an independent Director of Prosecutions pursuant to our Recommendations".[71] [Emphasis added]

- "The Minister should not be involved in prosecution decisions".[72] [Emphasis added]

71. The principle of prosecutorial independence cannot be respected if the exercise of a discretional prosecutorial power, such as the power to appeal, is granted to someone like the Minister who is at the apex of the chain of command.[73]

72. In fact, the Second Dickson Report warns that mere statements uttered by the Minister "could make a fair and independent trial difficult" and "result in a dismissal of the charges".[74] In other words, the conduct of a criminal prosecution *by the Minister*, in and of itself, amounts to an abuse of process.

73. Any suspicion that "politics" plays a part in the handling of prosecutions undermines the integrity of the entire proceeding.[75] Yet, as prosecutor, the Minister cannot "exercise restraint in matters of military justice".[76] He must argue. This undermines the integrity of the proceedings at the appellate level.[77]

74. Simply put, the Minister is the very antithesis of a prosecutor who is independent of political pressure. The Minister himself is the political pressure.[78]

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71 Second Dickson Report at 14, **R.B.A., Vol. IV, Tab 57**.
72 *Ibid* at 16, 23, **R.B.A., Vol. IV, Tab 57**.
73 *Gagnon* at para 188, **R.B.A., Vol. II, Tab 27**.
74 Second Dickson Report at 3, **R.B.A., Vol. IV, Tab 57**. See also Jerry Pitzul, "Speaking Notes to the Advisory Committee on Defence" (Halifax, 3 February 1997), last page [**Pitzul**] **R.B.A., Vol. IV, Tab 55**.
75 Rosenberg, *supra* note 44 at para 19, **R.B.A., Vol. IV, Tab 66**.
76 Second Dickson Report at 3, **R.B.A., Vol. IV, Tab 57**.
77 *Idem*.
78 Chris Madsen, *Military Law and Operations*, volume 1 (Canada Law Book, loose-leaf (Toronto: Carswell, 2008, updated July 2015) para 3:20.20, at pp 3-9 to 3-12, **R.B.A., Vol. IV, Tab 64**.

iii. The Minister Lacks the Prosecutorial Independence of the Attorney General and the DPP

75. The Minister's constitutional and legal position is distinct from the Attorney General and the DPP who are independent prosecutors.

76. Unlike the Attorney General, the Minister is conferred no prosecutorial independence by the Constitution. In *Krieger*, this Court declared that it is the Attorney General who, as a matter of constitutional principle, is fully independent in the exercise of prosecutorial discretion.[79]

77. The independence of the office of the Attorney General is based upon its constitutional role and lineage. "Custom, tradition and constitutional usage have charged the Attorney General" with the administration of justice as a primary duty.[80] The Court emphasized "the unique and important role of the Attorney General"[81] as guardian of the public interest, Chief Law Enforcement Officer and ultimate keeper of the public peace.[82] In *Krieger*, this Court identified the constitutional roots of the office of the Attorney General:

> In Canada, the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*. Although the specific duties conventionally exercised by the Attorney General are not enumerated, s. 135 of that Act provides for the extension of the authority and duties of that office as existing prior to Confederation.[83]
>
> [Emphasis added]

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79 *Krieger* at para 3, **R.B.A., Vol. I, Tab 17**. See also Public Prosecution Service of Canada "Public Prosecution Service of Canada Deskbook" (25 September 2014) at 3-4 online: http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch04.html, **R.B.A., Vol. IV, Tab 56.**

80 *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, para 35, **R.B.A., Vol. I, Tab 20**; See also *Department of Justice Act*, RSC 1985 c. J-2, s. 5, **R.B.A., Vol. I, Tab 5**; *Gagnon* at para 132, **R.B.A., Vol. II, Tab 27**.

81 *Krieger* at para 23, **R.B.A., Vol. I, Tab 17**; *Gagnon*, at para 134, **R.B.A., Vol. II, Tab 27**.

82 See also *Department of Justice Act*, RSC, 1985, c. J-2 at para 4(*b*)), **R.B.A., Vol. I, Tab 5.**

83 *Krieger* (The office of the Attorney General was created amidst a history wherein the Attorney General of England had intentionally never been accorded a place in the British cabinet, a fact of profound constitutional significance which reflected the determination in England that criminal prosecutions would not be politically tainted, at paras 26, 29), **R.B.A., Vol. II, Tab 17**.

78. In contrast, the Minister's office has no constitutional dimension.[84] As stated by the Appeal Court in *Gagnon*, there is "simply no possible equivalence between the constitutional protection given to the Attorney General's independence with regard to prosecutorial powers and the recognized protections afforded to other Cabinet ministers."[85]

79. The Minister does not hold the guardianship of the public interest in the domain of criminal law in Canada. He is not in a constitutionally protected position to advance the public interest in deciding whether to prosecute criminal conduct, especially where the broader public interest[86] clashes with the distinctly military interests.[87]

80. Furthermore, unlike the DPP, the Minister has no statutorily protected prosecutorial independence. In addition to acting on behalf of a constitutionally independent Attorney General,[88] the *Director of Public Prosecutions Act* provides the DPP with security of tenure[89] and financial security during that period.[90] In these circumstances, a reasonable person would conclude that the DPP is independent.

iv. A Reasonable Person Would Conclude that the Minister Is Not Independent

81. The Minister cannot be perceived as independent in the eyes of a reasonable person given that he is subject to collective ministerial responsibility and that his quasi-judicial role is incompatible with his executive role. Section 245(2) is therefore inconsistent with the principle of prosecutorial independence in violation of s. 7 of the *Charter*.

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84 Pitzul at last page, **R.B.A., Vol. IV, Tab 55**.

85 *Gagnon* at para 136, **R.B.A., Vol. II, Tab 27**.

86 See e.g. the *Cossitt* affair described in John Edwards, *The Attorney General, Politics and Public Interest* (London, Sweet & Maxwell, 1984) (the Attorney General in that case emphasized that "in exercising his discretion as to whether or not he should consent to a prosecution under the Official Secrets Act, it was incumbent upon him to ensure that the widest possible public interests of Canada were taken into account" at 360), **R.B.A., Vol. IV, Tab 60**.

87 O'Reilly & Healy at 43, **R.B.A., Vol. IV, Tab 65**.

88 *Director of Public Prosecutions Act*, SC 2006, c. 9, s 121 at s 3(3), **R.B.A., Vol. I, Tab 6**.

89 *Ibid*, s 5(1), **R.B.A., Vol. I, Tab 6**.

90 *Ibid*, s 5(5), **R.B.A., Vol. I, Tab 6.** See also *Gagnon* at paras 138-140, **R.B.A., Vol. II, Tab 27**.

82. On the other hand, a reasonable person, who is aware of the special constitutional protection of the Attorney General's independence, would conclude that the office of the Attorney General is independent.[91]

83. The same would be said of the DPP whose prosecutorial independence is statutorily protected.[92]

84. Unlike the Attorney General and the DPP, the Minister lacks prosecutorial independence. Neither the Constitution nor the *NDA* provide any principle or measure to ensure any degree of prosecutorial independence to the Minister.

B. THE RIGHT TO AN INDEPENDENT PROSECUTOR UNDER SECTION 11(D)

85. With respect, the Appeal Court in *Gagnon* did not appear to understand this argument as it may not have been clearly articulated. The Appeal Court stated that its members had "no ties with the Minister" and that they "enjoy the essential conditions of judicial independence."[93] With respect, this was not the point.

86. The point is that lack of prosecutorial independence undermines judicial independence. The rationale for the near absolute unreviewability of prosecutorial discretion makes this clear.

87. Prosecutorial independence is what legitimizes the near-absolute unreviewability of prosecutorial discretion. The abuse of process doctrine practically prevents judicial review of prosecutorial discretion on the premise of prosecutorial independence.[94]

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91 *Gagnon* at paras 128-136, **R.B.A., Vol. II, Tab 27.**
92 *Ibid* at paras 138-142, **R.B.A., Vol. II, Tab 27.**
93 *Ibid* at para 247, **R.B.A., Vol. II, Tab 27**.
94 *Krieger* at para 31, **R.B.A., Vol. I, Tab 17.**

88. If the prosecutor is not independent, how can near-absolute unreviewable prosecutorial discretion be legitimate? Indeed, without prosecutorial independence the courts could be called to review prosecutorial decisions even absent an abuse of process. This would erode judicial independence.[95]

89. If a judge is called to review prosecutorial decisions in the absence of an abuse of process, he may no longer be perceived as independent and impartial. The reasons of Viscount Dilhorne approvingly quoted by this Court in *R. v. Power* make this point:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.[96]
>
> [Emphasis added]

90. In *Krieger*, this Court again recognized that judicial review of prosecutorial discretion will undermine judicial independence. The Court approvingly quoted from David Vanek who explained:

> It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.[97]
>
> [Emphasis in original]

91. In this perspective, lack of prosecutorial independence erodes judicial independence.

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95 *Krieger* at para 31, **R.B.A., Vol. I, Tab 17**.
96 *R. v. Power*, [1994] 1 SCR 601 at 625, 627, 628, **R.B.A., Vol. III, Tab 37**.
97 *Krieger* at para 31, **R.B.A., Vol. I, Tab 17**.

92. In the case at bar, given the lack of independence of the Minister, the doctrine of abuse of process should be inapplicable. As a result, this Court could be called to review the Minister's prosecutorial decision to appeal in the absence of an abuse of process. In doing so, this Court would "become a supervising prosecutor" and cease to be "an independent tribunal".[98]

93. Section 245(2) thus violates the right to be tried by an independent tribunal guaranteed under s. 11(d) of the *Charter*.

C. SECTION 245(2) CANNOT BE JUSTIFIED UNDER SECTION 1

94. To justify a s. 7 violation, the Minister must demonstrate[99] that the purpose of s. 245(2) is pressing and substantial. He must also demonstrate that the Minister's right to appeal minimally impairs the right to be prosecuted by an independent prosecutor guaranteed under s. 7. Yet, the government has proved unable to call any evidence under s. 1.[100] Conventional assumptions are simply insufficient to justify a *Charter* violation under s. 1[101] – even in the context of military law where national security is at stake.[102]

(a) The Purpose of s. 245(2) to Confer the Right of Appeal to the Minister Is Not Pressing and Substantial

95. The purpose of s. 245(2) is to confer the right of appeal on the Minister to the exclusion of an independent prosecutor. There is no evidence to explain why this purpose is pressing and substantial.[103]

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98 *Krieger* at paras 31, 32, **R.B.A., Vol. I, Tab 17**.
99 *Carter* at para 119, **R.B.A., Vol. I, Tab 12**.
100 *Gagnon* at para 206, **R.B.A., Vol. II, Tab 27**.
101 *Carter* at para 119, **R.B.A., Vol. I, Tab 12**.
102 *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR SCC 248, McLaughlin CJC ("So, while Cicero long ago wrote "*inter arma silent leges*" (the laws are silent in battle) (*Pro Milone* 14), we, like others, must strongly disagree" at para 5), **R.B.A., Vol. I, Tab 9**.
103 *Gagnon* at paras 216-222, **R.B.A., Vol. II, Tab 27**.

96. The legislative facts demonstrate that Parliament chose the Minister, to the exclusion of an independent prosecutor, to exercise the right to appeal. Before adopting *Bill C-25*, Parliament considered recommendation 14 of the Second Dickson Report (abolishing the Minister's right to appeal).

97. In fact, *Bill C-25* was intended to address, *inter alia*, the concerns raised by the quasi-judicial role of the Minister.[104] In adopting *Bill C-25*, Parliament accepted the Second Dickson Report's recommendations 1, 2, 3, 4, 6, 10, 11, 12, 13 and 15 abolishing many quasi-judicial powers of the Minister. In adopting *Bill C-25*, Parliament specifically rejected all recommendations to abolish the Minister's right to appeal.[105]

98. In particular, Parliament rejected recommendation 14 to amend s. 245(2) by abolishing the Minister's right to appeal to this Court.[106]

99. There is no evidence to explain why Parliament knowingly maintained the Minister's right of appeal, to the exclusion of an independent prosecutor.

100. Since no pressing and substantial objective can be identified, the Appeal Court in *Gagnon* correctly concluded that "granting the Minister the power to appeal does not meet an identifiable objective is pressing and substantial."[107]

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104 David Goetz, *Bill C-25: An Act to Amend the National Defence Act*, LS-311E (Ottawa: Law and Government Division, 18 February 1998) pp 5, 6, 8,16, 21, including footnotes 4, 7 at 22, **R.B.A., Vol. IV, Tab 61**. [**Summary of *Bill C-25***]

105 Parliament rejected recommendations 8 and 14. Recommendation 8 was to transfer to the independent director of prosecutions the right to appeal a finding that a person is not a dangerous mentally disordered accused: Second Dickson Report at 16, **R.B.A., Vol. IV, Tab 57**.

106 National Defence, *Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces – Final Report - 1999* (Ottawa, December 1999) at 118 (Recommendation Dickson 2-14), **R.B.A., Vol. IV, Tab 54**.

107 *Gagnon* at para 222, **R.B.A., Vol. II, Tab 27**. See also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras 113-16, **R.B.A., Vol. III, Tab 50**.

(b) Section 245(2) Does Not Minimally Impair the Right to an Independent Prosecutor

101. Section 245(2) does not satisfy the minimal impairment requirement.[108] There is no reason why appeals cannot be conducted by an independent prosecutor. For example, in the United Kingdom, all military prosecutions are under the supervision of the independent Attorney General.[109]

102. Section 245(2) is unnecessary to practically enforce military discipline.[110] To claim otherwise amounts to fearmongering. Such discourse relies on conventional assumptions. No evidence justifies s. 245(2) under s. 1.

103. Section 245(2) cannot be justified by relying on the current practice of the Minister to be represented by counsel in the office of the Director of Military Prosecutions. Legal counsel acting on behalf of the Minister in this appeal is instructed by the Minister. A solicitor-client relationship binds them. Legal counsel in this appeal is the Minister's advocate. Legal counsel cannot be any more independent than her or his client, the Minister. The Minister's legal counsel cannot stand as a buffer between political power and the citizen.[111]

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108 *Gagnon* at paras 223-226, **R.B.A., Vol. II, Tab 27**.

109 *Ibid* at paras 224, 225, **R.B.A., Vol. II, Tab 27**. See also Ministry of Defence (UK), "Guidance – Service Prosecuting Authority" (12 December 2012) online: https://gov.uk/service-prosecuting-authority, **R.B.A., Vol. IV, Tab 53**; Houlder, Bruce, "Prosecutions for the Services" Counsel, online: http://counselmagazine.co.uk/, **R.B.A., Vol. IV, Tab 63**.

110 The maintenance of discipline depends, *inter alia*, on speedy trials: *Généreux* at para 60, **R.B.A., Vol. II, Tab 28**; *NDA*, s. 162, **R.B.A., Vol. I, Tab 8**. It cannot be ignored that the Minister's right of appeal is exercised on average 21 months after the commission of the offence. Bronson reports that the requirements of military discipline require a maximum delay of 6 months. As such, the Minister's right of appeal cannot be said to be necessary to maintain military discipline: see Berzins, Andrejs and Malcolm Lindsay, *External Review of the Canadian Military Prosecution Service – Final Report* (Ottawa: Bronson Consulting Group, 31 March 2008) at 9, 10, **R.B.A., Vol. IV, Tab 51**.

111 *Gagnon* at para 193, **R.B.A., Vol. II, Tab 27**; *Regan* at para 160, **R.B.A., Vol. III, Tab 39**.

D. THE APPROPRIATE REMEDY IS TO STRIKE DOWN S. 245(2)

104. There appears to be no alternative to striking down. Reading down and reading in are not available. The intent of Parliament was clear. Parliament intended to confer the right of appeal to the Minister and to no one else. Although Parliament was aware of the provision's defect, Parliament chose to adopt it as is.[112] Reading in or reading down would therefore usurp Parliament's role. For this reason, striking down is the appropriate remedy under s. 52 of the *Constitution Act, 1982*.[113]

E. THE DECLARATION OF INVALIDITY SHOULD NOT BE SUSPENDED

105. In his response to the motion to quash, the Minister is asking this Court to suspend the invalidity of s. 245(2) for at least one year.[114] He claims that not doing so would endanger the rule of law.

106. This assertion amounts to fearmongering. There is no evidence to support it.

107. In fact, during the past 57 years, since the Minister's right of appeal has been enacted, the Minister successfully appealed to this Court once. It was a sentence appeal.[115]

108. The Minister failed to justify a suspension of the declaration of invalidity. A suspension would not meet the two applicable criteria established in *Schachter* later reiterated in *Hislop*.[116]

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112 Summary of *Bill C-25*, **R.B.A., Vol. IV, Tab 61**.

113 *R. v. Ferguson*, [2008] 1 SCR 96 at paras 51, 65, **R.B.A., Vol. II, Tab 25**.

114 Minister's Response to Motion to Quash at para 41, A.R., p 204.

115 *R. v. St-Onge*, [2011] 1 SCR 625, **R.B.A., Vol. III, Tab 41**. This Court refused leave to appeal by the Minister three times: *R. v. Wehmeier*, 2014 CMAC 5, leave to appeal to SCC refused, **R.B.A., Vol. III, Tab 46**; *R. v. Trépanier*, 2008 CMAC 3, leave to appeal to SCC refused, **R.B.A., Vol. III, Tab 44**; *R. v. Grant*, 2007 CMAC 2, leave to appeal to SCC refused, **R.B.A., Vol. II, Tab 31**. Legislative history of s. 245(2) of *NDA*: Original 1950, c. 43, s 196; RSC 1952 c. 184, s. 196; SC 1959, c. 5, s. 6(1); SC 1969-70 c. 44, s. 10; RSC 1970 c. N-4, s. 208; RSC 1985 c. N-5, s. 245; SC 1997 c. 18, s. 134, **R.B.A., Vol. II, Tab 8**. The right of appeal to this Court was first conferred on the Minister in 1959: see Senate Debate, 9 March 1959, pp 329-30, **R.B.A., Vol. IV, Tab 52**.

116 *Schachter v. Canada*, [1992] 2 SCR 679 at p 719, **R.B.A., Vol. III, Tab 48**; *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429 at para 90, **R.B.A., Vol. I, Tab 11**.

109. First, striking down s. 245(2) will pose no danger to the public. Courts martial will continue to try and punish service offences. There is no risk of impunity in this case. The dismissal of the appeal against the Respondent will be no "windfall"[117] for the Respondent as a new trial by court martial has been ordered.[118]

110. Second, striking down s. 245(2) poses no threat to the rule of law. As this Court has recognized, the right to an appeal does not flow from either the rule of law[119] or the common law.[120] The prosecutor's right of appeal even less so.[121] There exists no constitutional or common law right to an appeal. In fact, "appeals are solely creatures of statute."[122] In short, independent and impartial courts martial will continue to try and punish service offences in accordance with the rule of law.

111. The Respondent's defence before this Court relies on a declaration that s. 245(2) violates his *Charter* rights. In *Powley*, this Court stated that "it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge."[123] [Emphasis added] In his case, if the Respondents are successful, no appeal lies.

112. There is no reason to justify suspending the declaration of invalidity in this case.

113. In the alternative, should this Court nevertheless suspend the declaration of invalidity, the Respondent asks this Court to be exempted from the period of suspension. This Court has previously recognized that successful *Charter* litigants in penal matters should personally benefit from the declaration of invalidity.[124]

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117 *Gagnon* at para 271, **R.B.A., Vol. II, Tab 27**.

118 *Cawthorne* at para 38, Appellant's Record**,** hereinafter **"A.R."**, p 122.

119 *Charkaoui v. Canada*, [2007] 1 SCR 350 at para 136, **R.B.A., Vol. I, Tab 13**.

120 *R. v. Meltzer*, [1989] 1 SCR 1764 at 1773, **R.B.A., Vol. II, Tab 34**.

121 *R v. Evans*, [1993] 2 SCR 629 at 645-46, **R.B.A., Vol. II, Tab 24**; *R. v. Graveline*, [2006] 1 SCR 609 at para 13, **R.B.A., Vol. II, Tab 30**.

122 *R. v. Smith*, [2004] 1 SCR 385 at para 21, **R.B.A., Vol. III, Tab 40**; *R. v. W.(G.)*, [1999] 3 SCR 597 at para 8, **R.B.A., Vol. III, Tab 45**; *Kourtessis v. M.N.R.*, [1993] 2 SCR 53 at 69, 70, 81, **R.B.A., Vol. I, Tab 16**.

123 *R. v. Powley*, [2003] 2 SCR 207 at para 52. [***Powley***], **R.B.A., Vol. III, Tab 38**.

124 *R. v. Guignard*, [2002] 1 SCR 472 at paras 32, 34, **R.B.A., Vol. II, Tab 32**; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at para 20, **R.B.A., Vol. III, Tab 47**.

F. APPEAL AS OF RIGHT AND MISTRIAL

114. The Minister's appeal as of right to this Court is limited to the following question of law on which Veit J.A. dissented: Did the trial judge err in denying the motion for mistrial?

(1) The Minister's Appeal as of Right Is Limited

115. This is an appeal as of right.

116. In his memorandum of fact and law, the Minister now raises an additional question on which no judge of the Appeal Court dissented.[125] The Minister's new question is that the re-examination question and answer were admissible. The Minister never raised this question neither at trial[126] nor at the Appeal Court.[127] As a result, the Appeal Court did not rule on this question.

117. The Minister did not seek leave on this new ground of appeal under s. 245(1)(b) of the *NDA*.

118. Justice Veit dissented on one question of law. That is:

> Did the military judge make an error when he exercised his discretion to deny the motion for mistrial?[128]

119. Pursuant to s. 245(1)(a) of the *NDA*, the Minister's right of appeal is limited to the "question of law on which a judge of the Court Martial Appeal Court dissents."[129] [Emphasis added]

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125 Minister's Factum at paras 112-120.
126 Decision on Mistrial, A.R. at p 284, line 19; p 285, lines 17, 18.
127 Minister's Memorandum of Fact and Law CMAC-575 at paras 35-47
128 Minister's Notice of Appeal, A.R., at p 153; *Cawthorne* at paras 4, 40, A.R., pp 111 and 123.
129 *NDA*, s. 245(1)(a), **R.B.A., Vol. I, Tab 8**.

120. As this Court decided in *Fliss*, the prosecution should not be authorized to raise a question which was not first raised before the Appeal Court.[130]

121. The statute limits the Minister's right of appeal to the question of law on which Veit J.A. dissented. The Minister has no appeal as of right on the additional question. Should the Minister wish to argue other grounds of appeal, "leave to appeal must be sought on those other grounds".[131]

122. The Respondent will therefore limit his response to the issue that is rightfully under appeal before this Court.

(2) Mistrial

123. In his decision, the trial judge misapplied the test to grant a mistrial. The legal test is whether it is likely that the exposure of the jury to the inadmissible evidence "could have affected the jury to the point that the entire trial was compromised and no remedy other than a new trial was available."[132]

124. In *Khan*, Lebel J. provided some useful factors to be considered to determine whether a miscarriage of justice occurred. These factors are consistent with the analysis of Arbour J. to determine a mistrial.[133] These factors include:

(a) Did the irregularity relate to a point which was particularly central to the case?[134]

(b) What is the relative gravity of the irregularity?[135]

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130 *R. v. Fliss*, [2002] 1 SCR 535, 2002 SCC 16 at paras 51-53, **R.B.A., Vol. II, Tab 26**; Desjardins, Tristan, *L'appel en droit criminel et pénal,* 2nd ed. (Toronto: LexisNexis, 2012) at para 611, **R.B.A., Vol. IV, Tab 59** (Le ministère public ne devrait pas être autorisé à soulever un argument qu'il n'a pas soulevé devant la cour d'appel);

131 Henry Brown, *Supreme Court of Canada Practice 2015* (Toronto: Carswell, 2014) at p 12, **R.B.A., Vol. IV, Tab 58**; *NDA*, s. 245(1)(b) , **R.B.A., Vol. I, Tab 8**.

132 *R. v. Khan*, [2001] 3 SCR 823, 2001 SCC 86 at para 32 [***Khan***], **R.B.A., Vol. II, Tab 33**.

133 *Ibid* at paras 32-37, **R.B.A., Vol. II, Tab 33**.

134 *Ibid* at para 75, **R.B.A., Vol. II, Tab 33**.

135 *Ibid* at para 76, **R.B.A., Vol. II, Tab 33**.

(c) Was the trial held before a judge sitting alone or a judge and jury?[136]

(d) Was the irregularity remedied at the trial?[137]

(a) Did the irregularity relate to a point which was particularly central to the case?[138]

125. The military judge failed to recognize that the inadmissible evidence was particularly central to the case although he "agreed with the defence that the re-examination evidence could be understood as an admission by Ordinary Seaman Cawthorne that he knew that he had downloaded child pornography onto his iPhone and knew that he was in possession of it".[139]

126. The inadmissible evidence amounted to an admission of guilt. The inadmissible question and answer related to an admission of the Respondent to the witness that he had in fact done what he was alleged to have done; i.e. that the appellant had knowingly accessed child pornography and had thereafter retained it in his possession. As the Appeal Court put it, this was "the crux of the Crown's case."[140] [Emphasis added].

127. This inadmissible evidence could not be more "pivotal"[141] and "central"[142] to the case.

(b) What is the relative gravity of the irregularity?[143]

128. The only direct evidence in this case was the inadmissible evidence. The panel was exposed to the inadmissible incriminating statement of the accused. This statement was in relation

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136 *Khan* at para 78, **R.B.A., Vol. II, Tab 33**.
137 *Ibid* at para 79, **R.B.A., Vol. II, Tab 33**.
138 *Ibid* at para 75, **R.B.A., Vol. II, Tab 33**.
139 *Cawthorne* at para 29, A.R., p 119. Decision on Mistrial, A.R. at p 289, lines 29-32; p 290, lines 28-33.
140 *Cawthorne* at para 30, A.R., p 119.
141 *Ibid* at para 35, A.R., p 121.
142 *Idem*.
143 *Khan* at para 76, **R.B.A., Vol. II, Tab 33**.

to the crux of the case. In these circumstances, the irregularity is of significant importance.[144]

(c) Was the trial held before a judge sitting alone or a judge and jury?[145]

129. The inadmissible confession of the accused could not have had a more severe impact on the fairness of this trial because it was held before a panel. This is especially true in this case where the charges relate to sexual crimes against children. The inadmissible confession of the accused could have had a psychological effect on panel members' decision to convict on the basis of circumstantial evidence alone. The fact that the trial was held before a panel obviously militates for a finding of unfairness.[146]

(d) Was the irregularity remedied at the trial?[147]

130. The irregularity was not effectively remedied at the trial. The trial judge did not issue a "clear and forceful"[148] warning about the inadmissible evidence. The military judge's warning was not carefully worded. It was unclear. His warning was worded as follows:

> You will recall that I have – or that I gave you a specific instruction after the testimony of ... a witness that was called by the prosecution. You will recall that I asked you to ignore the unique question and answer that arose from the re-examination of the witness by counsel for the prosecution, because they were the product of improper cross-examination.
>
> This instruction remains, but I further instruct you that you shall not draw any adverse inference against the accused Ordinary Seaman Cawthorne, from that inadmissible evidence because it is both unreliable and prejudicial. I therefore instruct you to completely and absolutely ignore the inadmissible evidence and that you shall evacuate from your mind anything about it.
>
> [Emphasis added]

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144 *Cawthorne* at para 34, A.R., p 121; *Khan* at para 118, **R.B.A., Vol. II, Tab 33**.
145 *Khan* at para 78, **R.B.A., Vol. II, Tab 33**.
146 *Ibid* at para 122, **R.B.A., Vol. II, Tab 33**.
147 *Ibid* at para 79, **R.B.A., Vol. II, Tab 33**.
148 *Ibid* at para 82, **R.B.A., Vol. II, Tab 33**.

131. The underlined words could be construed by the panel as indicating that it is the cross-examination and not the re-examination that was improper. Given that the Respondent is entitled to advance his case on the basis of the real possibility of the worst case scenario,[149] it follows that the panel members could have understood that the inadmissibility of the evidence was caused by the improper cross-examination of the witness by defence counsel and not because of the impropriety of the prosecutor's question on re-examination.

132. The warning was not clear. In this situation we cannot presume that the warning diminished the danger that the panel would misuse this information when rendering its verdict.[150]

Conclusion on Mistrial

133. Considering the above factors, the inadmissible confession affected the fairness of the trial.[151] It is difficult to articulate the unfairness that the inadmissible evidence caused in this case better than Zinn J.A. for the majority:

> In my view, the additional introduction of a confession that the appellant did the things for which he was charged, was not only pivotal and central to the case, but was likely to be very weighty, whether consciously or not, in the panel's assessment of the evidence given that the defence had taken the irrevocable step of not cross-examining the former girlfriend about the nature of the relevant conversations she had with the accused during the period following the charges being laid. [Emphasis added]

134. The inadmissible confession affected the fairness of the trial. The trial judge should have declared a mistrial.

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149 *Khan* at para 33, **R.B.A., Vol. II, Tab 33**.
150 *Ibid* at para 82, **R.B.A., Vol. II, Tab 33**.
151 *Ibid* at para 84, **R.B.A., Vol. II, Tab 33**.

135. Furthermore, the curative proviso cannot cure the trial judge's error in rejecting the motion for a mistrial.[152] As there was no overwhelming evidence of guilt based on the admissible evidence, it cannot be said that the panel's verdicts would have been the same, absent hearing the re-examination evidence of the former girlfriend which amounted to evidence of a confession from the appellant.

136. The dissenting judge's opinion to the contrary is based on a series of inferences that presumes the best case scenario for the prosecution.

137. Ultimately, in the particular circumstances of this case, both the mistrial test and the curative proviso test bring the same result: a new trial should be ordered.

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[152] *Khan* at para 37, **R.B.A., Vol. II, Tab 33**.

PART IV – SUBMISSIONS CONCERNING COSTS

138. The Respondent does not seek costs on this motion nor should costs be awarded against him.

PART V – ORDER SOUGHT

PLEASE THIS HONORABLE COURT TO:

DECLARE s. 245(2) of the *National Defence Act*, and its regulatory counterpart found at *Queen's Regulations and Orders for Canadian Forces* (*QR&O*) 115.27 invalid pursuant to s. 52(1) of the *Constitution Act*, 1982;

QUASH the Minister of National Defence's Notice of Appeal;

DISMISS the Minister of National Defence's appeal.

Gatineau, April 15, 2016

Mark Létourneau, LCdr **Jean-Bruno Cloutier, LCol**

Defence Counsel Services
Counsel for the Respondent

PART VI –TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence

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Government Documents

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Doctrine

Doctrine ***(cont'd)*** **Paragraph(s)**