File Nos. 40103
40065
40046
39822
39820

SUPREME COURT OF CANADA

(ON APPEAL FROM JUDGMENTS OF THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

LEADING SEAMAN C.D. EDWARDS
CAPTAIN C.M.C. CRÉPEAU
GUNNER K. FONTAINE
CAPTAIN IREDALE

APPELLANTS
(Respondents)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Appellant)

AND BETWEEN:

SERGEANT S.R. PROULX
MASTER-CORPORAL J.R.S. CLOUTIER

APPELLANTS
(Respondents)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Appellant)

(Style of cause continues next page)

APPELLANTS' FACTUM

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

LAFORTUNE
LEGAL

L-4823-23
Montréal 514 374-0400 | Québec 418 641-0101 | **lafortune.ca**

AND BETWEEN:

CORPORAL K.L. CHRISTMAS

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

AND BETWEEN:

LIEUTENANT (NAVY) C.A.I. BROWN

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

AND BETWEEN:

SERGEANT A.J.R. THIBAULT

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

Commander Mark Philippe Létourneau
Lieutenant Commander Patrice Desbiens
Major Francesca Ferguson
Defence Counsel Services
Centre Asticou, bloc 2600
241 de la Cité-des-Jeunes Blvd.
Gatineau, Québec
J8Y 6L2

Tel.: 613 979-4504
Fax: 819 997-6322
mark.letourneau@forces.gc.ca
patrice.desbiens@forces.gc.ca
francesca.ferguson@forces.gc.ca

Counsel for Appellants

Lieutenant Colonel Karl Lacharité
Canadian Military Prosecution Service
National Defence Headquarters
7th Floor, South Tower
101 Colonel By Drive
Ottawa, Ontario
K1A 0K2

Tel.: 613 996-6333
karl.lacharite@forces.gc.ca

Counsel for Respondent

TABLE OF CONTENTS

Page

APPELLANTS' FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS 1

Overview 1

Facts 3

(1) The public confidence crisis in the military justice system 5

(2) Longstanding problems with the independence of military judges 5

(3) The military prosecution of the CMJ, Colonel Dutil 8

(4) Decisions below 10

PART II – QUESTIONS IN ISSUE 12

PART III – ARGUMENT 14

A. A TRULY INDEPENDENT MILITARY JUDICIARY REQUIRES CIVILIAN JUDGES 14

(1) Military judges belong to the very CAF institution that lays charges against accused persons. 15

(a) The rule against bias requires judges not to preside over cases involving organizations to which they are affiliated. 15

(b) Military judges are institutionally biased. 16

(c) The conflicting roles of judge and officer aggravates reasonable apprehension of bias. 17

TABLE OF CONTENTS

Page

(2) Military judges are members of the executive exercising core judicial functions. 18

(a) Our Constitution disallows members of the executive branch from exercising core judicial functions. 19

(b) Military judges are members of the executive branch performing core judicial functions. 19

i. Military judges are members of the executive branch. 20

ii. Military judges perform core judicial functions. 20

(c) No safeguard changes the inherent executive nature of military judges. 21

(3) Military judges are subject to the pressure of being under the chain of command's disciplinary authority. 21

(a) Disciplining judges cannot depend on the discretion of the executive branch. 22

(b) The discipline of military judges depends on the discretion of the executive branch. 22

B. A TRULY INDEPENDENT MILITARY JUDICIARY IS REALISTIC AND PRACTICAL 27

(1) The concerns in *Généreux* 27

(2) The concerns in *Généreux* are now moot. 29

(3) A truly independent military judiciary is a constitutional minimum. 32

(a) The public confidence crisis in the military justice system. 32

TABLE OF CONTENTS

Page

(b) The exclusion of civilian judges erodes public confidence in the military justice system. 32

(c) A truly independent military judiciary is essential to instill public confidence in the military justice system. 34

C. THE APPROPRIATE REMEDY IS AN IMMEDIATE DECLARATION OF INVALIDITY 36

(1) A declaration of invalidity respects the role of the legislature. 36

(2) Suspending the right to an institutionally independent and impartial judge is unjustified given that military discipline would not be endangered by the declaration of invalidity. 37

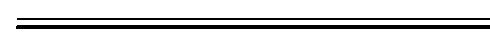
(3) If the declaration is suspended, the Appellants should be exempted. 39

PART IV – COSTS 40

PART V – ORDER SOUGHT 40

PART VI – PUBLICATION BANS 41

PART VII – TABLE OF AUTHORITIES 42



APPELLANTS' FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS

Overview

1. Our people who serve Canada at the peril of their life deserve to be judged by judges who are as independent and impartial as those who judge anyone else in our country. In fact, when they are sentenced to imprisonment by a military judge, they serve their sentence in the same civilian penitentiary or prison as any other person sentenced by a civilian judge.

2. This case is about ensuring the constitutional right of our soldiers to be tried by an independent and impartial judge guaranteed under s 11(d) of the *Canadian Charter of Rights and Freedoms*[1] (*Charter*) is not denied on the basis of operational imperatives that are nothing more than false assumptions.

3. In *Généreux*[2], this Court acknowledged that the military status of military judges raised a reasonable apprehension of bias and that only civilian judges could be truly independent. This remains true today. Indeed, as officers of the Canadian Armed Forces (CAF):

- Military judges belong to the very CAF institution that lays charges against the accused persons;
- Military judges are members of the executive who exercise core judicial functions; and
- Military judges are subject to the pressure of being under the CAF chain of command's disciplinary authority.

---

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.

2 *R v Généreux*, [1992] 1 SCR 259.

4. But due to concerns over the practical necessity that military judges be CAF officers, the *Généreux* Court maintained the constitutionality of military status for military judges.

5. Significant and uncontroversial social facts have since dissipated those concerns:

- Civilianized military judges preside over courts martial in the United Kingdom and New Zealand; and

- The CAF military hierarchy and the Minister of National Defence (MND) confirm that civilianized military judges with a sufficient degree of military experience could effectively preside over our courts martial in the context of the CAF.

6. The legislative scheme under the *National Defence Act*[3] (*NDA*) prescribing that military judges be CAF officers can therefore no longer constitutionally survive.

7. Indeed, an informed person, viewing the matter realistically and practically, now knows that no military rationale justifies depriving the right of accused persons to be tried by an independent and impartial judge – a judge separate and apart from the CAF.

8. Inserting individuals unaffiliated to the CAF, or any other part of the executive branch, in the pivotal role of military judge is not a matter of policy. Nor is it a quest for ideal justice. Rather, it is a constitutional minimum. Indeed, how can the public have confidence in a military judiciary that is not truly independent – especially given that the military status of judge is not practically necessary?

---

[3] RSC, 1985, c N-5.

Facts

9. Military judges are CAF officers.[4]

10. CAF officers have thus presided the courts martial of each appellant. These CAF officers hold the rank of lieutenant-colonel or commander. Five ranks exist above that rank.[5]

11. Importantly, as CAF officers, the Appellants' military judges belong to the very same CAF institution who investigated, laid charges against, and prosecuted them.[6]

12. Although exclusively run by CAF members[7], the military justice system is "a "full partner in administering justice alongside the civilian justice system".[8]

13. As a result, the military system allows military authorities to ignore decisions made by civilian authorities. Entrenched in an insular military culture "impervious to outside advice and influence"[9], military authorities sometimes second-guess decisions made by civilian authorities even in matters that transcend the disciplinary interests of the CAF.

---

4 *NDA*, s 165.21, 165.24(2).

5 *NDA*, Schedule.

6 Military law establishes the following procedure to charge, deal with and try CAF members: 1) the CAF investigates allegations of service offences or service infractions: QR&O art 102.02; (2) the CAF obtains advice from a CAF legal officer before laying charges: QR&O art 102.07(2); (3) the CAF can lay charges if they believe that a service offence or service infraction has been committed: QR&O arts 102.04, 102.07; (4) CAF members who lay charges for a service offence refer it to another CAF member, the CAF prosecutor called the Director of Military Prosecutions (DMP): QR&O art 107.09; (4) the CAF prosecutor may prefer the charge or any other charge: QR&O art 110.01, s 165.12(1) *NDA*; and (5) CAF judges, also CAF members, try and sentence persons investigated, charged and prosecuted by the CAF. For provisions prior to the adoption of Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 42nd Parl, 1st Sess, 2018, see previous QR&O arts 106.02, 107.015, 107.02, 107.03, 109, 110.01.

7 Excluding appeals.

8 *R v Stillman*, [2019] 3 SCR 144 [***Stillman***] at para 20.

9 Louise Arbour. *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces*, 2022 [**Arbour Report**] at p 274. See also Pauline Collins. *The Military as a Separate Society: Consequences for Discipline in the United States and Australia,* (Pennsylvania, USA: Lexington Books, 2019) [**Collins**] at p 6, **Appellants' Book of Authorities, hereinafter "ABA", Tab 3**.

14. The case of the Appellant Sergeant Thibault provides a good example.

15. In January 2012, the complainant files a complaint with the civilian police.[10]

16. In November 2012, the Directeur des poursuites criminelles et pénales (DPCP), represented by Me Marie-Josée Guillemette, refuses to lay a charge of sexual assault for lack of evidence.[11]

17. The DPCP informs the complainant and Sergeant Thibault of the decision ending the matter.[12]

18. Nearly one year later, amid Operation HONOUR[13], the CAF rejects this decision of the civil authority and lays a charge of sexual assault against Sergeant Thibault.[14]

19. In January 2015, Chief Military Judge (CMJ) Colonel Dutil, terminates the court martial of Sergeant Thibault because the matter is insufficiently connected to the CAF.[15] This decision was overturned on appeal.[16]

20. Five years later, a CAF officer tries and convicts Sergeant Thibault.[17]

21. Sergeant Thibault therefore served an 18-month prison sentence for a sexual assault that civil authorities believed unfair to prosecute "*pour insuffisance de preuve*".[18] He has always maintained his innocence since being charged over 10 years ago.

22. Sergeant Thibault is not the only one who lost confidence in the military justice system. All Appellants are now being prosecuted during an unprecedented public confidence crisis in the

---

10 Agreed Statement of Fact at para 2, **Appellants' Record, hereinafter "AR", p 299.**
11 *Ibid* at para 3, **AR, p 299.**
12 *Ibid* at para 4, **AR, p 299.**
13 Canada, Government of Canada, *About Operation HONOUR* (The CAF mission to prevent and address sexual misconduct within its ranks). See also Arbour Report, *supra* note 9 at p 48, 49.
14 Agreed Statement of Fact at para 3, **AR, p 299.**
15 *R v Thibault*, 2015 CM 1001 at para 10.
16 *Stillman*, *supra* note 8.
17 *R c Thibault*, 2020 CM 5005 (February 2020) (The CAF judge believed the complainant on the basis of self-corroborating demeanour evidence: "**sa réaction émotive et spontanée** à la suggestion lors de son réinterrogatoire qu'elle était une partenaire active et passionnée lors des activités sexuelles avec l'accusé **corrobore** son témoignage lorsqu'elle dit ne pas avoir consenti" (Emphasis added) at para 31.), **AR, p 9.**
18 Agreed Statement of Fact at para 3, **AR, p 299**; *R c Thibault*, 2021 CM 5016 at para 72.

military justice system. This crisis is due in large measure to longstanding problems with the independence of military judges identified by eminent jurists over the past 20 years. Ultimately, judicial bias became a real concern for accused persons in 2018 when the military hierarchy laid charges against the CMJ, Colonel Dutil.

(1) The public confidence crisis in the military justice system

23. The appellants are not alone. The Canadian public, the CAF – and all accused persons – have lost confidence in the independence of the military justice system; particularly in relation to allegations of sexual offences.[19]

24. The Director of Military Prosecution (DMP) and the Canadian Forces Provost Marshal (CFPM) publicly acknowledges "the current crisis of public confidence in the military justice system, particularly as it relates to sexual assault cases".[20] Adding it is a "real and pressing concern".[21]

25. As a result, the DMP and the CFPM decided to immediately implement the interim recommendation of Justice Arbour to refer all investigations and prosecutions for sexual offences to civilian authorities[22], acknowledging this "is now appropriate and **necessary**".[23]

(2) Longstanding problems with the independence of military judges

26. Loss of public confidence in the military justice system has increased due to longstanding problems with the independence of military judges. Over the last 20 years, Chief Justice Lamer[24],

[19] See Arbour Report, *supra* note 9 at p 89.
[20] Canada, National Defence, *Joint Statement of the Canadian Forces Provost Marshal and the Director of Military Prosecutions* [**Joint Statement**].
[21] *Ibid*.
[22] *Ibid*; Louise Arbour. *Independant External Comprehensive Review of the Department of National Defence (DND) and the Canadian Armed Forces (CAF): Interim Recommendations* (Montréal, Canada: Borden Ladner Gervais Law Group, October 20, 2021), **ABA, Tab 2**; Canada, National Defence, *Interim Direction Regarding the Implementation of Madame Arbour Interim Recommendation*, 2021.
[23] Joint Statement, *supra* note 20 (Emphasis added). But see *NDA*, ss 70, 130 (sexual crimes remain a matter within the discretion of military authorities to prosecute).
[24] Antonio Lamer. *First Independent Review of the provisions and operation of Bill C-25*, 2003 [**Lamer Report**] at p 26 (creation of permanent military court).

Justice Létourneau[25], Chief Justice Lesage[26], and now Justice Fish[27] have identified several problems with the independence of military justice including solutions to fix them.

27. For instance, unlike civilian judges, military judges do not belong to a permanent court located "within the judicial branch of government".[28] Rather, they belong to a unit of the CAF.[29] They preside over *ad hoc* courts martial located within the executive branch, which remain dependent on commanding officers.[30] They attempt to "contort the current system of *ad hoc* courts martial into an independent judicial institution".[31] The system has experienced significant delay trying members as a result.[32]

28. Moreover, unlike civilian judges, military judges depend on the executive in the performance of judicial functions as they are embedded within the CAF and the Department of National Defence.[33] As a result, the *Court Martial Rules of Practice* have not been enacted since 2018.[34] Additionally, military judges must rely on the MND or Deputy Minister for the approval of their travel to courts martial.[35]

---

25 Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured legacy: the lessons of the Somalia Affair: report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Executive Summary, ES-79, (civilianization of military judges) [**Somalia Inquiry Report**].

26 Patrick J LeSage. *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, 2011 pp 41-42 (distinct rank for military judges).

27 Morris J Fish. *Report of the Third Independent Review Authority to the Minister of National Defence*, 2021 [**Fish Report**] at paras 75-77, 100-113 (The civilianization of military judges and creation of the permanent Military Court of Canada under the responsibility of the Minister of Justice).

28 *Ibid* at para 102.

29 *NDA*, s 17; Office of the Chief Military Judge, *Canadian Forces Organization Order 3763*, February 27, 2008; Fish Report at para 50.

30 Fish Report, *supra* note 27 at para 89.

31 Lamer Report, *supra* note 24 at p 26.

32 Fish Report, *supra* note 27 at para 94; Canada, Office of the Auditor General of Canada, *Report 3 – Administration of Justice in the Canadian Armed Forces*, 2018 at paras 3.10-3.30.

33 Fish Report, *supra* note 27 at para 99.

34 *Ibid* at paras 93-96, 116; *Valente v The Queen*, [1985] 2 SCR 673 [***Valente***] (Section 11(d) of the *Charter* requires "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" at 709.) See also *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 [***Criminal Lawyers' Association***] at para 40.

35 Fish Report, *supra* note 27 at para 98 ("the risk of executive interference with their institutional independence is clear" at para 99).

29. Independent reviews pursuant to s 273.601 of the *NDA* play a vital role to help the military justice system evolve in response to developments in law and society.[36] While Parliament's inaction to implement recommendations to guarantee judicial independence such as civilianization of miliary judges and the creation of a permanent court does not necessarily mean that s 11(d) is violated, they remain relevant to the determination of whether the military judiciary may be reasonably perceived as independent and impartial.[37]

30. In fact, sometimes recommendations by independent review authorities do reflect a constitutional requirement, not only a sound policy choice. For example, in *Leblanc*[38] the Court Martial Appeal Court of Canada (CMAC) found that Chief Justice Lamer's recommendation to remove the renewable terms of appointment for military judges was required under s 11(d) of the *Charter*. Of note, this recommendation was different from the position he had taken in *Généreux*. Another example can be found in *Trépanier*[39] where the recommendation to provide the right to accused persons to choose between a military judge alone and a military judge and panel was found to be required under s 7 and s 11(d) of the *Charter*.

31. For the reasons set out in this factum, Justice Fish's first recommendation to civilianize military judges likewise reflects a constitutional minimum.[40] This recommendation echoes the one offered by Justice Létourneau 25 years ago as president of the Commission on the Somalia Inquiry.[41]

32. *Leblanc* and *Trépanier* illustrate that sometimes court intervention is necessary for Parliament to implement recommendations that reflect constitutional minimums. Numerous unimplemented recommendations remain.[42] And so, as the CMAC declared 15 years ago, "the actual system is in dire need of a change and modernization to improve its fairness and meet constitutional standards."[43]

---

36 See *Stillman*, *supra* note 8 at para 53.
37 See especially *Stillman*, *supra* note 8 (19 paras refer to six reports). See also *R v Pett*, 2020 CM 4002 [***Pett***] at paras 56, 57.
38 *R v Leblanc*, 2011 CMAC 2 [***Leblanc***] at para 52.
39 *R v Trépanier*, 2008 CMAC 3 [***Trépanier***] at paras 62, 102, 104, 116.
40 Fish Report, *supra* note 27 at para 77 (recommendation #1: civilianization of military judges).
41 Somalia Inquiry Report, *supra* note 25, ES-79.
42 See e.g. Fish Report, *supra* note 27 (a permanent court at paras 83-85).
43 *Trépanier*, *supra* note 39 at para 110.

(3) The military prosecution of the CMJ, Colonel Dutil

33. Judicial bias became a real concern for accused persons in 2018 when the military hierarchy laid charges against the CMJ, Colonel Dutil.

34. Before his prosecution, the CMJ had presided countless courts martial over nearly 20 years. He was especially well-known for his role in upholding judicial independence. He is the author of several decisions in which he became the first and only military judge to declare legislation in violation of s 11(d) of the *Charter*. Post-*Généreux*, he found that appointments of military judges for a fixed renewable term of office, at the time prescribed by s 165.21 of the *NDA*, violated s 11(d) of the *Charter* because it did not "adequately reflect the increase in the status and powers conferred on military judges under the present legislation and in the context of a modern Canadian society".[44]

35. In 2018, military authorities[45] laid charges against the CMJ for alleged conduct to the prejudice of good order and discipline for having a consensual personal relationship with a person under his command and an alleged fraud relating to one $927.60 travel claim.[46]

36. From then on, the CMJ ceased to preside over courts martial.[47]

37. The deputy CMJ, Lieutenant-Colonel (LCol) d'Auteuil, was assigned to Colonel Dutil's case. The military prosecution had no concern about the impartiality of a judge who was a

44 *R v Nguyen*, 2005 CM 57; *R v Lasalle*, 2005 CM 46 [***Lasalle***]; *R v Joseph*, 2005 CM 41; *R v Hoddinott*, 2006 CM 24; *R v Master Seaman R.J. Middlemiss*, 2008 CM 1025; and *R v Semrau*, 2010 CM 1004 confirmed in *Leblanc*, *supra* note 38, at paras 18, 20, 21, 22.

45 *Canada (The Director of Military Prosecutions) v Canada (Office of the Chief Military Judge and Colonel Mario Dutil)*, 2020 FC 330 ("Lieutenant-General J.A.J. Parent, Acting Vice Chief of the Defence Staff [the referral authority], approved the RDP and the recommendation made on January 30, 2018, by Major-General Jean-Marc Lanthier, Chief of Program [the commanding officer], to defer the charges to the Director of Military Prosecutions" at para 64) [***Colonel Dutil***].

46 *Ibid* at paras 62, 83, 84 and 92 (Colonel Dutil initially faced eight separate charges, later reduced to two).

47 *Colonel Dutil, supra* note 45 at para 72; *Pett*, *supra* note 37 at para 130; *R v D'Amico*, 2020 CM 2002 [***D'Amico***] at para 66.

"personal friend and confidant"[48] of the accused over the past several years.[49] LCol d'Auteuil was potentially a material witness.[50]

38. Contrary to what the military prosecution claimed, LCol d'Auteuil did not accept that the test for reasonable apprehension of bias should be applied with less rigour because of the military context.[51]

39. LCol d'Auteuil recused himself. He subsequently decided not to assign any of the three remaining judges to preside over Colonel Dutil's court martial. The Federal Court upheld this decision and qualified as "scandalous" the legislative gap not providing for the possibility of appointment of *ad hoc* judges from the outside like in civil courts when conflicts of interest arise.[52]

40. Once the CMJ had reached his compulsory age of retirement, the DMP withdrew the charges.[53] The charge of fraud was not brought before a civilian court.[54]

41. The government has not since appointed a new CMJ.

---

48 *Colonel Dutil, supra* note 45*,* at para 137.

49 *R c Dutil*, 2019 CM 3003 [***Dutil***] at para 74.

50 *Colonel Dutil, supra* note 45 at paras 137, 143.

51 *Dutil*, *supra* note 49 at paras 59, 60.

52 *Colonel Dutil, supra* note 45 at paras 180, 184: "To conclude, today **we cannot have the accused bear the burden of what seems to be, unfortunately, the result of an absence of legislative or governmental lucidity**. Public trust in the military justice system must be preserved. It is a key factor that we cannot appear to ignore when there is a risk of conflict of interest, apparent or real, which could shake the public trust in the administration of military justice. Justice is not a Pandora's box that can be opened as desired to see what is hiding in it, nor a game of chance where the accused must play Russian roulette with the prosecution. We are speaking of the career, the reputation, the freedom and the life in the future of an individual. There must exist a reasonable degree of probability that Colonel Dutil can benefit, in fact and in appearance, from a fair and equitable trial before the Court Martial. It is clearly not the case today. It is now up to the applicant and the military authorities concerned, including the Judge Advocate General, the defence staff and the Minister, to take note of these reasons, and, where applicable, to do what must be done in the circumstances." (Emphasis added).

53 Canada, National Defence, *Director of Military Prosecutions Withdraws All Charges against Chief Military Judge*, 2020.

54 *Colonel Dutil, supra* note 45 at para 177.

(4) Decisions below

42. In over 11 decisions[55], every military judge seized of the issue acknowledged being under the pressure of the disciplinary regime set out in the Code of Service Discipline (CSD)[56]. This pressure, they ruled, was inconsistent with s 11(d).

43. But no military judge declared any portion of the CSD invalid.[57]

44. Instead, military judges resorted to a "compromise".[58] First, the Chief of the Defence Staff (CDS) would have to publicly endorse their "novel"[59] interpretation of the *NDA* exempting sitting military judges from the CSD. Second, the CDS would have to rescind the order designating the Deputy Vice Chief of the Defence Staff ("DVCDS") as the commanding officer for all military judges in matters of discipline (CDS Order).[60] Or else, courts martial would be stayed.

45. The CDS Order was not rescinded, and the CDS made no public endorsement of the novel interpretation. So, stays began.[61]

---

55 *Pett*, *supra* note 37; *D'Amico*, *supra* note 47; *R v Edwards*, 2020 CM 3006 [***Edwards***], **AR, pp 12ff**; *R c Crépeau*, 2020 CM 3007 [***Crépeau***], **AR, pp 30ff**; *R c Fontaine*, 2020 CM 3008 [***Fontaine***], **AR, pp 53ff**; *R v Iredale*, 2020 CM 4011 [***Iredale***], **AR, pp 66ff**; *R v Christmas*, 2020 CM 3009 [***Christmas***], **AR, pp 83ff**; *R v Proulx*, 2020 CM 4012 [***Proulx***], **AR, pp 103ff**; *R c Cloutier*, 2020 CM 4013 [***Cloutier***], **AR, pp 130ff**; *R v Brown*, 2021 CM 4003, **AR, pp 156ff** and *R v Bourque*, 2020 CM 2008 [***Bourque***].

56 *NDA*, Part III.

57 Military judges dismissed motions to declare invalide s 60 of the *NDA* (which does not exclude military judges from the jurisdiction of CSD) inconsistent with s 11(d) of the *Charter*: *Crépeau, supra* note 55**, AR, pp 30ff**; *Iredale*, *supra* note 55, **AR, pp 66ff** *Proulx*, *supra* note 55, **AR, pp 103ff** and *Cloutier*, *supra* note 55, **AR, pp 130ff.**

58 *Cloutier*, *supra* note 55 at para 24, **AR, p 138.**

59 *Cloutier*, *supra* note 55 at para 22, **AR, p 137.**

60 Chief of the Defence Staff, *Order: Designation of commanding officers with respect to officers and non-commissioned members on the strength of the Office of the Chief Military Judge Dept ID 3763*, October 2, 2019 [**CDS Order**].

61 *Edwards*, *supra* note 55, **AR, pp 12ff**; *Crépeau*, *supra* note 55, **AR, pp 30ff**; *Fontaine*, *supra* note 55, **AR, pp 53ff**; *Iredale*, *supra* note 55, **AR, pp 66ff**; *Christmas*, *supra* note 55, **AR, pp 83ff**; *Proulx*, *supra* note 55, **AR, pp 103ff**; *Cloutier*, *supra* note 55, **AR, pp 130ff** and *Brown*, *supra* note 55, **AR, pp 156ff**.

46. When the CDS Order was suspended[62], some military judges stopped staying cases[63]; while another insisted on the CDS' public endorsement of the novel *NDA* interpretation, and so continued to stay cases.[64]

47. On appeal, the CMAC quashed all stays by simply "equat[ing]" the prosecution of military judges under the Code of Service Discipline with the prosecution of a civilian judge before a civilian court under the *Criminal Code*[65]. Moreover, the CMAC refused to consider the Fish Report, discarding its content as irrelevant to the s 11(d) analysis.[66]

48. The constitutionality of the military status of military judges prescribed under s 165.21 of the *NDA* was properly raised in *Thibault*.[67] This made no difference. The provision was found constitutional for the same reasons as in *Edwards*. The CMAC did add that: "[i]t may be that civilian judges are fit to be judges in the military justice system at the first instance level, but this decision is one for Parliament, not the judiciary, to make".[68]

49. The CMAC ignored that in *Généreux*, Chief Justice Lamer raised this very question of his own volition given how fundamental it was to the s 11(d) analysis.[69]

50. One last fact needs to be mentioned. Since the above decisions were rendered, executive pressure on military judges has increased. Bill C-77 amended the *NDA* to allow the military hierarchy to try and punish military judges by summary hearing.[70]

----

[62] Chief of the Defence Staff, *Suspension of the Order: Designation of commanding officers with respect to officers and non-commissioned members on the strength of the Office of the Chief Military Judge Dept ID 3763, dated October 2, 2019*, September 15, 2020.

[63] *R v MacPherson and Chauhan and J.L.*, 2020 CM 2012; *R c Jacques*, 2020 CM 3010; *R c Pépin,* 2021 CM 3005.

[64] *Proulx*, *supra* note 55, **AR, pp 103ff**; *Cloutier*, *supra* note 55, **AR, pp 130ff.**

[65] *R v Edwards*, 2021 CMAC 2 [***Edwards CMAC***] at para 85, **AR, p 208.**

[66] *Ibid* at paras 110, 111, **AR, p 216.**

[67] *R v Thibault*, 2022 CMAC 3, **AR, pp 276ff**.

[68] *Ibid* at para 46, **AR, p 296.**

[69] *Généreux*, *supra* note 2 at p 288 b.

[70] *NDA*, Division 5 (Summary Hearings). Prior to Bill C-77, military judges were expressly excepted from trial by summary trial under the former s 164(1.3) of the *NDA* [Repealed, 2019, c 15, s 25].

PART II – QUESTIONS IN ISSUE

51. The ultimate question in these appeals is whether the military status of military judges raises a reasonable apprehension of bias in the mind of "**an informed person, viewing the matter realistically and practically**".[71]

52. In *Généreux*, this Court was so preoccupied by this question that it raised it of its own volition. Chief Justice Lamer asked whether "a parallel system of military tribunals, staffed by members of the military who are aware and sensitive to military concerns, [was] by its very nature, inconsistent with s 11(d) of the *Charter"*.[72]

53. In answer to this question, the Court recognized the military justice system is essential. To be clear, that is not contested here.

54. But this Court said more.

55. This Court recognized that only civilian judges can be truly independent.

56. And that the military status of court martial decision-makers raises a reasonable apprehension of bias.

57. But due to concerns over the practical necessity that military judges be CAF officers, the *Généreux* Court maintained the constitutionality of military status for all decision-makers at General Court Martial, including military judges.

71 *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 [***Committee for Justice and Liberty***] at p 394 (Emphasis added); *Edwards*, *supra* note 55 at para 4, **AR, p 13.**

72 *Généreux*, *supra* note 2, at p 288 b (Emphasis in the original).

58. The questions at issue today are therefore:

- Since *Généreux*, does the military status of military judges still raise a reasonable apprehension of bias?

- Since *Généreux*, has there been significant societal change which dissipates this Court's concern that the military status of military judges is a matter of practical necessity?

- If so, does the military status of military judges, prescribed under the *NDA*'s legislative scheme, lead an informed person, viewing the matter realistically and practically, to conclude that there is an apprehension of bias contrary to s 11(d) of the *Charter*?

- If so, is this violation justified under s 1 of the *Charter*?

- If not, what is the appropriate constitutional remedy under s 52 of the *Constitution Act, 1982*?

59. Finally, the appeals focus exclusively on military judges. The practical necessity of the military status of panel members of a General Court Martial is not challenged.

PART III – ARGUMENT

60. This Court's conclusion in *Généreux* that only civilian judges can be truly independent remains true today (Part A).

61. Since *Généreux*, significant societal change contradicts the "practical necessity" of military status for military judges: civilianized military judges are today realistic and practical (Part B).

62. An informed person, viewing the matter realistically and practically, now knows that no military rationale justifies limiting the right of accused persons to be tried by an independent and impartial judge guaranteed under s 11(d) of the *Charter*.

63. The exclusion of civilian judges under the *NDA* legislative scheme therefore violates s 11(d) of the *Charter* because:

A. A truly independent military judiciary requires civilian judges; and

B. A truly independent military judiciary is realistic and practical.

A. A TRULY INDEPENDENT MILITARY JUDICIARY REQUIRES CIVILIAN JUDGES

64. In *Généreux,* this Court recognized that only civilian judges can be truly independent. Adopting the reasoning of James B Fay, this Court acknowledged that without civilian judges "there cannot ever be a truly independent military judiciary".[73]

65. This Court also recognized that the military status of military judges raises a reasonable apprehension of bias. Writing for the majority, Chief Justice Lamer acknowledged:

> In my opinion, a reasonable person might well consider that **the military status** of a court martial's members would affect its approach to the matters that come before it for decision.[74]

---

73 *Généreux, supra* note 2 at p 295 h.
74 *Généreux, supra* note 2 at at p 295 b (Emphasis added).

66. The reasonable apprehension of bias finding in *Généreux* remains sound today for at least three reasons. As CAF officers:

(1) Military judges belong to the very CAF institution that lays charges against the accused persons;

(2) Military judges are members of the executive who exercise core judicial functions; and

(3) Military judges are subject to the pressure of being under the chain of command's disciplinary authority.

67. Civilianizing military judges would resolve these constitutional incompatibilities.

(1) Military judges belong to the very CAF institution that lays charges against accused persons.

68. Military officership for military judges infringes the rule against bias in two ways. First, it directly links them to the very CAF institution that investigates, lays charges against, and prosecutes accused persons before them.[75] Second, it endows them with an executive and military role that conflicts with the role of judge.

(a) The rule against bias requires judges not to preside over cases involving organizations to which they are affiliated.

69. As Lord Hewart famously declared a century ago, it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[76] Respect for the rule against bias expressed by the Latin maxim *Nemo debet esse judex in propria sua causa* (no one ought to be a judge in their own cause) is critical to a reasonable perception of impartiality.[77]

---

75 *Supra* note 6.

76 *Rex v Sussex Justices, Ex parte McCarthy* [1924] KB 256, 259.

77 *Bell Canada v Canadian Telephone Employees Association*, [2003] 1 SCR 884 at para 17.

70. The rule against bias requires judges to avoid any "likelihood of potential conflict of interest".[78] They must always reasonably appear "disinterested in the outcome".[79] And so, as the Canadian Judicial Council notes, judges must decline to preside over cases involving organizations to which they have close ties.[80] To minimize recusals, they should avoid taking part in organizations that are routinely involved in legal actions.[81] In sum, judges should not occupy any role which places them in a conflict of interest with their role as a judge.[82]

71. Strict compliance with the rule against bias is especially required in the criminal context. Public confidence in the integrity of the administration of justice is particularly important in criminal cases: "In a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm."[83]

72. For this reason, the Federal Court treats the impartiality of military judges "with the same rigour as a judge of a superior court of criminal jurisdiction".[84] Indeed, courts martial are akin to criminal trials, not a proceeding before an administrative or professional tribunal as once suggested in *Généreux*.[85]

(b) Military judges are institutionally biased.

73. As long as military judges belong to the very CAF institution that lays charges against accused persons[86], they will reasonably appear to be a judge in their own cause, despite all the

---

78 *Yukon Francophone School Board v Yukon (A.G.)*, [2015] 2 SCR 282 at para 59.

79 *R v S(RD)*, [1997] 3 SCR 484 at para 104; *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29.

80 Canadian Judicial Council, *Why is Judicial Independence important to you?*, 2016 at p 21. See especially *Pinochet*, *In re,* [1999] UKHL 1 (Links between Lord Hoffman and Amnesty International raised an apprehension of bias).

81 Canadian Judicial Council, *supra* note 80 at p 22.

82 *Judges Act*, RSC 1985, c J-1, s 55.

83 *2747-3174 Québec Inc. v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 45. See also *Dutil*, *supra* note 49 at para 59.

84 *Colonel Dutil, supra* note 45 at para 18. See also *MacKay v The Queen*, [1980] 2 SCR 370 [***MacKay***] at p 380 (CJ Laskin, dissenting).

85 *Généreux, supra* note 2 at p 295 d and p 316 b. *Contra*: *Ocean Port Hotel Ltd v British Columbia*, 2001 SCC 52 at paras 23-24 (Courts martial can no longer be viewed as command-centric extensions of the executive or a mere tool to implement government policy); *Stillman*, *supra* note 8 (the military justice system is "a full partner in administering justice alongside the civilian justice system" at para 20).

86 *Supra* note 6.

safeguards in the world. Simply put, their CAF affiliation is fatal to any reasonable perception of impartiality.

74. As members of the CAF institution, military judges appear to share the same interests as their CAF institution. These institutional CAF interests conflict with those of the accused person. This conflict of interest is systemic: all courts martial involve an accused person investigated, charged, and prosecuted by the CAF institution. Military judges therefore reasonably appear to be institutionally biased.[87]

(c) The conflicting roles of judge and officer aggravates reasonable apprehension of bias.

75. As CAF officers, military judges represent the military hierarchy.[88] They are responsible for the maintenance of good order and discipline.[89]

76. But as judges, military judges are called upon to be guardians of the Constitution. To protect the constitutional rights of accused persons, in particular the presumption of innocence.[90]

77. The conflict between the roles of officer and judge could not be greater. Indeed, as Wigmore aptly points out: "The prime object of a military organization is Victory, not Justice".[91]

78. As CAF officers, military judges will therefore reasonably appear to favour the disciplinary interests of their CAF institution over the constitutional rights of the accused persons whom their CAF institution has investigated, charged and prosecuted.

---

87 Marc Gold et al. "Comments on Legislation and Judicial Decisions", Case Comment on *R v MacKay,* (1982) 60-1 Canadian Bar Review 121, 1982 CanLIIDocs 13 [**Gold**] at p 142.

88 *Généreux*, *supra* note 2 at p 295 a.

89 Chapter 4 of the *QR&O*.

90 See *Lasalle*, *supra* note 44, Colonel Dutil CMJ (the role of the military judge "is to protect the rights of people who are subject to the Code of Service Discipline" at para 83).

91 United States Army Judge Advocate General's Corps, *The Army Lawyer: A History of the Judge Advocate General's Corps*, 1775- 1975, (1975) at p 131; Fredric I Lederer. "From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System", (2017) 225 Military Law Review 512 at p 516; David A Schlueter. "The Military Justice Conundrum; Justice or Discipline?", (2013) 215 Mil L Rev 1 at pp 21, 22. See generally *Stillman*, *supra* note 8 ("the focus of a court martial was placed far more on discipline than on what we call justice" at para 39).

79. It is therefore no surprise that during the last independent review of the military justice system[92], a good number of members of the CAF met by Justice Fish expressed the belief that because military judges remain members of the CAF while holding office:

- Military judges are generally more lenient towards accused officers of higher ranks;
- Military judges may be reluctant to see high-ranking witnesses as lacking in credibility;
- Military judges find complainants from lower ranks less trustworthy;
- Members of a panel who outrank the military judge may show less deference to the military judge's instructions; and
- Military judges could be tempted to "toe the party line" in sensitive cases where the legally-correct decision may go against the solution preferred by the military hierarchy.[93]

80. These perceptions are nothing new. They only confirm the reasonable apprehension of bias acknowledged by this Court 30 years ago in *Généreux*.

(2) Military judges are members of the executive exercising core judicial functions.

81. The legislative scheme prescribing the military status of military judges violates s 11(d) of the *Charter* because:

(a) Our Constitution disallows members of the executive branch from exercising core judicial functions;

(b) Military judges are members of the executive who perform core judicial functions; and

(c) No legislative safeguard can change the inherent executive nature of military judges as military officers.

---

92 *NDA*, s 273.601.
93 Fish Report, *supra* note 27 at paras 57, 58.

(a) Our Constitution disallows members of the executive branch from exercising core judicial functions.

82. The Constitution prohibits members of the executive branch from usurping core judicial functions. Trial fairness, the maintenance of the rule of law, separation of powers[94] and public confidence in the administration of justice all underpin the constitutional right to be tried by a judge "**completely** separate in authority and function"[95] from the executive branch, a right guaranteed under s 11(d) of the *Charter*.[96] Core judicial functions include trying crimes and adjudicating constitutional rights against the state. These "core functions"[97] of the judiciary must always remain completely separate from the executive.[98]

83. While "on occasion, members of the judicial branch perform executive functions without compromising institutional independence or giving rise to a concern about impartiality"[99], the converse is not true. To borrow from the example of the CMAC, the Chief Justice of Canada may exceptionally act as the Administrator of the Government of Canada pending the appointment of the Governor General; but the Constitution does not permit the Governor General to perform core judicial functions such as presiding a criminal trial.

(b) Military judges are members of the executive branch performing core judicial functions.

84. Our Constitution does not allow the Governor General[100], the prime minister or a police officer to preside over a murder case. This is so because these actors are not independent from, but are rather part of the executive. The same can be said of a military officer.

---

94 *Ref Re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 [***Remuneration of Judges***] at paras 138, 139; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at p 389; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [***Greenhouse***] at paras 279-285.

95 *The Queen v Beauregard*, [1986] 2 SCR 56, at para 30 (Emphasis added).

96 See e.g. *Ell v Alberta,* 2003 SCC 35 [***Ell***] at para 23; *Valente*, *supra* note 34 at para 22; *Mackeigan v Hickman*, [1989] 2 SCR 796 at p 827; *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 [***Mackin***] at para 38; *Greenhouse*, *supra* note 94 at para 262; *Groia v Law Society of Upper Canada*, [2018] 1 SCR 772 at para 167 (Côté J, dissenting in part).

97 *Criminal Lawyers' Association*, *supra* note 34 at paras 28, 29.

98 *Remuneration of Judges*, *supra* note 94 at para 139; *Re Greenhouse*, *supra* note 94 at paras 283, 285 (Côté J, dissenting in part).

99 *Edwards CMAC*, *supra* note 65 at para 73, **AR, p 202.**

100 *Ibid* at para 72, **AR, p 202.**

i. Military judges are members of the executive branch.

85. Military judges are not independent from, but rather are part of the executive. Although some military judges may disagree,[101] with respect, they have not been transferred from the executive to the judicial branch upon appointment: by requiring military officership the legislative scheme requires them to stay members of the executive branch to be military judges. And that is precisely the problem.

86. Being CAF officers, military judges are members of the executive branch.[102] They hold "Her Majesty's commission in the Canadian Forces".[103] At all times.[104] Including when they sit as military judges. In fact, especially when they sit as military judges.[105]

87. With the greatest of respect, the executive owns its military judges. As a military judge candidly acknowledged, what we have here is "the military chain of command and **its** judges".[106]

88. The time has come to acknowledge that the emperor has no clothes. Military judges are members of the executive branch. The practice of donning judicial robes instead of wearing military uniforms changes nothing about the true executive nature of military judges as CAF officers. It only confirms the grave perception issues surrounding their executive status.[107]

ii. Military judges perform core judicial functions.

89. Military judges perform serious core judicial functions.[108] Since *Généreux*, the numerous amendments to the *NDA* have "caused the roles and functions of military judges to become

---

101 *Iredale*, *supra* note 55 at para 34, **AR, pp 66ff**; *Edwards, supra* note 55 at para 54, **AR, p 22.**

102 See *Constitution Act, 1867*, 30 & 31 Vict, c 3, ss 15, 91(7); *NDA*, s 30, *Edwards*, *supra* note 55 at paras 67-73, **AR, pp 24-25**.

103 *NDA*, s 2.

104 *NDA*, s 60.

105 *NDA*, ss 165.22(2), 165.24(2).

106 *D'Amico*, *supra* note 47 at para 7 quoted in *Edwards CMAC*, *supra* note 65 at para 19, **AR, p 184** (Emphasis added).

107 *R c Dutil*, 2019 CM 3002 at para 11.

108 *NDA*, s 165.23.

intrinsically comparable to those of civilian criminal court judges".[109] They may try all criminal offences[110], adjudicate *Charter* rights against the state and sentence an accused person up to life imprisonment.[111] They may also at times try civilians in or out of Canada.[112]

(c) No safeguard changes the inherent executive nature of military judges.

90. Safeguards are meant to protect the judiciary from interference *by the executive*. They do not and cannot change the inherent executive nature of military judges as CAF officers.

91. The legislative safeguards in the *NDA*[113] are meaningless because they do not protect members of the judiciary. They merely protect members of the executive from other members of the executive. Simply put, military judges are members of the executive branch with some security of tenure[114] and financial security[115].

92. In consequence, an individual unaffiliated to the CAF in the pivotal role of military judge is a minimal constitutional requirement to safeguard judicial independence.

(3) Military judges are subject to the pressure of being under the chain of command's disciplinary authority.

93. To preserve a reasonable perception of judicial independence, disciplining judges cannot be entirely left up to the discretion of the executive branch. However, this is precisely the case with military judges.

---

109 *Leblanc*, *supra* note 38 at paras 29, 31, 32, 33, 37, 47. See e.g. s 227.01 *NDA* (SOIRA order), ss 147.1-147.3 *NDA* (firearms prohibition orders), s 147.6 *NDA* (No contact orders), s 226.2 *NDA* (parole delay); s 149 *NDA* (parole delay when multiple murders; *NDA*, s 149 (DNA orders)).

110 *NDA*, ss 70 (only three offences are excluded when committed in Canada), 130.

111 *NDA*, s 139.

112 *NDA*, s 60(1)(f)(j).

113 *NDA*, s 165.21(3)(5) (security of tenure); s 165.33 (financial security); *NDA*, s 165.21 (2) (oath of office); *NDA* ss 165.23(2) (limit on assignment of duties) *NDA*, s 165.231 (civil immunity); *NDA*, s 29(2.2) (separate grievance scheme); QR&O arts 19.75, 101.09 (no relief from performance of military duty); QR&O arts 26.10, 26.12 (no evaluations). See also *Edwards*, *supra* note 55 at paras 13-15, **AR, p 14**; *Pett*, *supra* note 37 at paras 69-80.

114 *NDA*, ss 165.21(3)(4), 165.31, 165.32.

115 *NDA*, ss 165.33 to 165.37.

(a) Disciplining judges cannot depend on the discretion of the executive branch.

94. Any system of discipline for judges must respect judicial independence.[116] If not, a reasonable apprehension of bias will surge. Legislation providing for the discipline of judges at the discretion of any person or body which can exert pressure on the judiciary (especially the executive branch) raises problems of judicial independence. In *Lippé*, Chief Justice Lamer warned:

> The facts of this case raise no "independence" problem because the Barreau du Québec has no authority over the municipal court judge in his or her capacity as a judge. **However, if legislation provided for the discipline of municipal court judges by the Barreau du Québec, such provisions would raise problems of judicial independence.**[117]

(b) The discipline of military judges depends on the discretion of the executive branch.

95. In contrast to municipal court judges, "military judges are under the disciplinary authority of the military hierarchy as officers even in their capacity as judges".[118] Military judges are subject to the CSD[119], the obligation to comply with any order that is not manifestly unlawful (crafted at the discretion of the CAF chain of command)[120] and the general duties and responsibilities of officers.[121] Specifically, military judges fall under the disciplinary authority of the VCDS[122], not

---

116 See *Therrien (Re)*, 2001 SCC 35 at para 57; *Valente*, *supra* note 34 at pp 695, 696; Richard Devlin and Sheila Wildeman. *Disciplining Judges: Contemporary Challenges and Controversies* (Cheltenham, United Kingdom: Edward Elgar Publishing Inc, 2021) at p 5, **ABA, Tab 4**; Beverley PC McLachlin Chief Justice of Canada. "Judicial Accountability" (Conference on Law and Parliament, Ottawa, November 2, 2006) ("any system of accountability for judges must take judicial independence as a necessary condition"); Martin L. Friedland. "A Place Apart: Judicial Independence and Accountability in Canada", Report prepared for the Canadian Judicial Council, 1995 at p 129; Antonio Lamer. "The Tension between Judicial Accountability and Judicial Independence: A Candian Perspective by the Rt. Hon. Antonio Lamer, P.C. Chief Justice of Canada" (1996) 8: Part 2 Sing Ac LJ at p 296, **ABA, Tab 6.**

117 *R v Lippé*, [1991] 2 SCR 114 [*Lippé*] at p 138 (Bold added but underlined in the original).

118 *Pett*, *supra* note 37 at para 45.

119 *NDA*, s 60.

120 *NDA*, s 18; *Edwards CMAC*, *supra* note 65 at para 63, **AR, p 198** ("Military judges are liable to be ordered in harm's way, up to and including actions that could result in injury or death."). *Contra*: *Pett*, *supra* note 37 at para 80.

121 QR&O, art 4.02; *Pett*, *supra* note 37 at para 129.

122 CDS Order, *supra* note 60.

the CMJ.[123] Military judges acknowledge the reality of this executive pressure.[124] The military prosecution against Colonel Dutil still resonates in their minds – and the minds of all accused persons.[125]

96. The failed prosecution of Colonel Dutil illustrates how the executive may exert pressure on military judges by charging them with a service offence. In addition to having a chilling effect, it effectively undermines the purpose of security of tenure by compelling *de facto* removal from the bench.[126] Though some may argue that Colonel Dutil should not have stepped down when charged, the Federal Court reminds us that he had in fact no choice:

> There is no doubt that if Colonel Dutil had presided when charges were outstanding, an accused person could have requested his recusal because of the **pressure** exerted on him and the **appearance of partiality** that this situation was likely to create.[127]

Once the CMJ had reached his compulsory age of retirement, the DMP withdrew the charges.[128]

97. The failed military prosecution against the CMJ illustrates that no legislative safeguards prevent the chain of command from exerting disciplinary pressure on military judges.

98. The fear of the executive disciplining military judges is ever present given their liability under the CSD for "special disciplinary standards."[129] For example, in contrast to civilian judges, military judges may be disciplined by the executive for insubordination[130], conduct to the prejudice and good

---

123 QR&O art 4.091(2) ("the Chief Military Judge shall not exercise the powers or jurisdiction of a commanding officer or an officer commanding a command in respect of any disciplinary matter or a grievance").

124 *Pett*, *supra* note 37; *D'Amico*, *supra* note 47; *Edwards, supra* note 55, **AR, p 12ff**; *Crépeau*, *supra* note 55, **AR, pp 30ff**; *Fontaine*, *supra* note 55, **AR, pp 53ff**; *Iredale*, *supra* note 55, **AR, pp 66ff**; *Christmas*, *supra* note 55, **AR, pp 83ff**; *Proulx, supra* note 55, **AR, pp 103ff**; *Cloutier, supra* note 55, **AR, pp 130ff**; *Brown supra* note 55, **AR, pp 156ff** and *Bourque*, *supra* note 55.

125 *Supra* paras 33-41 (the military prosecution of the CMJ, Colonel Dutil).

126 *Pett*, *supra* note 37 at para 130; *D'Amico*, *supra* note 47 at para 66.

127 *Colonel Dutil, supra* note 45 at para 72 (Emphasis added). See also *NDA*, s 139(1)(c)(d) (the punishment of dismissal from Her Majesty's service similarly jeopardizes the purpose of security of the tenure); *Pett*, *supra* note 37 at para 114.

128 Canada, National Defence, *Director of Military Prosecutions Withdraws All Charges against Chief Military Judge*, 2020.

129 *Généreux*, *supra* note 2 at p 293 g.

130 *NDA*, s 85.

order and discipline[131], disgraceful conduct[132], being tardy to their place of duty[133], adopting a demeanour that is inconsistent with CAF requirements[134] – "even in their capacity as judges".[135]

99. This executive pressure on military judges is even worse today. Since the implementation of Bill C-77[136], military officers may now even try and punish military judges. For example, a superior commander[137] may conduct summary hearings for any military judge. Upon finding on a balance of probabilities that a service infraction has been committed, the CAF officer may impose on military judges the sanction of reduction in rank, severe reprimand, reprimand, some deprivation of pay, and minor sanctions.[138]

100. To be clear, the issue here does not pertain to the criminal liability of military judges. Respectfully, by equating the military disciplining of military judges with the criminal liability of civilian judges[139], the CMAC misses the point. Civilian judges are under nowhere near this kind of executive pressure. Unlike military judges, the executive or legislative branch cannot exert any *disciplinary* pressure on civilian judges without a judicial inquiry committee. In contrast, the chain of command may discipline military judges despite the existence of the Military Judges Inquiry Committee.[140]

101. Moreover, the requirement for members of the executive to obtain legal advice prior to laying charges does not protect judicial independence from the executive's interference. Not only does this legal advice need not be followed, it is the Judge Advocate General (JAG) – a member of the executive themself – who provides it.[141]

102. Finally, the CMAC's concerns over equality before the law are misplaced, particularly in the context of military law. Disciplining judges in a way that respects judicial independence does not

---

131 *NDA*, s 129; QR&O art 120.03(i).
132 *NDA*, s 93.
133 QR&O art 120.03(f).
134 QR&O art 120.03(g).
135 *Pett*, *supra* note 37 at para 45. See *NDA*, s 60, s 165.21.
136 *NDA*, Division 5 (Summary Hearings). Prior to Bill C-77 military judges were expressly excepted from trial by summary trial under the former s 164(1.3) of the *NDA* [Repealed, 2019, c 15, s 25]. Under the current *NDA*, no provisions exempt military judges from the summary hearing regime.
137 *NDA*, s 162.3.
138 *NDA*, s 163.1, 162.7.
139 *Edwards CMAC*, *supra* note 65 at para 85, **AR, p 208.**
140 *NDA*, ss 165.31, 165.32.
141 *Généreux, supra* note 2 at p 302 i. See also *Pett*, *supra* note 37 at para 76; QR&O art 102.07(2) (JAG legal advice).

offend this principle. It does not prevent "a common liability to answer to the same civil tribunals".[142] More fundamentally, this concern is moot if military judges are civilians.

103. Fundamentally, the disciplinary authority of the military hierarchy over military judges is incompatible with judicial independence. It is contrary to this Courts warning in *Généreux* that military judges be "as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces."[143]

104. Judicial bias is a real concern for accused persons. As summarized by Justice Fish, "[t]he fact that military judges are subject to the CSD puts them in a position of subordination which is inconsistent with the exercise of judicial duties. This dynamic could lead to concerns that military judges may improperly take into account the disciplinary consequences to which they may be exposed if they adjudicate cases in a certain way."[144]

---

142 *Reference as to whether members of the Military or Naval Forces of the United States of America are exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] SCR 483 at p 525, Rand J. See also *Pett*, *supra* note 37 at paras 122-130; Albert Venn Dicey. *Introduction to the Study of the Law of the Constitution,* (New York: The Macmillan. Company, 1967) at pp 193, 194, 300, 301, **ABA, Tab 5.**

143 *Généreux, supra* note 2 at p 308 g.

144 Fish Report, *supra* note 27 at para 58.

105. In conclusion, the above reasons confirm what this Court acknowledged in *Généreux*. The military status of military judges does raise a reasonable apprehension of bias. A truly independent military judiciary can only be achieved by civilian judges who are naturally unaffiliated to the CAF. Indeed:

- Civilian judges will not belong to the very CAF institution that lays charges against the accused persons;
- Civilian judges would be members of the judicial branch exercising core judicial functions; and finally,
- Civilian judges would not be subject to the pressure of being under the chain of command's disciplinary authority.

B. A TRULY INDEPENDENT MILITARY JUDICIARY IS REALISTIC AND PRACTICAL

106. New significant and uncontroversial social facts "dissipate"[145] the 30-year-old *Généreux* concerns that maintained the constitutionality of the military status of judges.

107. Today, a person informed of the fact that a truly independent military judiciary – only possible with civilian judges – is realistic and practical would conclude that the military status of military judges raises a reasonable apprehension of bias.[146]

108. A truly independent military judiciary is a constitutional minimum because public confidence in the independence of the military justice system cannot rest on outdated concerns.

(1) The concerns in *Généreux*

109. Thirty years ago, this Court considered it a matter of practical necessity that military judges be military officers. Justice McIntyre's statement in *MacKay*, quoted *in extenso* by all three opinions of this Court in *Généreux*[147], captures the central importance of this practical necessity to the contextual constitutional analysis:

> From the earliest times, officers of the armed forces in this and, I suggest all civilized countries have had this judicial function. It arose from **practical necessity** and in my view must continue for the same reason.[148]

110. By extension, Justice L'Heureux-Dubé, dissenting in the result, declared:

> **The military is, after all, something of its own society within the greater one.** While ultimately it must adhere to the expectations and carry out the policies of the civilian world, like any society it entails a certain number of traditions, rules, and taboos which are not within the normal ken of outsiders. **These are the sort of considerations which must be kept in mind while measuring the General Court Martial against the requirements of the *Charter*.**[149]

---

145 *R v Kirkpatrick*, 2022 SCC 33 [***Kirkpatrick***] at para 224.
146 *Committee for Justice and Liberty*, *supra* note 71 at p 394; *Edwards CMAC*, *supra* note 65 at para 4, **AR, p 178.**
147 See *Généreux*, *supra* note 2 (Lamer CJ at p 290 d, Stevenson J at p 316 a, L'Heureux-Dubé J at p 324 f).
148 *MacKay, supra* note 84 at p 372 (Emphasis added).
149 See *Généreux*, *supra* note 2 at p 326, 327.

111. The *Généreux* Court was concerned that military tribunals presided over by civilian judges would undermine the existence[150] and purpose of military tribunals to deal with matters that pertain directly to the discipline, efficiency, and morale of the military.[151]

112. In particular, the *Généreux* Court was concerned that civilian judges would lack the military knowledge and experience possessed by military officers to adequately preside over military tribunals. It was thought that a "… military officer must be involved in the administration of discipline at all levels…" and that the strength of the system lied in officers in judicial roles with military knowledge and experience.[152] In other words, it was assumed "essential both that discipline be maintained and that alleged instances of non-adherence to rules be tried by other members of the military".[153]

113. Additionally, the impression at the time was that the portability, deployability and flexibility of the military justice system also depended on the military status of judges.[154]

114. Over time, these military concerns have justified the constitutionality of separating and excluding civilian judges from the military justice system. As Professor Collins aptly observes, such military concerns have "become self-sustaining with little genuine investigation" and are today "a self-serving basis for military leaders to argue the maintenance of this separation".[155]

115. This is precisely what is happening here. Based on *Généreux*, military authorities argued before the CMAC the practical necessity of maintaining military judges as officers. And it worked.

116. The CMAC refused to consider new significant and uncontroversial social facts contradicting this "practical necessity". Indeed, it found the Fish Report "irrelevant".[156] As a result,

---

150 *Généreux*, *supra* note 2 ("section 11(f) reveals, in my opinion, that the *Charter* does contemplate the **existence** of a system of military tribunals with jurisdiction over cases governed by military law" at p 296 b (Emphasis added)).

151 *Ibid* at p 295 e.

152 *Ibid* at p 295 i quoting James B Fay. "Canadian Military Criminal Law: An Examination of Military Justice" (1975), 23 Chitty's LJ 120, 228.

153 *Généreux, supra* note 2 (L'Heureux-Dubé J, dissenting) at p 336 b.

154 *Ibid* at p 325 e.

155 Collins, *supra* note 9 at p 232, **ABA, Tab 3**. See also Gold, *supra* note 87 at 142.

156 *Edwards CMAC*, *supra* note 65 at para 111, **AR, p 216.**

the CMAC failed to view the matter "realistically and practically".[157] Instead, the CMAC doubled down on the practical necessity argument declaring the military status of military judges was the "difference between life and death".[158]

(2) The concerns in *Généreux* are now moot.

117. Significant societal change establishes that civilianized military judges are today realistic and practical. New significant and uncontroversial social facts "dissipate"[159] the 30-year-old *Généreux* concerns that maintained the constitutionality of the military status of judges:

- Civilian judges now preside over courts martial in other democratic commonwealth countries, such as the United Kingdom and New Zealand – without undermining the existence and purpose of a parallel system of military tribunals.[160]

- The CAF military hierarchy[161] and the MND[162], the opposing party, confirm today that civilian judges with a sufficient degree of military experience could effectively preside over our military tribunals in the context of the CAF.

118. These legislative facts are today so uncontroversial that evidence of their existence is unnecessary.[163] Indeed, the MND presented no facts or opinion contradicting the government's

---

157 *Committee for Justice and Liberty*, *supra* note 71 at p 394.

158 *Edwards CMAC*, *supra* note 65 at paras 61-62, **AR, pp 197-198.** *Contra*: *Pett*, *supra* note 37 at para 81 ("**In reality**, military judges are no different than civilian judges as it pertains to their day-to-day duties" (Emphasis added)).

159 *Kirkpatrick*, *supra* note 145 at para 224.

160 See *Armed Forces Act 2006* (UK), c 52, s 362(3); *Court Martial Act,* 2007 No 101, New Zealand Legislation (October 24, 2019), Public Act 10 Judges of Court Martial, ss 10-20. See also Fish Report, *supra* note 27 at para 73; Canada, Office of the Judge Advocate General, *Draft Internal Report – Court Martial comprehensive Review*, January 17, 2018 at 139).

161 Fish Report, *supra* note 27 (the former and current CDS, the Commanders of the Canadian Army, Royal Canadian Navy and Royal Canadian Air Force, the Vice Chief of the Defence Staff, the Commander Canadian Joint Operations Command and the Commander Special Operations Forces Command unanimously support the appointment of civilian judges with a sufficient degree of military experience, at para 76 and footnote 68).

162 Canada, National Defence, *Message from the MND regarding the tabling of the Third Independent Review of the National Defence Act report*, 2021 [**MND Statement**] ("I have accepted the 107 recommendations, in principle").

163 *R v Find*, [2001] 1 SCR 863 at para 48; *R v Le*, [2019] 2 SCR 692 at para 84.

public endorsement of all recommendations of Justice Fish, including his first to civilianize military judges.[164] Rather, the MND confirms that "[t]here exists an abundance of evidence and commentary dealing with the utility of engaging civilian judges in the MJS."[165]

119. The CMAC likewise confirmed the notoriety of this evidence.[166]

120. The JAG "recognized that Canada is at a juncture in history where the civilianization of military judges needs to be considered for the military justice to maintain its legitimacy."[167]

121. Finally, and perhaps most importantly, the United Kingdom experience with civilianized military judges – conducting approximately 500 trials each year for the last 17 years – is self-evident.[168]

122. A truly independent military judiciary – only possible through civilian judges – is today realistic and practical. Concerns that civilianized military judges would not have sufficient military knowledge and experience or be able to hold hearings anywhere in the world are no longer legitimate. As Justice Fish reports "judges of the Court Martial of the United Kingdom and the Court Martial of New Zealand are civilians. Yet both courts may hold hearings overseas and have done so. Perhaps importantly, the CMAC is composed of civilian judges and could currently be called to hold hearings in a theatre of operations".[169] Military judges' conditions of appointment could easily include a requirement to act anywhere in the world, including a theatre of operations[170]; and at least 10 years of experience as an officer or non-commissioned member of the CAF.[171]

123. Not only is a civilian in the pivotal role of military judge realistic and practical, international and comparative law finds it "one of the most significant guarantees"[172] of independence in the

---

164 MND Statement, *supra* note 162.

165 *R v Edwards et al,* (2023) SCC 39820 (Factum of the Respondent at para 50).

166 *R v Thibault*, 2021 CMAC 6 at para 10.

167 Fish Report, *supra* note 27 at para 75.

168 United Kingdom, Ministry of Defence, *Court martial results from the military court centres: January to December 2021*, 2023; Canada, Office of the Judge Advocate General, *Draft Internal Report – Court Martial comprehensive Review*, January 17, 2018, pp 139, 143, 144.

169 Fish Report, *supra* note 27 at para 73.

170 *Ibid* at para 73.

171 *Ibid* at para 78.

172 *Grieves v The United Kingdom,* Council of Europe, Grand Chamber (Application no. 57067/00) at p 23 or para 89. See also Emmanuel Decaux. *Draft Principles Governing the*

military justice system. Although not binding on this Court[173], international trends are relevant to establish the realism and practicality of civilianized military judges.

124. Times have changed. As Justice Kirby of the Australia High Court colourfully points out: "Today, the spectacle of courts martial hastily convened in the field of battle appears a creature of imagination or cinema rather than a procedure for which the Act provides."[174] Justice Fish confirms this reality in the CAF context: "Since the coming into force of Bill C-25 in 1998, there have been very few courts martial outside Canada, and not a single one conducted entirely in a theatre of operations..."[175] Adding, "[t]oday's information and communications technology also go a long way towards ensuring the portability, deployability and flexibility of the military justice system."[176]

125. In short, significant societal change has dissipated *Généreux*'s outdated concerns that maintained the constitutionality of the military status of judges.

126. An informed person, viewing the matter realistically and practically[177], now knows that no military rationale justifies limiting the right of accused persons to be tried by an independent and impartial judge.

127. Indeed, a truly independent military judiciary – only possible with judges who are unaffiliated to the CAF – is realistic and practical. The legislative scheme excluding civilian judges therefore violates s 11(d) of the *Charter*.

Administration of Justice through Military Tribunals, 62nd Sess, UN Doc E/CN.4/2006/58 (2006), Principle No 13 at para 46.

173 *R v Bissonnette*, 2022 SCC 23 at paras 98, 103, 105.

174 *White v Director of Military Prosecutions*, [2007] HCA 29 (Justice Kirby, dissenting) at para 158. See also Collins, *supra* note 9 at p 34, **ABA, Tab 3**.

175 Fish Report, *supra* note 27 at para 70.

176 Fish Report, *supra* note 27 at para 74.

177 *Committee for Justice and Liberty*, *supra* note 71 at p 394.

(3) A truly independent military judiciary is a constitutional minimum.

128. Inserting individuals having no affiliation with the CAF in the pivotal role of military judge is not a matter of policy best left for Parliament. Neither is it a quest for ideal justice. Rather, it is a constitutional minimum.

(a) The public confidence crisis in the military justice system.

129. The Canadian public, the CAF – and particularly accused persons – have lost confidence in the independence of the military justice system; particularly in relation to allegations of sexual crimes.[178] Following the report of Justice Arbour, the DMP and the CFPM themselves acknowledge "the current crisis of public confidence in the military justice system, particularly as it relates to sexual assault cases".[179]

(b) The exclusion of civilian judges erodes public confidence in the military justice system.

130. Excluding civilian judges from the military justice system is a relic of the culture[180] of the military as a separate society.[181] It erodes public confidence in the system because it emboldens the military to operate as a "highly separated military coterie"[182] that is "impervious to outside advice and influence".[183] According to Justice Arbour, this is a liability for the CAF and for Canada:

> Firmly entrenched in its historical way of life, the military has failed to keep pace with the values and expectations of a pluralistic Canadian society, increasingly sophisticated about the imperatives of the rule of law. Operating as a **totally self-regulated, self-administered organization, entirely reliant on deference to hierarchy**, it has failed to align with the ever-changing, progressive society we live in. **This disconnect is a liability for the CAF and for Canada**.
>
> **The long-established way of doing business in the CAF is anchored in operational imperatives that are often nothing more than assumptions.** One of

178 Arbour Report, *supra* note 9 at p 89.
179 Joint Statement, *supra* note 20.
180 Arbour Report, *supra* note 9 at p 9 (the term "culture" term is used here, as Justice Arbour did in her report, to mean: "a series of assumptions, understandings and practices").
181 *Stillman*, *supra* note 8 at para 39 ("the focus of a court martial was [then] placed far more on discipline than on what we call justice").
182 Collins, *supra* note 9 at p 236. See also pp 6-15, **ABA, Tab 3.**
183 Arbour Report, *supra* note 9 at p 274.

> the dangers of the model under which the CAF continues to operate is the high likelihood that some of its members are more at risk of harm, on a day to day basis, from their comrades than from the enemy.
>
> This must change.[184]

131. Military coteries erode public confidence in the military justice system when they favour their own institutional image ("*la bella figura*"[185]) over justice and constitutional rights.[186] For instance, when the CAF covered up the beating to death of a Somalia teenager by CAF members.[187] Or when the CAF's top military officer can act with complete impunity under the military justice system.[188]

132. In relation to the crime of sexual assault, Justice Arbour rejects the assumption that the military status of actors dealing with sexual assaults has "increased the discipline, efficiency or morale" of the CAF.[189] On the contrary, the military status of the actors has "contributed to an erosion of public and CAF member confidence" in the military justice system, especially in dealing with "high profile cases involving senior officers".[190]

133. Judges external to the CAF are necessary to restore public confidence in the military justice system. Outside input is necessary "to truly transform the insular culture entrenched in the CAF".[191]

---

184 *Ibid* at p 9 (Emphasis added) (Still today, despite an abundance of newly published CAF policies on ethics, Justice Arbour observes that "there is an obvious disconnect between rhetoric and reality" at p 214).

185 Collins, *supra* note 9 at p 7, **ABA, Tab 3.**

186 Arthur Shafer. *The Buck Stops Here – Reflections on Moral Responsibility, Democratic Accountability and Military Values*, Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997) at p 30; O'Reilly, James W. and Patrick Healy. *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion*, Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997) at p 71.

187 Somalia Inquiry Report, *supra* note 25, ES-2.

188 Canada, National Defence, *Obstruction of Justice Charge Laid Against Retired General Jonathan Vance*, 2021 (the CDS cannot be prosecuted in the military justice system given legislative gaps identified in the Fish Report); Fish Report, *supra* note 27 (the CDS cannot be prosecuted at all – either before a civil or a military tribunal – for any serious service offence that does not correspond to a civil offence, at paras 462-464 and footnote 550).

189 Arbour Report, *supra* note 9 at p 99.

190 *Ibid* at p 99.

191 *Ibid* at p 274; Fish Report, *supra* note 27 ("the appearance of justice is prejudiced by the fact that military judges remain members of the CAF while holding office", at para 54).

(c) A truly independent military judiciary is essential to instill public confidence in the military justice system.

134. To be sure, the Constitution does not guarantee the ideal.[192] The standard for judicial independence is flexible.[193] That said, where liberty is at stake, a truly independent military judiciary is a constitutional minimum.

135. The public now knows it is not a matter of practical necessity to have institutionally biased military judges. Realizing this changes everything. Nothing less than true judicial independence is legitimate. Nothing less is capable to instill public confidence in the military justice system, so "essential to its effective operation."[194] Canada is at a juncture in history where the civilianization of military judges is necessary for the military justice to maintain its legitimacy.[195]

136. Though some might argue that military context justifies weakening guarantees of judicial independence of military judges, it is reason to bolster them. The existence of a strong chain of command[196], the absence of a permanent court[197], and the absence of a right to trial by jury – even for murder – make the need for independence in military courts greater than in the context of an ordinary criminal trial. Unlike a jury made up of 12 people who generally do not know each other, a panel of a General Court Martial is composed of only five members of the chain of command.[198] Some of which may even outrank the judge. The judge can appear "beholden to these five members of the chain of command."[199]

137. Military context or not, the accused person who will be led from the hearing room in handcuffs to serve a life sentence without the possibility of parole for 20 or 25 years must have the

---

[192] *Lippé*, *supra* note 117 at p 142; *Edwards*, *supra* note 55 at para 75, **AR, p 203.**
[193] *Généreux*, *supra* note 2 at p 285 a; *Valente*, *supra* note 34 at p 694 at para 26.
[194] *Valente*, *supra* note 34 at p 689 e. See also *Généreux*, *supra* note 2 at para 46 or p 286; *Mackin*, *supra* note 96 at para 38; *Ell, supra* note 96 at para 23; Fish Report, *supra* note 27 at para 75.
[195] Fish Report, *supra* note 27 at para 75.
[196] *Ibid* at para 155.
[197] *Supra* para 27.
[198] See *Stillman*, *supra* note 8 at para 68; *Leblanc*, *supra* note 38 at paras 53, 54.
[199] *Leblanc*, *supra* note 38 at paras 51, 52.

assurance, indeed the firm conviction, that the presiding military judge is institutionally independent and impartial.[200]

138. Our soldier's constitutional rights can no longer be deprived on the basis of operational imperatives that amount to nothing more than false assumptions.[201]

139. It's only fair that those who put their lives on the line to serve Canada should be judged by judges who are truly independent and impartial, just like anyone else in our country. After all, our soldiers risk everything to protect our country, and they deserve nothing less than the same level of fairness and impartiality that any citizen would expect. As the Federal Court declared:

> Today, we must say it loudly and clearly: **the litigants of the Code of Service Discipline are not second-class citizens**. They all deserve fair treatment and the same quality of justice to which anyone accused of an offence punishable by imprisonment aspires and is entitled.[202]

---

200 *Ibid* at para 54.

201 See Gold (in *R v Mackay* "the court should have put an onus on Parliament to defend its assumptions about the nature of military society and its disciplinary needs. Only then could the court be justified in deferring to Parliament on this issue" at p 150).

202 *Colonel Dutil, supra* note 45 at para 171 (Emphasis added). See also *R v O'Toole*, 2012 CMAC 5, Blanchard CJ ("the military justice system should therefore resemble the civilian justice system insofar as there is no military rationale for adopting a different approach" at para 32); Fish Report, *supra* note 27 ("exceptions to the law's equal treatment of everyone in Canada must be rationally connected to a valid objective" at p ii).

C. THE APPROPRIATE REMEDY IS AN IMMEDIATE DECLARATION OF INVALIDITY

140. The government has presented no evidence to justify the constitutional violation under s 1 of the *Charter*.

141. The legislative scheme under the *NDA* prescribing military judges must belong to the CAF should therefore be declared invalid pursuant to s 52 of the *Constitution Act, 1982*. The extent of the inconsistency with s 11(d) of the *Charter* is limited to the military status of military judges.

142. A declaration that the legislative scheme is invalid insofar as it allows military judges to be CAF members would respect the role of the legislature and cure the law's unconstitutionality. No public safety concerns justify a suspension. But if so, the Appellants respectfully ask to be exempted as successful litigants.

(1) A declaration of invalidity respects the role of the legislature.

143. A declaration is appropriate given Parliament's clear intent[203] that military judges be CAF officers. The legislative scheme provides for military judges to be CAF officers. In particular, subsection 165.21(4) of the *NDA* specifies that: "A military judges ceases to hold office **upon being released at his or her request from the Canadian Forces** or on attaining the age of 60 years." This is the maximum age of retirement for officers and non-commissioned members of the CAF as per articles 15.17 and 15.31 of the QR&O. In addition, subsection 165.24(2) of the *NDA* prescribes that: "The Chief Military Judge holds **a rank that is not less than colonel**." Legislative history confirms Parliament's intent that military judges be CAF officers.[204]

144. Furthermore, a declaration is the only remedy that respects the role of the legislature. This Court cannot predict whether Parliament even wants courts martial to exist at all if military judges are to be civilianized given the efficiency of command-centric summary hearings. Nor is it known whether Parliament would have civilianized military judges outside a permanent court as

---

203 See *Ontario (Attorney General) v G*, 2020 SCC 38 [***G***] at para 102.

204 See also Legislative History of Bill C-25: *An Act to amend the National Defence Act,* 36th Parl, 1st Sess, 1998

suggested by Chief Justice Lamer and Justice Fish and agreed to by the government.[205] These are policy choices best left for Parliament.[206]

(2) Suspending the right to an institutionally independent and impartial judge is unjustified given that military discipline would not be endangered by the declaration of invalidity.

145. Suspending constitutional rights is exceptional. It is a momentous balancing act that strongly presumes the immediate protection of constitutional rights. Particularly when criminal jeopardy is at stake. In those cases, "the weight to be given to ongoing rights infringement will be especially heavy."[207] In the present case, the government cannot discharge its heavy burden to prove military discipline is endangered.

146. On one hand, the continued violation of the constitutional right to be tried by an independent and impartial tribunal will cause significant harm to accused persons and erode public confidence in the military justice system.[208] Wrongful convictions may result. This is a real compelling public interest. As aptly put by the CMAC, "the right to be tried by an independent and impartial court is every bit as important to the public as any competing interest."[209]

147. On the other hand, the temporary absence of jurisdiction of military judges does not endanger military discipline. Operational imperatives that are nothing more than assumptions should no longer be sufficient to perpetuate the violation of constitutional rights.

148. Especially given that Parliament can quickly fix the unconstitutionality of the *NDA*. For example, in *Trépanier*, the CMAC declared legislation invalid that effectively brought the courts martial system to a halt.[210] Within 85 days, before this Court had even addressed the government's

---

205 Lamer Report, *supra* note 24 at p 26; Fish Report, *supra* note 27 at para 113; Canada, National Defence, *Message from the MND regarding the tabling of the Third Independent Review of the National Defence Act report*, 2021.

206 See *G*, *supra* note 203 at paras 114, 115, 116.

207 *Ibid* at para 131.

208 *Ibid* at para 132.

209 *R v Remington*, 2023 CMAC 5 at para 13.

210 *Trépanier*, *supra* note 39 (Declaration of invalidity: April 24, 2008).

motions for stay and leave to appeal[211], Parliament had already amended the *NDA* and courts martial resumed.[212] Military discipline was not endangered.

149. Still today, summary hearings, CAF administrative measures, and civilian courts will continue to maintain military discipline until Parliament inserts civilian military judges, should it choose to do so.

150. Summary hearings are quick and command centric. They allow military authorities to deal with service infractions relating to property and information, military service, and drugs and alcohol.[213] Sanctions include reduction in rank and deprivation of pay.[214] Importantly, no legislative gap is possible given the broad scope of the infraction of behaving "in a manner that adversely affects the discipline, efficiency or morale of the Canadian Forces."[215]

151. Exhaustive administrative measures[216], including the authority to immediately relieve a member from the performance of military duty[217], allows military authorities to control CAF members.

152. Finally, civilian courts will continue to exercise their concurrent jurisdiction.[218] As recognized by the CMAC, military discipline is maintained "whether a trial is held before a service tribunal or a civil tribunal".[219] In fact, civilian courts have proven capable to effectively deal even with serious matters that pertain directly to the discipline, efficiency and moral of the CAF. For example, in *Delisle*, a provincial court convicted and sentenced a Lieutenant (Navy) intelligence

---

211 *R v JSKT*, 2008 SCC No 32672 (Discontinuance of motion for a stay of execution: 19 June 2008; Leave to appeal not granted: 25 September 2008).

212 Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another,* 39th Parl, 2nd Sess, 2008, s 32 (Coming into force: 18 July 2008).

213 QR&O, arts 120.02-120.04.

214 *NDA*, s 162.7.

215 QR&O, art 120.03 (i).

216 See e.g. Canada, National Defence, *DAOD 5019-0, Conduct and Performance Deficiencies*, 2004; QR&O chapter 15 (release); *Stillman*, *supra* note 8 at para 85 (an "elaborate administrative infrastructure that undergirds the modern military justice system").

217 QR&O, art 19.75.

218 *NDA* ss 71, 273. (Nothing exempts any CAF member from prosecution before a civil court in relation to any criminal offences, including those committed outside of Canada).

219 *R v Beaudry*, 2018 CMAC 4 [***Beaudry 2018***] at para 68, rev'd on other grounds *Stillman*, *supra* note 8.

officer to 20 years of imprisonment and a fine of $111, 817 for selling classified information held by the military to the Russians.[220] Further, civilian courts will continue to deal with sexual crimes, domestic violence and drinking and driving cases as they do today.

153. As in *Beaudry*, this Court should refuse to suspend the constitutional rights of soldiers. This Court then refused to suspend the right of soldiers to be tried by jury for 10 months pending its final decision in *Stillman* without any apparent prejudice to good order and discipline.[221]

154. In the end, no public safety concerns justify suspending the right to an institutionally independent and impartial judge.

(3) If the declaration is suspended, the Appellants should be exempted.

155. Should this Court suspend the declaration, the Appellants should be exempted from the suspension under s 24(1) of the *Charter* because no compelling reason justifies otherwise.[222]

156. Indeed, all Appellants are released without conditions. None pose any danger to the public.[223]

---

220 *Her Majesty the Queen v Jeffrey Paul Delisle,* (8 February 2013), Halifax 2409566/2409567/2409568 (NSPC), **ABA, Tab 1.**

221 *R v Beaudry*, 2019 SCC 2. No military jurisdiction over civil offence punishable to imprisonment for five years or more, for 10 months: *Beaudry 2018*, *supra* note 219 (section 130(1)(a) of the *NDA* declared unconstitutional 19 September 2018) to *Stillman*, *supra* note 8, (SCC overruled the CMAC 26 July 2019).

222 See *G*, *supra* note 203 at paras 140-152.

223 See *G*, *supra* note 203 at paras 149, 150; *R v Albashir*, 2021 SCC 48 at para 66. Sergeant Thibault has completed serving his sentence.

PART IV – COSTS

157. The Appellants seek no costs.

PART V – ORDER SOUGHT

158. The Appellants respectfully ask that this Appeal be allowed and that the decision of the CMAC be set aside.

159. The Appellant Thibault respectfully asks that his conviction be quashed because "[n]o one should be subjected to an unconstitutional law."[224]

160. The Appellants ask this Honourable Court to:

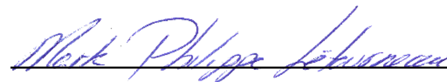
DECLARE section 165.21 and subsection 165.24(2) of the *NDA* of no force and effect, insofar as these provisions prescribe military judges hold military status, pursuant to s 52 of the *Constitution Act, 1982*.

SET ASIDE the decisions of the Court Martial Appeal Court of Canada.

QUASH the conviction of the Appellant Sergeant Thibault.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Gatineau, 15 May, 2023



Commander Mark Philippe Létourneau
Lieutenant Commander Patrice Desbiens
Major Francesca Ferguson
Defence Counsel Services
Counsel for Appellants

---

224 See *G*, *supra* note 203 at para 109; See also *R v Nur,* 2015 SCC 15 at para 51; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, at p 313.

PART VI – PUBLICATION BANS

161. The publication bans under s 179, s 183.5 of the *NDA* or s 486.4 of the *Criminal Code* prohibits publication of information that could identify the complainants. The Court should not publish the name of the complainants, or any other information tending to identify the complainants.

PART VII –TABLE OF AUTHORITIES

Legislation	**Paragraph(s)**
Armed Forces Act 2006 (UK), c 52 (English) s 362(3)	117
Bill C-25: *An Act to amend the National Defence Act,* 36th Parl, 1st Sess, 1998 (English)	143
Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another,* 39th Parl, 2nd Sess, 2008 (English) (French)	148
Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 42nd Parl, 1st Sess, 2018 (English) (French)	11,50,99
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 (English) ss 1, 7, 11(d), 11(f), 24(1) (French) ss 1, 7,1 1(d), 11(f), 24(1)	.....2,28,30,34,43,52,58,62,63,81 82,89,111127,140,141
Constitution Act, 1867, 30 & 31 Vict, c 3 (English) ss 15, 52, 91(7) (French) ss 15, 52, 91(7)	58,86,141,160
Court Martial Act, 2007 No 101, New Zealand Legislation (October 24, 2019) (English) ss 10-20	117
Criminal Code, RSC 1985, c C-46 (English) s 122 (French) s 122	47,152
Judges Act, RSC 1985 c J-1 (English) s 55 (French) s. 55	70
National Defence Act, RSC 1985, c N-5 (English) (French)	....6ff

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

Queen's Regulations and Orders (QR&O) (English) (French) 11,75,91,95,98,101,143,150,151

Case Law

2747-3174 Québec Inc. v Québec (Régie des permis d'alcool), [1996] 3 SCR 919 71

Bell Canada v Canadian Telephone Employees Association, [2003] 1 SCR 884 69

C.U.P.E. v Ontario (Minister of Labour), 2003 SCC 29 70

Canada (The Director of Military Prosecutions) v Canada (Office of the Chief Military Judge and Colonel Mario Dutil), 2020 FC 330 35,36,37,39,40,72,96,139

Committee for Justice and Liberty v National Energy Board, [1978] 1 SCR 369 51,107,116,126

Ell v Alberta, 2003 SCC 35 82,135

Grieves v The United Kingdom, Council of Europe, Grand Chamber (Application no. 57067/00) 123

Groia v Law Society of Upper Canada, [2018] 1 SCR 772 82

Her Majesty the Queen v. Jeffrey Paul Delisle, (8 February 2013), Halifax 2409566/2409567/2409568 (NSPC) 152

Mackeigan v Hickman, [1989] 2 SCR 796 82

Mackin v New Brunswick (Minister of Finance), [2002] 1 SCR 405 82,135

New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319 82

Ocean Port Hotel Ltd. v British Columbia, 2001 SCC 52 75

Ontario (Attorney General) v G, 2020 SCC 38 143,144,145,146,155,156,159

Ontario v Criminal Lawyers' Association of Ontario, 2013 SCC 43 28,82

Pinochet, In re, [1999] UKHL 1 70

Case Law ***(cont'd)*** **Paragraph(s)**

R c Dutil, 2019 CM 3002 88

R c Dutil, 2019 CM 3003 37,38,71

R c Jacques, 2020 CM 3010 46

R c Pépin, 2021 CM 3005 46

R c Thibault, 2021 CM 5016 21

R v Albashir, 2021 SCC 48 156

R v Beaudry, 2018 CMAC 4 152,153

R v Beaudry, 2019 SCC 2 153

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 159

R v Bourque, 2020 CM 2008 42,95

R v D'Amico, 2020 CM 2002 36,42,87,95,96

R v Find, [2001] 1 SCR 863 118

R v Généreux, [1992] 1 SCR 259 ..3,4,30,34,49,52,57,58,60,61,64 ....65,66,72,75,80,89,98,101,103 ....105,106,109,111,112,113,115 117,125,134,135

R v Hoddinott, 2006 CM 24 34

R v Joseph, 2005 CM 41 34

R v JSKT, 2008 SCC *No 32672* *(Discontinuance of motion for a stay of execution: 19 June 2008; Leave to appeal not granted: 25 September 2008)* 148

R v Kirkpatrick, 2022 SCC 33 106,117

R v Lasalle, 2005 CM 46 34,76

R v Le, [2019] 2 SCR 692 118

R v Leblanc, 2011 CMAC 2 30,32,34,89,136,137

R v Lippé, [1991] 2 SCR 114 94,134

Case Law ***(cont'd)*** **Paragraph(s)**

R v MacKay, [1980] 2 SCR 370 72,109

R v MacPherson and Chauhan and J.L., 2020 CM 2012 46

R v Master Seaman R.J. Middlemiss, 2008 CM 1025 34

R v Nguyen, 2005 CM 57 34

R v Nur, 2015 SCC 15 159

R v O'Toole, 2012 CMAC 5 139

R v Pett, 2020 CM 4002 ....29,36,42,91,95,96,98 101,102,116

R v Remington, 2023 CMAC 5 146

R v S(RD), [1997] 3 SCR 484 70

R v Semrau, 2010 CM 1004 34

R v Stillman, [2019] 3 SCR 144 ....12,19,29,72,77,130,136, ...151,152,153

R v Thibault, 2015 CM 1001 19

R v Thibault, 2021 CMAC 6 119

R v Trépanier, 2008 CMAC 3 30,32,148

R. v Bissonnette, 2022 SCC 23 123

Ref Re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 SCR 3 82

Reference as to whether members of the Military or Naval Forces of the United States of America are exempt from Criminal Proceedings in Canadian Criminal Courts, [1943] SCR 483 102

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 82

Rex v Sussex Justices, Ex parte McCarthy [1924] KB 256 69

The Queen v Beauregard, [1986] 2 SCR 56 82

Case Law ***(cont'd)*** **Paragraph(s)**

Therrien (Re), 2001 SCC 35 94

Valente v The Queen, [1985] 2 SCR 673 28,82,94,134,135

White v. Director of Military Prosecutions, [2007] HCA 29 124

Yukon Francophone School Board v Yukon (A.G.), [2015] 2 SCR 282 70

Secondary Sources

Arbour, Louise. *Independant External Comprehensive Review of the Department of National Defence (DND) and the Canadian Armed Forces (CAF): Interim Recommendations* (Montréal, Canada: Borden Ladner Gervais Law Group, October 20, 2021) 25

Collins, Pauline. *The Military as a Separate Society: Consequences for Discipline in the United States and Australia* (Pennsylvania, USA: Lexington Books, 2019) 13,114,124,130,131

Devlin, Richard and Sheila Wildeman. *Disciplining Judges: Contemporary Challenges and Controversies* (Cheltenham, United Kingdom: Edward Elgar Publishing Inc, 2021) 94

Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution,* (New York: The Macmillan. Company, 1967) 102

Friedland, Martin L. "A Place Apart: Judicial Independence and Accountability in Canada", Report prepared for the Canadian Judicial Council, 1995 94

Gold, Marc et al. "Comments on Legislation and Judicial Decisions", Case Comment on *R v MacKay,* (1982) 60-1 Canadian Bar Review 121, 1982 CanLIIDocs 13 74,114,138

Lederer, Fredric I. "From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System", (2017) 225 Military Law Review 512 77

Secondary Sources ***(cont'd)*** **Paragraph(s)**

O'Reilly, James W. and Patrick Healy. *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion*, Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997) 131

Shafer, Arthur. *The Buck Stops Here – Reflections on Moral Responsibility, Democratic Accountability and Military Values*, Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997) 131

Schlueter, David. A. "The Military Justice Conundrum; Justice or Discipline?", (2013) 215 Mil L Rev 1 77

United States Army Judge Advocate General's Corps, *The Army Lawyer: A History of the Judge Advocate General's Corps*, 1775- 1975, (1975) 77

Government Documents

Arbour, Louise, *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces*, 2022 13,18,23,129,130,132,133

Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured legacy: the lessons of the Somalia Affair: report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, vol 1-5, 1997 26,31,131

Canada, Government of Canada, *About Operation HONOUR* 18

Canada, National Defence, *Director of Military Prosecutions Withdraws All Charges against Chief Military Judge*, 2020 40,96

Canada, National Defence, *Interim Direction Regarding the Implementation of Madame Arbour Interim Recommendation*, 2021 25

Canada, National Defence, *Joint Statement of the Canadian Forces Provost Marshal and the Director of Military Prosecutions* 24,25,129

Government Documents ***(cont'd)*** **Paragraph(s)**

Canada, National Defence, *Message from the MND regarding the tabling of the Third Independent Review of the National Defence Act report*, 2021 117,118,144

Canada, National Defence, *Obstruction of Justice Charge Laid Against Retired General Jonathan Vance*, 2021 131

Canada, Office of the Auditor General of Canada, *Report 3 – Administration of Justice in the Canadian Armed Forces*, 2018 27

Canadian Judicial Council, *Why is Judicial Independence important to you?*, 2016 70

Fish, Morris J. *Report of the Third Independent Review Authority to the Minister of National Defence*, 2021 ....26,27,28,31,32,47,79,104,116 ....117,120,122,124,131,133,135 136,139,144

Lamer, Antonio, *First Independent Review of the provisions and operation of Bill C-25*, 2003 26,27,144

LeSage, Patrick J. *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, 2011 26

Directives

Canada, National Defence, *DAOD 5019-0, Conduct and Performance Deficiencies*, 2004 151

Canada, Office of the Judge Advocate General, *Draft Internal Report – Court Martial comprehensive Review*, January 17, 2018 117,121

Chief of the Defence Staff, *Order: Designation of commanding officers with respect to officers and non-commissioned members on the strength of the Office of the Chief Military Judge Dept ID 3763*, October 2, 2019 44,45,46,95

Chief of the Defence Staff, *Suspension of the Order: Designation of commanding officers with respect to officers and non-commissioned members on the strength of the Office of the Chief Military Judge Dept ID 3763, dated October 2, 2019*, September 15, 2020 46

Office of the Chief Military Judge, *Canadian Forces Organization Order 3763*, February 27, 2008 27

Conference

Lamer, Antonio. "The Tension between Judicial Accountability and Judicial Independence: A Canadian Perspective by the Rt. Hon. Antonio Lamer, P.C. Chief Justice of Canada" (1996) 8: Part 2 Sing Ac LJ 94

McLachlin, Beverley PC, Chief Justice of Canada. "Judicial Accountability" (Conference on Law and Parliament, Ottawa, November 2, 2006) 94

Other Documents

Decaux, Emmanuel. *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62nd Sess, UN Doc E/CN.4/2006/58 (2006), Principle No 13 123

United Kingdom, Ministry of Defence, *Court martial results from the military court centres: January to December 2021*, 2023 121