FILE NUMBER: 39820
39822
40046
40065
40103

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA)

No. CMAC-606
CMAC-607
CMAC-608
CMAC-609
CMAC-610
CMAC-612
CMAC-614
CMAC-616
CMAC-617

BETWEEN:

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

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

(Style of cause continues on next page)

RESPONDENT'S FACTUM
(Rule 42 of the *Rules of the Supreme Court of Canada*)

AND BETWEEN:

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

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

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)

Canadian Military Prosecution Service
7th Floor, South Tower
101 Colonel By Drive
Ottawa ON K1A 0K2

Telephone: 613-996-6333
Facsimile: 613-995-1840
Email: dylan.kerr@forces.gc.ca
karl.lacharite@forces.gc.ca
jagdmpappeals.jagdpmappels@forces.gc.ca

Dylan Kerr (Colonel)
Karl Lacharité (Lieutenant-Colonel)

COUNSEL FOR THE RESPONDENT

Original to:

The Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa ON K1A 0J1

Copy to:

Defence Counsel Services
Asticou Centre, Block 2600
241 Cité-des-Jeunes Boulevard
Gatineau QC J8Y 6L2

Tel.: 819-994-7186
Facsimile : 819-997-6322
Email: mark.letourneau@forces.gc.ca
patrice.desbiens@forces.gc.ca
francesca.ferguson@forces.gc.ca

Mark Létourneau (Commander)
Patrice Desbiens (Lieutenant-Commander)
Francesca Ferguson (Major)

COUNSEL FOR THE APPELLANTS

FILE NUMBER: 39820
39822
40046
40065
40103

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

LEADING SEAMAN C.D. EDWARDS ET AL.

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

(Style of cause continues on next page)

RESPONDENT'S FACTUM

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

Dylan Kerr (Colonel)
Karl Lacharité (Lieutenant-Colonel)

COUNSEL FOR THE RESPONDENT

Canadian Military Prosecution Service

7th Floor, South Tower
101 Colonel By Drive
Ottawa ON K1A 0K2
Tel.: 613-996-6333
dylan.kerr@forces.gc.ca
karl.lacharite@forces.gc.ca
jagdmpappeals.jagdpmappels@forces.gc.ca

Mark Philippe Létourneau (Commander)
Patrice Desbiens (Lieutenant-Commander)
Francesca Ferguson (Major)

COUNSEL FOR THE APPELLANTS

Defence Counsel Services

Asticou Centre, Block 2600
241 Cité-des-Jeunes Boulevard
Gatineau QC J8Y 6L2
Tel.: 613-979-4504
mark.letourneau@forces.gc.ca
patrice.desbiens@forces.gc.ca
francesca.ferguson@forces.gc.ca

AND BETWEEN:

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

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

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)

TABLE OF CONTENTS

APPELLANT'S FACTUM

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This Court has time and again confirmed the constitutionality of a separate system of military justice, designed to meet the unique needs of the Canadian Armed Forces in maintaining discipline, efficiency, and morale among its members. In *MacKay*, and again in *Généreux*, the Court endorsed a system of military tribunals with military members tried by military officers, noting the need for military officers to perform judicial roles in a properly functioning military justice system.

2. While the issues have been reframed since the various trial decisions, the core issue raised by the Appellants is: does the status of military judges as military officers violate section 11(d) of the *Charter*? This Court has already definitively answered this question in *Génereux*, a decision that has been relied on in all modern jurisprudence surrounding the military justice system, and as recently as this Court's decision in *Stillman*. The military status of military judges does not offend section 11(d) of the *Charter*. What matters is that military judges meet the hallmarks of independence as expressed in *Valente*.

3. Military judges are insulated from the command of the military hierarchy. Military judges are not subject to orders from the chain of command. They are only liable to perform their judicial duties and those duties assigned to them by the Chief Military Judge which are not incompatible with their judicial duties. They have security of tenure, security of pay, and sufficient administrative independence to perform their judicial functions free from interference. With all this in place, the reasonable and informed observer could only conclude that military judges are independent and impartial.

4. No one is above the law. Like all judges in Canada, military judges are subject to the criminal law; and as military officers they are subject to the military law. This does not offend section 11(d) of the *Charter*.

B. STATEMENT OF FACTS

I. The origin of the current challenge to the independence of military judges

5. The current challenge to the independence and impartiality of the military judges arose following the issuance of a Chief of Defence Staff (CDS) order designating a new officer to act as the commanding officer with respect to the administration of the Code of Service Discipline in relation to military judges charged with a service offence.[1] Prior to this order, military judges were subject to the regime applicable to all officers on strength at National Defence Headquarters (NDHQ).[2] Under that regime, lieutenant-colonels and below were assigned one commanding officer while colonels and above were assigned a more senior commanding officer.[3] The CDS order assigned this more senior commanding officer to all military judges regardless of rank.

II. The Office of the Chief Military Judge and the CDS Order

6. The Office of the Chief Military Judge (OCMJ) was established by Ministerial Organization Order (MOO) in February 2000 in response to amendments to the *National Defence Act* (NDA) focused on military justice system reforms which came into force in September 1999. The OCMJ was assigned as a unit of the regular force, replacing the previous Office of the Chief Military Trial Judge.[4] Under the MOO, the Chief Military Judge (CMJ) is designated as an officer commanding a command in relation to persons on the strength of the OCMJ except that the CMJ may not exercise those powers in relation to matters of discipline or with respect to grievances.

7. The Canadian Forces Organization Order (CFOO) for the OCMJ, like any other CFOO, is derived from, and supplements, the MOO. Under the CFOO, the CMJ is designated as both a commanding officer (CO) and an officer commanding a command, except in relation to matters of

---

[1] CDS 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, 19 January 2018 [Respondent's Record (RR), Part 3, TAB 2].
[2] Canadian Forces Organization Order 3763 Office of the Chief Military Judge, 27 February 2008 at para 9 [RR, Part 3, TAB 7].
[3] Canadian Forces Organization Order 0002 – Canadian Forces Support Unit (Ottawa), 9 August 2013 at paras 5, 10(b) [RR, Part 3, TAB 6].
[4] Ministerial Organization Order 2000007, [Office of the Chief Military Judge], 7 February 2000 [RR, Part 3, TAB 4].

discipline or with respect to grievances.[5] In accordance with the CFOO in effect at the time the CDS order was issued, the disciplinary process for persons on the strength of the OCMJ was the same as for persons on strength at NDHQ.[6] Pursuant to section 165.24 of the NDA, the CMJ holds a rank that is not less than colonel.[7] While not prescribed in the Act, other military judges typically hold the rank of lieutenant-colonel, which is the case for all currently sitting military judges.

8. The COs for matters of discipline for military personnel on strength at NDHQ were originally designated by CDS order and identified in the CFOO for the Canadian Forces Support Unit (Ottawa) (CFSU(O)). Under this regime, the designated CO depended on the rank of the accused, which led to the CMJ being assigned a different CO than the other military judges. At that time:

a. the Chief of Programme (C Prog) was designated as the CO for matters of discipline for all colonels and brigadier-generals on strength at NDHQ; and

b. the Commandant of CFSU(O) was designated as the CO for matters of discipline for persons holding the rank of lieutenant-colonel and below.[8]

9. On 19 January 2018, the CDS issued a separate order designating C Prog as the CO for all military judges. In effect, this brought all military judges, regardless of their actual rank, under the same designated CO for matters of discipline as for colonels and brigadier-generals on strength at NDHQ.[9]

10. In October 2019, CFSU(O) was replaced by Canadian Forces Base (CFB) Gatineau-Ottawa and the CFOO for CFSU(O) was repealed.[10] The CO for matters of discipline for colonels and brigadier-generals on strength at NDHQ was reassigned to the Deputy Vice Chief of Defence Staff

---

[5] Canadian Forces Organization Order 3763 Office of the Chief Military Judge, 18 November 2020 [RR, Part 3, TAB 9].
[6] *Supra* note 2.
[7] *National Defence Act*, RSC 1985, c N-5, s 165.24 [NDA].
[8] *Supra* note 3.
[9] *Supra* note 1.
[10] Canadian Forces Organization Order 0002 – Canadian Forces Base Ottawa-Gatineau, 29 October 2019 [RR, Part 3, TAB 5].

(DVCDS), while the CO for lieutenant-colonels and below was reassigned to the CO CFB Gatineau-Ottawa.[11]

11. The CDS also replaced the order designating C Prog as the CO for disciplinary matters involving military judges with a new order (hereinafter "the CDS Order") designating the DVCDS as fulfilling this role, thus bringing it in line with his order for colonels and brigadier-generals on strength at NDHQ.[12]

III. The Pett and D'Amico decisions

12. The first challenge to the independence and impartiality of the military judges resulting from the CDS Order was filed on 15 November 2019 in the *Pett* case.[13] Military Judge Commander (Cdr) Pelletier heard the application on 28 November 2019 and rendered his decision orally on 2 December 2019, with written reasons issued on 10 January 2020. In his decision, he concluded that military judges are immune from the disciplinary process applicable to military officers while they hold judicial office, a process that in his view is exclusively assigned to the Military Judges Inquiry Committee (MJIC). On that basis, he found the CDS Order to be unlawful in that it purported to grant authority to charge an officer holding the office of military judge. However, he dismissed the application for a stay of proceedings on the basis that his declaration that the CDS Order was unlawful was sufficient to cure any perception that independence and impartiality had been undermined.

13. Master-Corporal Pett was subsequently convicted of one count of behaving with contempt towards a superior officer contrary to section 85 of the NDA and one count of ill-treating a subordinate contrary to section 95 of the NDA.[14] This case does not form part of the current appeal.

---

[11] CDS Order, Designation of Commanding Officers with respect to certain officers and other ranks on the strength of National Defence Headquarters, 14 June 2019 [RR, Part 3, TAB 3].
[12] CDS 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, 2 October 2019 [RR, Part 3, TAB 1].
[13] *R v Pett*, 2020 CM 4002.
[14] NDA, *supra* note 7, s 85.

14. The same challenge was heard before Military Judge Cdr Sukstorf on 17 January 2020 in the *D'Amico* case.[15] In her decision, rendered orally on 21 February 2020, Military Judge Cdr Sukstorf found that the CDS Order was overbroad and encroached on the disciplinary jurisdiction of the MJIC. As such, she declared the CDS Order to be unlawful, but left open the possibility that military judges could be charged, dealt with, and tried by court martial in exceptional circumstances. She dismissed the plea in bar, refusing to terminate the proceedings.

15. Corporal D'Amico was subsequently convicted of one count of neglect to the prejudice of good order and discipline contrary to section 129 of the NDA.[16] This case does not form part of the current appeal.

IV. The Bourque court martial

16. On 6 July 2020, one week before the court martial was scheduled to begin, the accused raised the challenge to the independence and impartiality of the military judges again in the *Bourque* case.[17] The prosecution filed a motion to dismiss the application for lack of reasonable notice. On Friday, 10 July 2020, Military Judge Cdr Sukstorf dismissed the prosecution's motion, expressing significant concerns that the CDS Order had not been rescinded following the *Pett* and *D'Amico* decisions. She adjourned the application until the following Monday, 13 July 2020 at 1330 hours, indicating that if the CDS Order was rescinded by then, the trial would proceed as scheduled. Otherwise, she would hear the application and expect evidence to "explain or account for why the CDS Order has not yet been rescinded."[18]

17. In the interim, Major Bourque withdrew his application, pled guilty and was convicted of one count of conduct to the prejudice of good order and discipline contrary to section 129 of the NDA.[19] This case does not form part of the current appeal.

---

[15] *R v D'Amico*, 2020 CM 2002.
[16] NDA, *supra* note 7, s 129.
[17] *R v Bourque*, 2020 CM 2008.
[18] *Ibid* at para 40.
[19] NDA, *supra* note 7, s 129.

V. The Edwards and Crépeau decisions

18. This issue arose again before Acting Chief Military Judge (ACMJ) Lieutenant-Colonel (LCol) d'Auteuil in the cases of *Edwards* (filed on 11 June 2020)[20] and *Crépeau* (filed on 23 June 2020).[21] The ACMJ heard the *Edwards* application on 26 June 2020 and the *Crépeau* application on 29 and 30 June 2020. In both applications, the accused sought a stay of proceedings on the basis that the CDS Order had not yet been rescinded, referencing Military Judge Cdr Sukstorf's decision in *Bourque*. In *Crépeau*, the accused also sought a declaration of invalidity over sections 12, 18 and 60 of the NDA[22] which, in his view, were unconstitutional in that they permitted the CDS to issue an order, such as the CDS Order, in violation of an accused's section 11(d) *Charter* rights.

19. The ACMJ issued his decisions orally in both matters on 14 August 2020 where he dismissed the challenge to sections 12, 18 and 60 of the NDA[23] but granted stays of proceedings in both cases. He held that the CDS Order's continued existence invited the conclusion that a declaration that the order is unlawful would appear meaningless. In his view, short of the CDS rescinding the CDS Order, only a stay of proceedings would remedy the order's threat to the perception of military judicial independence and impartiality. In concluding so, he found that the MJIC was the exclusive forum for dealing with disciplinary matters involving military judges in their judicial role, and that this role was practically impossible to separate from their role as military officers.[24]

20. The Crown filed notices of appeal in these cases with the Court Martial Appeal Court (CMAC) on 18 and 19 August 2020, respectively.

---

[20] *R v Edwards*, 2020 CM 3006 [*Edwards*].
[21] *R v Crépeau*, 2020 CM 3007.
[22] NDA, *supra* note 7, ss 12, 18 and 60.
[23] *Ibid.*
[24] *Edwards*, *supra* note 20 at paras 43, 48; *Ibid* at paras 56, 62.

VI. The Fontaine decision

21. On 3 September 2020, ACMJ LCol d'Auteuil heard this application again in the *Fontaine* case (filed on 17 August 2020).[25] On 10 September 2020, he concluded that a stay of proceedings was once again required, not only for the reasons in *Edwards* and *Crépeau*, but also because the prosecution chose to bring this matter before a court martial despite those decisions. In his view, granting a termination of proceedings to allow charges to be heard in a civilian criminal court would completely distort the accused's right to a fair trial before an independent and impartial tribunal.[26] The Crown filed a notice of appeal with the CMAC on 11 September 2020.

VII. The Iredale decision

22. This challenge was heard yet again on 11 September 2020 before Military Judge Cdr Pelletier in the *Iredale* case (filed on 23 June 2020).[27] Military Judge Cdr Pelletier dismissed the accused's challenge to sections 12, 18 and 60 of the NDA[28] for the reasons set out in *Crépeau*, confirmed his finding that the CDS Order violates section 11(d) of the *Charter* declaring it to be of no force and effect, and granted a stay of proceedings. In granting the stay, he relied on the principle of judicial comity but also stated that, in his view, the remedy granted needed to be relevant to the experience of the accused. Having been brought before a court with known deficiencies in relation to independence and impartiality, it would in his view be inappropriate to issue a termination of proceedings to allow charges to be heard in a civilian criminal court.[29] The Crown filed a notice of appeal with the CMAC on 13 September 2020.

---

[25] *R v Fontaine*, 2020 CM 3008.
[26] *Ibid* at para 61.
[27] *R v Iredale*, 2020 CM 4011 [*Iredale*].
[28] NDA, *supra* note 7, ss 12, 18 and 60.
[29] *Iredale*, *supra* note 27 at paras 62-64.

VIII. The suspension of the CDS Order and the subsequent applications

23. On 15 September 2020, the CDS suspended the CDS Order pending the outcome of the appeals to the CMAC.[30] In a number of subsequent courts martial, accused persons filed new applications alleging violations of section 11(d) of the *Charter* on the basis that the suspension of the CDS Order was not sufficient to remedy the violation, and that there were institutional problems which extended beyond the CDS Order.

24. The first of these challenges, a joint application in the cases of *R v MacPherson and Chauhan and JL*,[31] was dismissed by Military Judge Cdr Sukstorf on 14 October 2020, with written reasons delivered on 23 October 2020. She concluded that it was only the CDS Order that undermined military judges' independence and impartiality, and its suspension had cured any violation of the accused's section 11(d) *Charter* rights. She also endorsed the previous decisions regarding sections 16, 18 and 60 of the NDA[32], finding that they did not violate section 11(d) of the *Charter*.

25. On 10 November 2020, ACMJ LCol d'Auteuil reached a different conclusion in *Christmas,* where he found that the suspension of the CDS Order was insufficient to cure the breach. He concluded that there was also a problem with paragraph 9 of the CFOO for the OCMJ which indicated that the disciplinary regime for military personnel in the OCMJ was the same as for those belonging to NDHQ. The ACMJ found that paragraph to be of no force or effect but nevertheless granted a stay of proceedings.[33] On 18 November 2020, the CFOO was amended to remove paragraph 9.[34]

26. On 13 November 2020, Military Judge Cdr Pelletier granted a stay of proceedings in *Proulx*, with written reasons released on 24 November 2020.[35] He found that the previous actions

---

[30] CDS Suspension of the order Designation of commanding officers with respect to officers and non-commissioned members on strength of the Office of the Chief Military Judge, 15 September 2020 [RR, Part 3, TAB 8].
[31] *R v MacPherson and Chauhan and JL*, 2020 CM 2012.
[32] NDA, *supra* note 7, ss 12, 18 and 60.
[33] *R v Christmas*, 2020 CM 3009.
[34] *Supra* note 5.
[35] *R v Proulx*, 2020 CM 4012.

of the CDS were insufficient to "cure the disease". He concluded that the only way to ensure that military judges were sufficiently independent and impartial was for the military hierarchy to issue a statement of clear acceptance of his decision in *Pett* that military judges could not be charged for having committed a service offence.

27. On 4 December 2020, ACMJ LCol d'Auteuil denied an application for a stay of proceedings in *Jacques,*[36] finding that the removal of paragraph 9 of the CFOO following his declaration of invalidity in *Christmas* was sufficient to cure what he had identified as the remaining problem.

28. However, on 9 December 2020, Military Judge Cdr Pelletier granted another stay of proceedings in *Cloutier*.[37] In that case, he found that the re-issuance of the CFOO for the OCMJ without paragraph 9 did not cure the defect, as charges could still be laid under the NDA and referred to the CO of the base where a military judge was located. He re-iterated that only an acknowledgement by the military hierarchy of the law that he had set out in *Pett* could cure the continued threat to independence.[38] On 23 May 2021, Military Judge Cdr Pelletier granted another stay of proceedings in *Brown,*[39] for substantially the same reasons he set out in *Cloutier*.

IX. The CMAC appeals

29. On 29 January 2021, the CMAC heard the first in a series of appeals from the various trial decisions on these issues beginning with *Edwards et al*.[40] In that decision, rendered on 11 June 2021, the CMAC unanimously overturned the stays of proceedings and ordered new trials. In doing so, the CMAC confirmed that military judges are subject to the Code of Service Discipline,[41] that the MJIC has no power to discipline,[42] and that the prosecution of military judges before courts martial is consistent with the rule of law principle that no one is above the law.[43]

---

[36] *R v Jacques*, 2020 CM 3010.
[37] *R v Cloutier*, 2020 CM 4013.
[38] *Ibid* at para 58.
[39] *R v Brown*, 2021 CM 4003.
[40] *R v Edwards; R v Crépeau; R v Fontaine; R v Iredale*, 2021 CMAC 2.
[41] *Ibid* at para 114.
[42] *Ibid* at paras 76-83.
[43] *Ibid* at paras 86-87.

The CMAC concluded that the necessary hallmarks of judicial independence were present in the military justice system and that:

> An informed person, viewing the matter realistically and practically—and having thought the matter through could, in our respectful view, reach no other conclusion than military judges meet the minimum constitutional norms of impartiality and independence as required by section 11(*d*) of the *Charter*.[44]

30. The CMAC's decision in *Edwards et al* was subsequently followed in the appeals in *Proulx et al*,[45] *Christmas*,[46] *Brown*,[47] *Thibault*,[48] *Remington*,[49] *Turner*,[50] and *Cookson*.[51] Leave applications to this Court are pending in the latter three decisions, while the others have been joined and form part of the present appeal.

---

[44] *Ibid* at para 114.
[45] *R v Proulx; R v Cloutier*, 2021 CMAC 3.
[46] *R v Christmas*, 2022 CMAC 1.
[47] *R v Brown*, 2022 CMAC 2.
[48] *R v Thibault*, 2022 CMAC 3 at paras 43-46.
[49] *R v Remington*, 2023 CMAC 3.
[50] *R v Turner*, 2023 CMAC 6.
[51] *R v Cookson*, 2023 CMAC 8.

PART II – QUESTIONS IN ISSUE

31. While the Appellants have reframed the issues before this Court, at the heart of their appeal is the following issue and consequential questions:

a. Does the status of military judges as military officers breach section 11(d) of the *Charter*?

b. If so, can the breach be saved by section 1 of the *Charter*?

c. If there is a breach of section 11(d) that is not saved by section 1 of the *Charter*, what is the appropriate remedy?

32. The Respondent would answer these questions as follows:

a. No. The military status of military judges does not offend section 11(d) of the *Charter*. This question has been definitively answered by this Court in *Généreux*, a decision which has consistently been relied upon and remains good law.

b. If this Court finds that the military status of military judges does offend section 11(d) of the *Charter*, then the Respondent concedes that this could not be saved by section 1. There would be no compelling reason to depart from the minimum constitutional guarantee of an independent and impartial tribunal.

c. If there is a breach of section 11(d) of the *Charter*, this Court should issue a delayed declaration of invalidity. Extensive legislative reform would be necessary to address the issue effectively. The military justice system must be able to continue to function until a legislative solution can be implemented. While some cases could be diverted to the civilian justice system, many could not. A declaration with immediate effect would have a devasting effect on the administration of justice.

PART III – ARGUMENT

33. This Court has time and again re-iterated the importance of a separate system of military justice, operating alongside the civilian justice system, which is designed to meet the unique needs of the military in fostering discipline, efficiency, and morale of the Canadian Armed Forces.[52] This system of military justice is based on service tribunals presided over by military officers.

34. The "concept of 'members tried by members' fosters morale within the military."[53] The Court spoke to the importance of this principle by adopting this passage from Professor J. Walker:

> Esprit de corps depends on the confidence that one's conduct, alleged to have violated the *Code of Service Discipline* […] will be assessed by those whose familiarity with the challenges and circumstances of military life is the product of personal experience and whose sensitivity to the requirements of the Code is derived from an ongoing commitment to uphold it.[54]

A. THE MILITARY JUDGES' STATUS AS MILITARY OFFICERS DOES NOT VIOLATE SECTION 11(d) OF THE *CHARTER*

35. In *Généreux*, this Court considered the independence and impartiality of the court martial. Although the Court determined that certain aspects of the court martial system, as it then existed, violated section 11(d) of the *Charter*, Chief Justice Lamer, speaking for a majority of the Court, endorsed the constitutionality of a separate system of military justice, where members of the military are tried by military officers performing judicial roles:

> Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military. 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.
>
> This, in itself, is not sufficient to constitute a violation of s. 11(d) of the *Charter*. In my opinion the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed

---

[52] See e.g. *R v Stillman*, 2019 SCC 40 at paras 35-36.
[53] *Ibid* at para 70.
[54] *Ibid*.

> above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11(d) of the *Charter*, must be interpreted in this context.[55]

36. Chief Justice Lamer then quoted with agreement the following excerpt from James B. Fay:

> In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.[56]

37. Similarly, in *MacKay* the Court considered, albeit in the pre-*Charter* context, whether having military officers preside at courts martial was in violation of the right of the accused to an independent and impartial tribunal guaranteed by section 2(f) of the *Canadian Bill of Rights*.[57] Both the majority and the concurring minority found that there was no violation, and that it was preferable to have a military officer perform this judicial role rather than to have a civilian judge.[58]

38. Although the majority in *Généreux* distinguished *MacKay* on other grounds (without over-ruling that decision), the minority concurring opinion and the dissent both refer approvingly to Justice McIntyre's remarks regarding the need for military officers to perform judicial functions:

> 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. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of

---

[55] *R v Généreux*, [1992] 1 SCR 259 at 295, 1992 CanLII 117 (SCC) [emphasis added].
[56] *Ibid* at 248.
[57] *MacKay v The Queen*, [1980] 2 SCR 370, 1980 CanLII 217 (SCC).
[58] *Ibid* at 395, 403-04.

> our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline—which includes the welfare of their men—are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.[59]

39. This is exactly the system that Parliament has created in the NDA. Military judges are military officers, and military officers are necessarily subject to the Code of Service Discipline like any other member of the Canadian Armed Forces. As this Court has noted, the Code is "an essential ingredient of service life".[60] The status of military judge as both judge and officer is not incompatible but complimentary. Both roles fulfil the same function of maintaining the discipline, efficiency, and morale of the Canadian Armed Forces.

40. The Appellants mistakenly rely on *Généreux* for the proposition that the military status of military judges is a *de facto* breach saved only by necessity. This is a misreading of *Généreux*. The rationale for, and advantage of, military officers presiding over courts martial is described in *Généreux* and other decisions as necessary for a properly function military justice system. Yet, Chief Justice Lamer was clear in his decision that their military status does not breach section 11(d) of the *Charter*. While he went on to consider whether a section 1 analysis could save other aspects of the system which, as it then existed, did violate section 11(d) of the *Charter*, he did not rely on section 1 to justify the military status of military judges.

41. This Court confirmed recently in *Stillman* that the military justice system is "a full partner in administering justice alongside the civilian justice system."[61] While the military justice system has a separate purpose, it too must conform to the *Charter*, including section 11(d).[62] Like the criminal justice system, the military justice system grows and evolves in response to developments in law and society.[63]

---

[59] *Ibid* at 403-04.
[60] *Stillman*, *supra* note 52 at para 55, citing *MacKay*, *supra* note 57 at 400.
[61] *Ibid* at para 20.
[62] *Ibid* at para 44.
[63] *Ibid* at para 53.

42. In *Stillman*, this Court noted the continued evolution of the military justice system over the 30 years since *Généreux*.[64] In light of the legislative changes over the years which have further secured the independence of the military judiciary, it would be perverse to now conclude that having military officers preside at courts martial is *de facto* inconsistent with section 11(d) of the *Charter*.[65] Rather, in analysing whether the military justice system meets its constitutional obligations, like this Court did in *Généreux*, the Court should apply the *Valente* framework to consider whether military judges have sufficient hallmarks of independence. Those hallmarks have only been strengthened over the years since *Généreux*.

B. MILITARY JUDGES HAVE ALL THE HALLMARKS OF JUDICIAL INDEPENDENCE

43. There are many safeguards built into the NDA to prevent any conflict arising from the status of military judges as military officers, all of which would be known to the reasonable and informed observer.

44. First, other than their judicial duties, military judges are only liable to perform duties assigned to them by the CMJ, and those duties may not be incompatible with their judicial duties.[66] The CMJ is only liable to perform the judicial duties assigned to him by the NDA.[67]

45. Second, military judges enjoy the same immunity from liability as a judge of a superior court of criminal jurisdiction.[68]

46. Third, a military judge may only be removed from office by the Governor in Council on recommendation of the MJIC.[69] The MJIC consists of three judges of the CMAC appointed by the Chief Justice.[70]

---

[64] *Ibid* at paras 44-53.

[65] These many reforms are summarized in *Stillman*, *supra* note 52.

[66] NDA, *supra* note 7, s 165.23.
[67] *Ibid*, s 165.25.
[68] *Ibid*, s 165.231.
[69] *Ibid*, s 165.21(3).
[70] *Ibid*, s 165.31.

47. Fourth, military judges have the security of tenure and financial security required to ensure their independence and impartiality. Military judges serve until the age of 60, unless they voluntarily release from the Canadian Armed Forces, resign their office, or are removed for cause.[71] Their pay is set by Treasury Board regulation after the consideration of a report by the Military Judges Compensation Committee (MJCC) and a response by the Minister of National Defence to that report.[72] The MJCC consists of three persons appointed by the Governor in Council, of whom one is nominated by the military judges, one is nominated by the Minister of National Defence, and one is nominated by the other two (and who acts as Chairperson).[73]

48. Fifth, military judges have additional protections to their administrative independence from the military hierarchy. A military judge cannot receive performance evaluations.[74] They have their own grievance regime.[75] A military judge may only be released voluntarily[76] and may not be relieved from the performance of military duty.[77] The only administrative review of a military judge's conduct is therefore through the MJIC.

49. The application of the Code of Service Discipline to military judges is no different than the application of the *Criminal Code* to a civilian judge. There is no exemption for civilian judges from the application of the criminal law, nor are they exempt from other Federal or Provincial laws or Municipal bylaws. There is no requirement for a civilian judge to be removed from office before criminal charges or other offences can be laid, or before those charges can be heard by a court of appropriate jurisdiction. Judicial independence and impartiality do not require such an exemption. Indeed, exempting judges from criminal, penal and regulatory laws would have a devasting effect on the public's perception of, and confidence in, the administration of justice.

---

[71] *Ibid*, ss 165.21(3)-(5).
[72] *Ibid*, ss 12(3)(a), 165.33-165.37.
[73] *Ibid*, s 165.33(1).
[74] *Queen's Regulations & Orders for the Canadian Forces*, ss 26.10, 26.12 [QR&O].
[75] NDA, *supra* note 7, ss 29(2.1), 29.101.
[76] QR&O, *supra* note 74, s 15.01(5).
[77] *Ibid*, s 19.75(1).

One of the fundamental concepts of the rule of law is that no one is above the law and everyone regardless of condition or rank is subject to the ordinary laws of the land.[78]

C. THE APPELLANTS' PERCEIVED VIOLATIONS OF SECTION 11(d) OF THE *CHARTER* FLOW FROM IMPROPER PRESUMPTIONS

50. The Appellants' concerns with judicial independence and impartiality are based on the ill-conceived notion that actors within the military justice system could act improperly, unlawfully or in bad faith to bring charges against a military judge in order to effectively remove that military judge from office. This approach fails to recognize the presumption that statutory actors exercise their powers and responsibilities in good faith. This presumption is reinforced by strong safeguards in place to prevent actors from acting improperly against a military judge.

51. Persons are entitled, absent evidence to the contrary, to a general presumption that they will act in good faith.[79] Public officials exercising a prosecutorial function are entitled to a strong presumption that they exercise prosecutorial discretion independently of partisan concerns.[80] The Appellants' concerns are based on hypothetical scenarios in which military police, or other charge-layers, bring unwarranted charges in order to pressure military judges perceived to be making unfavourable decisions. In other words, that the military police and the military hierarchy might act improperly, unlawfully and in bad faith.

52. Not only does this violate the presumption that those actors will exercise their discretionary roles in good faith, it ignores the many protections in place to prevent such actions. For example:

a. The QR&O requires that charge-layers receive legal advice before laying a charge under the Code of Service Discipline.[81]

---

[78] It is this principle which underpins Prof Dicey's statement quoted by Cdr Pelletier MJ in *Iredale*, *supra* note 27 at para 48.

[79] See e.g. *Blair v Consolidated Enfield Corp*, [1995] 4SCR 5 at 12, 1995 CanLII 76 (SCC) re-affirming *General Motors of Canada Ltd v Brunet*, [1977] 2 SCR 537 at 548, 1976 CanLII 196 (SCC).

[80] *R v Cawthorne*, 2016 SCC 32 at para 32 [*Cawthorne*].

[81] QR&O, *supra* note 66, s 102.07(2)(b).

b. Charge-layers are held to the same legal standard as police laying an information in civilian criminal court, that is, the charge-layer must have a reasonable belief that a service offence has been committed.[82]

c. When charges are laid, they must be referred to the Director of Military Prosecutions (DMP).[83]

d. The DMP, or a military prosecutor acting on behalf of the DMP, will determine whether to proceed to court martial.[84] In doing so, the DMP is subject to the same legal standard as all other prosecutors in Canada, that is, the DMP must have a reasonable belief that proof of guilt beyond a reasonable doubt could be made out in court.[85]

e. The DMP acts independently of the military hierarchy and must make decisions free from partisan or other improper considerations.[86]

53. There is no real risk that charges against a military judge could be brought before a court martial for an improper purpose. For this to happen, the charge-layer and the DMP would both have to have acted unlawfully and in bad faith. In the unlikely event that either of these actors behaved in such a manner, the Crown would be subject to an abuse of process application and a malicious prosecution suit. Any individual actors involved in the impropriety would be liable to be charged with several criminal and service offences.[87] Police officers and lawyers involved would also be subject to serious career repercussions under their respective professional codes of conduct.

---

[82] *R v Edmunds*, 2018 CMAC 2.

[83] NDA, *supra* note 7, s 161.1(1). [Note: Prior to Bill C-77 charges were referred to the member's CO first for a decision as to whether to proceed with the charges, then through a referral authority to the DMP.]

[84] *Ibid*, s 165.

[85] *Miazga v Kvello Estate*, 2009 SCC 51 at paras 58-77.

[86] *Cawthorne*, *supra* note 80 at paras 24, 31-32.

[87] See e.g. false accusations (NDA, *supra* note 7, s 95), detaining unnecessarily (*ibid*, s 99), fabricating evidence (*Criminal Code*, RSC 1985, c C-46, s 137, obstructing justice (*ibid*, s 139).

54. No legal regime could survive an analysis based on hypothetical scenarios of statutory actors acting unlawfully and in bad faith. Indeed, no judge anywhere in Canada could be immune from police, prosecutors or other statutory actors behaving unlawfully and in bad faith. If these types of hypothetical scenarios were to prevail, no judge would be able to be perceived as independent and impartial.

D. CONCLUSION

55. The status of military judges as military officers does not offend section 11(d) of the *Charter*. This question was considered and decided by this Court in *Généreux*, a decision which has been relied upon consistently since it was released in 1992. *Généreux* remains good law. As this Court noted in *Stillman*, the military justice system has come a long way since *Généreux* and continues to grow and evolve with developments in the law and society. As a result of that evolution, the independence of military judges has only been strengthened. To find now, after 30 years of improvements, that the military status of military judges violates section 11(d) of the *Charter* would diminish that progress. Such a finding would not only be inconsistent with the decision in *Généreux*, it would also conflict with all of this Court's recent jurisprudence related to the military justice system.

PART IV – SUBMISSIONS AS TO COSTS

56. The Crown does not seek costs in these cases.

PART V – ORDER SOUGHT

57. The Crown asks this Honourable Court to dismiss the appeals and affirm the CMAC orders for trials to proceed in *Edwards*, *Crépeau*, *Fontaine*, *Iredale*, *Proulx*, *Cloutier*, *Christmas*, and *Brown*, and to affirm the conviction in *Thibault*.

58. If the status of military judges as military officers violates s. 11(d) of the *Charter*, the Respondent requests that this Court issue a delayed declaration of invalidity of at least 12 months to allow Parliament to implement an appropriate and effective legislative solution. The military status of military judges is firmly entrenched in the current regime, and any legislative proposal

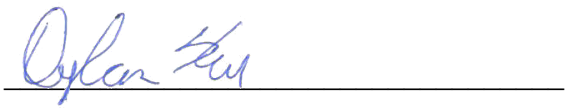
would need to be carefully crafted, analysed, and implemented, along with sufficient transitional provisions. Until such legislative amendment can be enacted, it will be critical to maintain a functioning military justice system. While some cases could be diverted to the civilian justice system, many could not. A declaration with immediate effect would cause a devasting effect on the administration of justice.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

59. The military judges in the cases of *R v Thibault* and *R v Iredale* ordered publication bans on information tending to identify the victims in those cases. No information that would be subject to the publication bans has been included in the submissions of the Crown, nor did any such information form any part of the decisions in these matters in the CMAC. These publication bans should not impact this Court's reasons on the issues under appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Ottawa, Ontario this 20th day of July 2023.



Dylan Kerr (Colonel)
Karl Lacharité (Lieutenant-Colonel)

Canadian Military Prosecution Service
7th Floor, South Tower
101 Colonel By Drive
Ottawa ON K1A 0K2

Telephone: 613-996-6333
Facsimile: 613-995-1840
Email: dylan.kerr@forces.gc.ca
karl.lacharite@forces.gc.ca
jagdmpappeals.jagdpmappels@forces.gc.ca

COUNSEL FOR HIS MAJESTY THE KING

PART VI – TABLE OF AUTHORITIES

AUTHORITIES	PARAGRAPHS	TAB
LEGISLATION		
National Defence Act, RSC 1985, c N-5. (English): ss 12, 12(3)(a), 18, 29(2.1), 29.101, 60, 85, 95, 99, 129, 161.1(1), 165, 165.21(3)-(5), 165.23, 165.231, 165.24, 165.25, 165.31, 165.33-165.37 (French): ss 12, 12(3)(a), 18, 29(2.1), 29.101, 60, 85, 95, 99, 129, 161.1(1), 165, 165.21(3)-(5), 165.23, 165.231, 165.24, 165.25, 165.31, 165.33-165.37	7, 13, 15, 17, 18, 19, 22, 24, 44, 45, 46, 47, 52, 79	
Criminal Code, RSC 1985, c C-46. (English) : ss 137, 139 (French) : ss 137, 139	79	
REGULATIONS		
Queen's Regulations & Orders for the Canadian Forces (English): ss 26.10, 26.12, 15.01(5), 19.75(1), 102.07(2)(b) (French): ss 26.10, 26.12, 15.01(5), 19.75(1), 102.07(2)(b)	48, 52	
JURISPRUDENCE – SUPREME COURT OF CANADA		
Blair v Consolidated Enfield Corp, [1995] 4 SCR 5; 1995 CanLII 76 (SCC)	51	
General Motors of Canada Ltd. v Brunet, [1977] 2 SCR 537; 1976 CanLII 196 (SCC)	51	
MacKay v The Queen, [1980] 2 SCR 370; 1980 CanLII 217 (SCC)	37, 38	
Miazga v Kvello Estate, 2009 SCC 51	52	

R v Généreux, [1992] 1 SCR 259; 1992 CanLII 117 (SCC)	35, 36	
R v Cawthorne, 2016 SCC 32	51, 52	
R v Stillman, 2019 SCC 40	33, 34. 39, 41, 42	
JURISPRUDENCE – COURT MARTIAL APPEAL COURT OF CANADA		
R v Cookson, 2023 CMAC 8	30	
R v Edwards; R v Crépeau; R v Fontaine; R v Iredale, 2021 CMAC 2	29, 52	
R v Edmunds, 2018 CMAC 2	52	
R v Proulx; R v Cloutier, 2021 CMAC 3	30	
R v Christmas, 2022 CMAC 1	30	
R v Brown, 2022 CMAC 2	30	
R v Thibault, 2022 CMAC 3	30	
R v Remington, 2023 CMAC 3	30	
R v Turner, 2023 CMAC 6	30	
JURISPRUDENCE – COURT MARTIAL		
R v Bourque, 2020 CM 2008	16	
R v Brown, 2021 CM 4003	28	
R v Christmas, 2020 CM 3009	25	
R v Cloutier, 2020 CM 4013	29	
R v Crépeau, 2020 CM 3007	18, 19	
R v D'Amico, 2020 CM 2002	14	
R v Edwards, 2020 CM 3006	18	
R v Fontaine, 2020 CM 3008	21	
R v Iredale, 2020 CM 4011	22, 49	
R v Jacques, 2020 CM 3010	27	
R v MacPherson and Chauhan and JL, 2020 CM 2012	24	
R v Pett, 2020 CM 4002	12	
R v Proulx, 2020 CM 4012	26	