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

File No.: 39820

B E T W E E N:

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

Appellants

and

HIS MAJESTY THE KING

Respondent

File No.: 39822

A N D B E T W E E N:

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

Appellants

and

HIS MAJESTY THE KING

Respondent

File No.: 40046

A N D B E T W E E N:

CORPORAL K.L. CHRISTMAS

Appellant

and

HIS MAJESTY THE KING

Respondent

File No.: 40065

A N D B E T W E E N:

LIEUTENANT (NAVY) C.A.I. BROWN

Appellant

and

HIS MAJESTY THE KING

Respondent

File No.: 40103

A N D B E T W E E N:

SERGEANT A.J.R. THIBAULT

Appellant

and

HIS MAJESTY THE KING

Respondent

FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I - OVERVIEW

1. These appeals are about whether the role and status of military judges as military officers in the chain of command compromises their institutional independence, denying an accused their right to a hearing before an independent and impartial tribunal under s. 11(*d*) of the *Charter*. They implicate the proper framework under s. 11(*d*) underpinning a robust guarantee of judicial independence—both in reality and the public perception. And they call for an affirmation of the nuanced, contextual approach to s. 11(*d*) long endorsed by this Court, emphasizing the need for clear demarcation between the executive and judicial branches of government.

2. These appeals come on the heels of multiple decisions by military judges holding that they lack institutional independence because their risk of prosecution under the military's Code of Service Discipline leaves them vulnerable to coercion and improper influence by more senior members of the military hierarchy. The Court Martial Appeal Court of Canada ("**CMAC**") disagreed, holding that a reasonably informed person would not perceive compromised independence. In coming to that conclusion, the CMAC reasoned that the separation of powers in our system of government will involve overlap between judicial and executive functions; that prosecutors and commanders must be presumed to carry out their duties in good faith and without improper motives; and that there is no concrete evidence that military judges have been coerced or influenced in the performance of their judicial functions.

3. The CCLA respectfully submits that, regardless of the outcome of these appeals, this Court should not endorse the CMAC's analytical approach. The separation of powers between judicial and executive branches is a fundamental pre-requisite to the rule of law in a constitutional democracy. The CMAC's reasoning fails to give full faith and credit to that separation. It places undue emphasis on decontextualized examples of overlap between executive and judiciary to dismiss the risk of executive interference on the judicial function. Such analysis risks undermining the separation of powers and the robust treatment of judicial independence in the jurisprudence. To protect our judicial system, the separation of powers must be staunchly and unreservedly defended by our highest Court.

4. Likewise, the CMAC's analytical presumption of good behaviour on the part of prosecutors and senior members of the executive as a bulwark against encroachments on the

independence of judges is an unhelpful and problematic construct. It is contrary to the authorities and affords insufficient protection to courts and tribunals. The test must focus on the *institutional risk* of bad faith or improper conduct rather than whether it has already materialized.

5. The independence and impartiality of courts is an essential precondition to an accused person's right to a fair prosecution and the public's confidence in our justice system. This Court should reaffirm a robust, contextual analysis capable of ensuring the judiciary's freedom from interference—both in fact and in the minds of the public.

PART II - ARGUMENT

A. Governing Principles on Judicial Independence

6. Judicial independence is the "lifeblood of constitutionalism in democratic societies" and the foundation of our court system and of the rule of law.[1] This Court has repeatedly affirmed its importance within our constitutional framework and developed a rich body of law to prevent encroachments on it:

(a) **Judicial Independence Is A Constitutional Guarantee:** Our constitution enshrines judicial independence in several ways. The concept finds expression in the preamble of the *Constitution Act, 1867* in the unwritten constitutional principle of judicial independence.[2] Part VII of the *Constitution Act, 1867*—and in particular, s. 96—has been interpreted to protect the institutional independence of judges.[3] And s. 11(*d*) of the *Charter* guarantees any accused a "fair and public hearing by an independent and impartial tribunal".[4] These provisions protect the judicial branch so that judges can, in turn, uphold and defend the constitution.

(b) **Judicial Independence Is An Essential Pre-Condition to Other Rights and Guarantees and Our Federal System of Government:** The judiciary must be independent to fulfill its core function. The defence of civil liberties and

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[1] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, at para. 4; *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at p. 70; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 70-72.
[2] *Reference re Remuneration of Judges of the Provincial Court* (P.E.I.), [1997] 3 S.C.R. 3, at paras. 9, 83-84.
[3] *Reference re Remuneration*, at para. 124.
[4] *Reference re Remuneration*, at para. 107.

fundamental freedoms, the maintenance of the rule of law in the exercise of public powers, and the clear delineation of the division of powers between federal and provincial governments requires "an impartial umpire to resolve disputes".[5] This crucial mandate cannot be achieved without institutional independence.

(c) **The Overlap of Judicial and Executive Roles Must Be Minimized:** Our system of government necessarily implicates interactions between judiciary and executive, and in some cases, will involve judges taking on duties that belong within the executive branch of government.[6] However, these duties "must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution." Such overlap must be minimized to ensure the judiciary is "completely independent of any other entity in the performance of [its] judicial functions."[7]

(d) **Judicial Independence Must Not Only Exist in Fact, It Must Be Seen to Exist:** In determining whether a court or tribunal is independent, the test is whether a reasonable person, fully informed of the circumstances, would conclude that it is. The perception of reasonable members of the public is therefore intrinsic to the analysis. This is because justice must not only be done—it must be seen to be done. If a reasonable observer apprehends that the institutional independence of the court or tribunal *could* be compromised, that will be sufficient to render it constitutionally deficient under s. 11(*d*) of the *Charter*.[8]

(e) **The Assessment of Judicial Independence is Sensitive to Context:** The independence of a court or tribunal must be examined in context. The analysis must bring to bear the legislative scheme as a whole, the interests at stake, and indicia of independence, including security of tenure and financial security. For example, courts or tribunals may require stronger guarantees of independence

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[5] *Beauregard,* at pp. 71-73.
[6] *R. v. Edwards*, **2021 CMAC 2** ("**CMAC Decision**"), at para. 75, citing Lamer C.J. in *R. v. Lippé,* [1991] 2 S.C.R. 114, at p. 142.
[7] *R. v. Généreux,* **[1992] 1 S.C.R. 259**, at p. 286; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, **2002 SCC 13**, at para. 35.
[8] *Mackin*, at para. 38; *Généreux,* at p. 303.

where their decisions impact on a party's security of the person.[9] The relevant context is broad; it can and should include any matter a reasonably informed observer would consider in assessing whether the guarantee of judicial independence has been met.

B. Decontextualized Analysis Should Be Rejected

7. At paragraphs 67 to 75 of *Edwards*, the CMAC asks whether the role of a military judge is "incompatible" with their role as a military officer. It articulates the concern as follows:[10]

> There is a common thread throughout the decisions of the military judges in the cases under appeal, that one cannot be a military officer and part of the executive and still perform the role of a judge. According to them, having executive responsibilities is inconsistent with the judicial role. To put it another way, one is "transferred" from the executive branch to the judicial branch upon appointment as a judge (*supra*, para. 25). With respect, such an approach does not reflect the reality of our Westminster system of government.

8. In rejecting the concern over military judges holding dual roles (judge and officer) in the military hierarchy, the CMAC provides a list of examples in our system of government of judges exercising functions in the executive branch:

(a) civilian judges "are often asked to chair or participate in commissions of inquiry at both the federal and provincial levels" and such "commissions and inquiries are executive branch functions, conducted at the behest of the executive branch" (paragraph 69);

(b) "several Federal Court judges sit on boards and tribunals. For example, a Federal Court judge chairs the Copyright Board of Canada and a Federal Court judge is Chairperson of the Canadian Competition Tribunal" (paragraph 70);

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[9] *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at pp. 51-52.
[10] CMAC Decision, at para. 68.

(c) "sitting judges of superior courts are eligible to sit on binational panels" and "such panels and commissions of inquiry constitute part of the executive branch" (paragraph 70);

(d) "the Canadian Judicial Council's work on discipline constitutes executive rather than judicial functions" (paragraph 70); and

(e) "the current Chief Justice of Canada, is, at the time of writing, the Administrator of the Government of Canada, until the next governor general is installed. He is the official representative of the Queen of Canada" (paragraph 72).

9. According to the CMAC, "these examples demonstrate that, on occasion, members of the judicial branch perform executive functions without compromising institutional independence or giving rise to a concern about impartiality" (at paragraph 73). It cites them to conclude that the dual role of military judge and officer does not violate the principle of judicial independence. However, the CMAC's reliance on these examples of overlapping judicial and executive roles lacks proper context. Respectfully, it does not advance the analysis in this case, and risks watering down the robust conception of judicial independence repeatedly endorsed by this Court. It trivializes and chips away at the separation of powers, which is foundational to the architecture of our constitution.

10. The separate and distinct roles of executive and judiciary is a fundamental postulate of the rule of law. As this Court held in *Provincial Court Judges' Association of British Columbia*, the "broader principle of judicial independence serve[s] not only to protect the separation of powers between the branches of the state and thus, the integrity of our constitutional structure, but also to promote public confidence in the administration of justice." It is "fundamental to the rule of law and to democracy in Canada". Indeed, "[t]he overarching principle of judicial independence applies to all courts, whether of civil or criminal jurisdiction and whether their judges are appointed by federal, provincial or territorial authorities." [11]

11. The CMAC's decontextualized reliance on "the extent to which the Westminster model of constitutional democracy permits members of the judicial branch to perform executive functions"

[11] **2020 SCC 20**, at paras. 29-30.

muddies a clear delineation of boundaries between executive and judiciary. An emphasis on overlap, rather than separation of powers, is a problematic orientation. It misunderstands our historical and constitutional DNA. And it minimizes the institutional safeguards inherent in the Westminster model of government and in our *Constitution Act*—for which the maintenance of the rule of law is paramount.

12. Put simply, the fact that members of the judiciary may sometimes perform "executive functions" in narrow and unrelated contexts[12] has little or no bearing on what is constitutionally required to maintain their independence. Nor does this 'feature' of Westminster government help in answering whether military judges are compromised, or seen to be compromised, in the performance of their judicial role when they are subject to the military chain of command.

13. The CCLA respectfully submits that, whatever this Court's disposition, it should not endorse the CMAC's statements on the Westminster model's supposed tolerance for 'overlapping' executive and judicial roles. If endorsed, such an approach could unwittingly justify encroachments by the executive on court or tribunal independence in all manner of cases—regardless of context or the interests at stake. Nor does this framing display the rigor and nuance necessary to defend our rich and robust tradition of judicial independence.

14. In any event, the "examples" cited by the CMAC—and the reliance placed on them—merits considerable caution. According to the CMAC, its examples show that judges can maintain independence *in spite of exercising functions within the executive*. But this is the wrong point. What matters is not *where* the function is being performed (i.e., in the executive or judicial branch), but rather the *type* of function being performed. If a person is carrying out an essentially judicial or quasi-judicial function, independence and the appearance of it must be maintained.

15. This is true of the examples the CMAC relies on. The fact that commissions of inquiry or tribunals are creatures of the executive does not detract from their status as judicial or quasi-judicial bodies demanding a high level of independence and protection from real or perceived external influence. To effectively carry out their duties, judges who sit on commissions or tribunals must enjoy institutional independence, just as they do when they sit in court:

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[12] CMAC Decision, at paras. 69-70, 73.

(a) **Commissions of Inquiry**: In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, this Court explained that "[o]ne of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover 'the truth'." Although established by the executive, "[i]nquiries are, like the judiciary, independent".[13] A reasonably informed person would not countenance the executive seeking to influence the fact-finding of a commissioner;

(b) **Tribunals**: As this Court emphasized in *Bell Canada v. Canadian Telephone Employees Association*, the fact that a tribunal "functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch." Speaking in relation to the Canadian Human Rights Tribunal, it explained that "[a] high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal — such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices."[14] This rationale applies with even greater force where the interests at stake are criminal jeopardy and loss of liberty; and

(c) **Judicial Councils**: In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, this Court held that "[i]n light of their functions, judicial discipline committees must be composed primarily of judges".[15] To put disciplinary authority outside of that sphere would risk creating the perception that judges serve at the pleasure of the government and can be disciplined or removed from their offices because of decisions they render.

16. As these examples make clear, the relevant inquiry is not about whether "executive" and "judicial" roles can co-exist, or whether a judicial officer can maintain their independence as a judge while having some other role within the executive branch. Rather, the inquiry is about the nature of the function being exercised, whether it is essentially "judicial", the degree to which

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[13] [1995] 2 S.C.R. 97, at para. 62.
[14] 2003 SCC 36, at para. 24.
[15] 2002 SCC 11, at para. 47.

executive influence or interference may be brought to bear on that function, and the resulting potential for compromise to the actual or perceived independence of the process. No party appearing before a civilian court, a commission of inquiry, an adjudicative tribunal, a judicial council—or indeed a military court—should perceive that their fact-finder or decision-maker may be subject to real or perceived influence or interference from the executive branch. If that perception is held by a reasonable person looking at the matter holistically, s. 11(*d*) of the *Charter* will be violated.

17. The "reasonable observer" test sets a high bar for guarding against potential influence or interference by the executive over judicial or quasi-judicial functions. The reasonable observer must be someone who is well-versed in, and holds in high esteem, the traditions of judicial independence and separation of powers that form the backbone of our justice system. In the context of military justice, this Court held in *R. v. Généreux* that it "is important that military tribunals be as free as possible from the interference of the members of the military hierarchy." Although the case law does not call for perfection in securing institutional independence of courts and tribunals, the applicable standard is high.[16]

18. Respectfully, the CMAC's approach confuses the analysis by advancing a problematic and less-than-robust view of the separation of powers. It also demonstrates the dangers and pitfalls of analogizing to situations that are far removed from the court or tribunal being examined. Courts must be careful not to allow generalizations to oversimplify and overwhelm the nuanced, contextual analysis called for in the case law.

C. Judicial Independence Should Not Depend on Presumptions of Good Behaviour

19. At paragraphs 88 to 92 of *Edwards*, the CMAC discusses the possibility (raised by the appellants in this Court and the court below) that military judges could be subject to coercion or retribution by superiors for unwelcome decisions given their role as military officers subject to the Code of Service Discipline. At paragraph 90, the CMAC rejects this concern, relying on presumptions of good faith conduct on the part of prosecutors and commanding officers:

> It is appropriate in considering the context of the potential prosecution of military judges, to be cognizant of, and expect

[16] *Généreux*, at p. 308.

> behaviour consistent with, the constitutional norm that prosecutors and commanders will exercise prosecutorial discretion in a quasi-judicial manner and independent of partisan concerns.

20. In arriving at its conclusion, the CMAC relies on this Court's decision in *R. v. Cawthorne*[17] and distinguishes this Court's decision in *R. v. Nur*.[18] In its factum before this Court, the respondent reiterates good faith as a key analytical presumption informing the stance of a reasonable observer. It asserts that the appellants' argument "fails to recognize the presumption that statutory actors exercise their powers and responsibilities in good faith", a presumption to which "[p]ersons are entitled, absent evidence to the contrary."[19]

21. With respect, the elevation of the presumption of good faith conduct as a lodestar for what a reasonable and well-informed observer would think is not supported:

(a) In *Nur*, this Court held that prosecutorial discretion cannot be invoked to save an otherwise unconstitutional law. It cautioned, at paragraph 95, that "one cannot be certain that the discretion will always be exercised in a way that would avoid an unconstitutional result", "[n]or can the constitutionality of a statutory provision rest on an expectation that the Crown will act properly."

(b) In *R. v. Appulonappa*,[20] the CCLA submitted that Ministerial or prosecutorial discretion cannot remedy an otherwise unconstitutional law. This Court agreed, holding that ministerial discretion did not negate the "risk of prosecution, conviction and imprisonment" for "conduct beyond Parliament's object." The risk of unconstitutional overreach was not saved by *presuming* state discretion would prevent that risk from arising.[21]

22. Presumptions of good faith conduct by government actors—in this case, others within the military hierarchy—are a fragile foundation on which to ground the real or perceived independence of a court or tribunal. Indeed, this Court acknowledged in *Cawthorne* that

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[17] **2016 SCC 32**.
[18] **2015 SCC 15**.
[19] Respondent Factum, at paras. 50-51.
[20] **2015 SCC 59**.
[21] *Appulonappa*, at para. 74.

presumptions of good behaviour are no panacea to constitutionally-defective legislation.[22] Instead, the proper analysis must be directed at institutional protections and safeguards, and whether they are sufficiently robust to prevent encroachments on the independent and impartial decision-making of judges. The protection of the rule of law should not depend on a belief—however well-intentioned—that our institutions are somehow immune from impropriety. The safer presumption is no presumption at all.

23. The CMAC, at paragraph 92, states that there "is no evidence that any military judge has ever been prosecuted for improper purposes." The respondent echoes this view at paragraphs. 50-51 of its factum, suggesting that any concerns about military judges' independence "are based on hypothetical scenarios" alleging the military hierarchy "might act improperly, unlawfully and in bad faith". However, these comments afford insufficient weight to s. 11(*d*)'s concern with the *appearance* of compromised independence. The question is not whether there is evidence of abusive conduct or improper influence or interference with judicial functions by the executive. It is whether the regime has been established in a manner that creates or exacerbates an institutionally-grounded *potential* for external influence or interference. Presumptions of good faith conduct do not—and should not—displace this analysis.[23]

PART III - CONCLUSION

24. An independent judiciary, empowered to uphold constitutional rights of those subject to the criminal prosecution by the state, is a cornerstone of the rule of law. Regardless of the outcome of these appeals, this Honourable Court should endorse an analytical approach that reflects the gravity of that role. The CCLA respectfully submits that the CMAC's decontextualized view of the separation of powers and its reliance on presumptions of good faith conduct are insufficient to the task. These appeals require a strong, unequivocal affirmation from this Court of a robust, nuanced, and properly contextualized approach to judicial independence.

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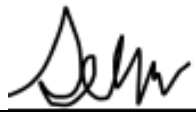
[22] *Cawthorne*, at paras. 32, 34; see also *R. v. D'Amico*, **2020 CM 2002**, at paras. 35-39, where the Court observed that *Cawthorne* did not overrule *Nur*.
[23] Respondent Factum, at paras. 51.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 15TH DAY OF AUGUST, 2023



Jonathan C. Lisus/Zain Naqi/David Ionis

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