Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20151221

Dockets: CMAC-577
CMAC-581

Citation: 2015 CMAC 2

CORAM: CHIEF JUSTICE BELL
DESCHÊNES J.A.
COURNOYER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL A.J.R. THIBAULT

Respondent

Heard at Ottawa, Ontario, on June 12, 2015.

Judgment delivered at Ottawa, Ontario, on December 21, 2015.

REASONS FOR JUDGMENT BY:	COURNOYER J.A.
CONCURRED IN BY:	DESCHÊNES J.A.
PARTIALLY CONCURRING REASONS BY:	BELL C.J.

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PARTIALLY CONCURRING REASONS

CHIEF JUSTICE B. RICHARD BELL

[1] I have read the reasons for judgment prepared by Justice Cournoyer. Although I agree with his finding with respect to the dismissal of the respondents' motions to quash and dismiss the appeals as well as the declaration of invalidity of section 230.1 of the *National Defence Act*, R.S.C., 1985, c. N-5 (NDA), I do not share his reasoning and I am of the view that I have to express my separate opinion on the interpretation of the case law regarding the military justice system in Canada and the impact of that jurisprudence on the amendments that will have to be made to the NDA for section 230.1 to satisfy the constitutional requirement of prosecutorial independence.

I. Military justice system in Canada

[2] I believe that it is important to first understand the legal and constitutional basis of the Canadian military justice system.

[3] Subsection 91(7) of the *Constitution Act, 1867*, gives the Parliament of Canada the exclusive right to make laws with respect to "militia, military and naval service, and defence". That exclusive power includes the right to legislate in relation to military justice. The following was confirmed in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 at p. 397 (*MacKay*):

> The power to allow prosecutions by military authorities is a necessary aspect of dealing with service offences, which have always been considered part of military law.

[4] Under this exclusive power, the NDA was enacted, which created a military justice system. For several years now, the legal legitimacy of that system has no longer been in issue. The system was first recognized by the Supreme Court in *Mackay* and *R. v. Généreux*, [1992] 1 S.C.R. 259 (*Généreux*).

[5] To that effect, I believe it important to reproduce a passage from the Supreme Court's decision in *Généreux* at p. 261:

> A parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, is not, by its very nature, inconsistent with s. 11(*d*). The existence of such a system, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by compelling principles. The accused's right to be tried by an independent and impartial tribunal must thus be interpreted in this context and in the context of s. 11(*f*) of the *Charter*, which contemplates the existence of a system of military tribunals with jurisdiction over cases governed by military law.

[6] Furthermore, the Supreme Court recently upheld in *R. v. Moriarity*, 2015 SCC 55 (*Moriarity*) that the provisions of the Code of Service Discipline (CSD), entrenched in the NDA, were enacted by Parliament with the objective of providing processes that would ensure the maintenance of discipline, efficiency and morale of the military. The Supreme Court stated that the *Canadian Charter of Rights and Freedoms* (Charter) allows for the existence of a parallel justice system such as the one established under the NDA, that system being justified.

[7] The Canadian military justice system also plays a public role because the provisions of the CSD not only deal with the maintenance of discipline but also seek to punish any conduct

that would threaten public order and public interest. The principle is defined at pp. 281-282 of *Généreux*, already cited by my colleague, but helpful to reproduce here:

> It is clear to me that the proceedings of the General Court Martial in this case attract the application of s. 11 of the *Charter* for both reasons suggested by Wilson J. in *Wigglesworth*. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the *Narcotic Control Act*. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*). For these reasons, I find that the appellant, who is charged with offences under the Code of Service Discipline and subject to the jurisdiction of a General Court Martial, may invoke the protection of s. 11 of the Charter.

[8] Military justice is therefore subject to the Charter principles for the entire judicial process. Those principles include the section 7 legal rights.

II. Constitutional right to an independent prosecutor

[9] To begin, I would like to specify that I agree with my colleague's finding that the concept of the prosecutor's independence, by his or her prosecutorial discretion, constitutes a principle of

fundamental justice. The case law of the Supreme Court in this regard is clear and uncontradicted.

[10] However, I have reservations about my colleague's decision that the finding in *MacKay* that "the Minister of National Defence stands in the place of the Attorney General" did not survive *Généreux*. Although *Généreux* determined institutional independence with respect to the judicial function of military tribunals, and such assessment is relevant to the analysis of prosecutorial independence in the military justice system, the role of the Minister, similar to that of the Attorney General, remains the same, albeit limited by constitutional principles. I will explain.

[11] The limits with respect to the role of the Attorney General, or simply the role of a Crown prosecutor, include the principle of fundamental justice of prosecutorial independence under section 7 of the Charter (*R. v. Regan*, [2002] 1 SCR 297 at paras 157-58), and the concept of the independence of the Attorney General was deeply rooted in the discretionary exercise in penal prosecutions (*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372).

[12] At the same time, concerns that the Attorney General's political and partisan responsibilities influence his or her quasi-judicial functions led to the creation of the Director of Public Prosecutions (DPP). Today, even though the Attorney General, for constitutional reasons, is limited with respect to his or her interventions in prosecutions (see, for example, the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121 at sections 10, 14), the Attorney General still retains his or her supervisory power over criminal prosecutions. I am therefore of the opinion

that the Minister of National Defence, like the Attorney General, must maintain that same role in criminal prosecutions in the military justice system.

[13] Although I acknowledge that "custom, tradition and constitutional usage" (Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43 at para. 35) have charged the Attorney General with his or her quasi-judicial functions, and that that cannot be said about other cabinet ministers, I am of the opinion that the role of the Minister of National Defence is unique because the military judicial process can lead to the imprisonment of his or her personnel. As already discussed, since the Canadian military justice system co-exists with the civilian justice system, the Minister of National Defence consequently has some prosecutorial authority that other departments cannot have.

[14] Section 4 of the NDA expressly states that the Minister of National Defence has the management and direction of the Canadian Forces and of all matters relating to national defence, just as the Attorney General has the superintendence of all matters connected with the administration of justice in Canada (*Department of Justice Act*, RSC, 1985, c. J-2 at para. 4(*b*)). The importance of the Minister of National Defence keeping his or her supervisory power over prosecutions is enhanced by the fact that, like the Attorney General, the Minister has the responsibility of public accountability given his or her role in Parliament. That is an essential responsibility that provides a level of intrinsic transparency in the criminal justice system, be it civilian or military. That level of transparency is also increased by the role of the Judge Advocate General, who, acting as legal adviser to the Minister of National Defence, regularly conducts reviews of the administration of military justice under sections 9.1 and 9.2 of the NDA.

The annual report on the administration of military justice in the Canadian Forces, prepared by the judge advocate general, is also tabled in Parliament by the Minister of National Defence. As with the Attorney General, the Minister's authority must be maintained and he or she must continue to be able to issue guidelines with respect to the initiation or conduct of a prosecution, as set out in the *Director of Public Prosecutions Act*, subject to limits consistent with constitutional guarantees.

[15] By this logic, *Généreux* did not eliminate the role of the Minister of National Defence, similar to that of the Attorney General. Instead, it was the advent of the Charter that led to the delineation of the Minister's jurisdiction, just as constitutional conventions limited the functions of the Attorney General as prosecutor and thus created the function of the DPP.

III. Conclusion

[16] That said, because society's interest in appeals being heard and assessed on their merits prevails over the right of the appellants to an independent prosecutor on appeal, I agree with my colleague's finding that the striking down of section 230.1 should have a suspensive effect and not an immediate effect, and that the respondents' motions to quash and dismiss the appeals should be dismissed.

[17] I also agree with what my colleague stated regarding the possibility of conferring on the Director of Military Prosecutions (DMP) the authority to commence appeals. However, I would go even further by stating that giving such authority to the DMP seems to be the only solution available in the circumstances to ensure that section 230.1 of the NDA satisfies the constitutional

requirement of prosecutorial independence as well as the Supreme Court decisions acknowledging the legitimacy of the Canadian military justice system.

[18] As was recently confirmed in *Moriarity*, the overall objective of the military justice system is to "assure the maintenance of discipline, efficiency and morale of the military" using general provisions that also play a public role. *Moriarity* thereby confirmed the legitimacy that must be afforded to the military justice system, working together with the regular (or civilian) criminal justice system. The military justice system has its own reality and requires that the appointment of an independent prosecutor in the exercise of the right of appeal be carried out within the Canadian Forces.

[19] The role of the DMP, in this regard, is similar to the functions of the DPP in the civilian criminal justice system, but based on the reality and the nature of the military justice system. In fact, I see no other position than that of the DMP, a member of the Canadian Forces, to exercise that type of function. The DMP has the qualities, skills and experience required to exercise the discretion related to criminal prosecutions in the military context, while projecting an appearance of independence.

[20] Furthermore and as stated above, I am of the view that the Minister of National Defence must maintain a supervisory power over prosecutions in the Canadian military justice system, a power that must, however, be limited by parameters similar to those on the Attorney General in the *Director of Public Prosecutions Act*. This solution would maintain the control and

administration of the military justice system within its jurisdiction and the limits guaranteed by the Charter.

"B. Richard Bell"
C.J.

REASONS FOR JUDGMENT

COURNOYER J.A.

I. Overview

[21] The principle of prosecutorial independence regarding decisions concerning the nature and extent of prosecutions is firmly recognized in Canada.

[22] The decision to appeal is one of those decisions.

[23] Section 230.1 of the *National Defence Act* (NDA) confers the Crown's right to appeal on the Minister of National Defence (Minister).

[24] The issue in these appeals is whether the principle of prosecutorial independence requires the right to appeal to be exercised by an independent prosecutor.

[25] The respondent Gagnon was acquitted on a charge of sexual assault. In the case of the respondent Thibault, the Court Martial found that it had no jurisdiction over the charge of sexual assault because of a lack of sufficient military nexus. The Minister appealed those two decisions.

[26] The respondents are seeking to have the Minister's appeal in their case quashed and dismissed because they are of the view that the right to appeal must be attributed to an independent prosecutor and that it is contrary to section 7 of the *Canadian Charter of Rights and Freedoms* (Charter) to confer it on the Minister.

[27] For the following reasons, I find that section 7 of the Charter protects the constitutional right of an accused to an independent prosecutor, that is to say, a prosecutor who is objectively able to act independently, at every stage of the judicial process, when making decisions concerning the nature and extent of prosecutions and who can reasonably be perceived as independent.

[28] The Minister is responsible for the Canadian Forces and it is under the Minister's authority that the Chief of the Defence Staff is charged with the control and administration of the Canadian Forces.

[29] The Minister's role and duties under the NDA are inconsistent with the exercise of an authority concerning the nature and extent of a prosecution against one of his or her own employees in the context of a judicial process that could lead to the imprisonment of that employee and, where appropriate, the release of that employee from the Canadian Forces.

[30] The Minister cannot reasonably be perceived as an independent prosecutor who can act in a manner that is autonomous and independent from the chain of command, because he or she is at the apex of it.

[31] Section 230.1 of the NDA, which confers on the Minister the right to appeal, thus does not satisfy the constitutional requirement of prosecutorial independence. It is of no force and effect to the extent that its holder is not independent. The section is not a justifiable limit that can be saved under section 1 of the Charter.

[32] However, it is not appropriate to grant the respondents' motion to have the appeals quashed and dismissed. That would be a consequence disproportionate to the societal interest in a determination of the merits of the appeals.

[33] The declaration of invalidity of section 230.1 must be suspended from the date of this judgment for a period of six months.

[34] In the circumstances, it is possible to provide an additional just and reasonable remedy to the respondents by adjourning the hearing of the appeals. The new hearing of the appeals will take place after the suspension period for the declaration of invalidity of section 230.1.

[35] Presumably, Parliament will have amended section 230.1 in order to pass the amendments deemed necessary to the NDA, thus granting the respondents the remedy sought, that is, an independent prosecutor for the conduct of the appeal proceedings.

II. Background: the purpose of the Minister's appeals

A. *Warrant Officer Gagnon*

[36] Warrant Officer Gagnon was the subject of a sexual assault charge. He and the complainant presented contradictory versions at trial. Warrant Officer Gagnon was acquitted. The Minister has commenced an appeal and seeks a new trial because the Minister is of the opinion that the military judge erred by putting to the five-member panel of the General Court Martial the defence of honest but mistaken belief in consent.

B. *Corporal Thibault*

[37] Corporal Thibault was charged with sexual assault. At trial, he presented a plea in bar of trial pursuant to paragraphs 112.24(1)(*a*) and (*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). He claimed that the matter was not under military justice jurisdiction because the offence did not have a nexus with military service. The parties presented a joint statement of facts to the military judge. The military judge allowed the plea in bar of trial. The judge found that the military nexus was not established.[1]

C. *Motions to quash and dismiss the appeals*

[38] The respondents brought a motion to quash and dismiss the Minister's appeals. In accordance with section 11.1 of the *Rules of Appeal Practices and Procedures of the Court Martial Appeal Court*, they served notice of a constitutional question on the Attorney General of Canada and on the attorney general of each province. None of them deemed it appropriate to intervene.

[39] The Minister filed a reply to those motions. Except in the book of authorities filed in support of his written and oral submissions, the Minister did not request the hearing of witnesses or the presentation of the legislative facts in documentary form as evidence of justification under section 1 of the Charter.

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1 *R. v. Thibault*, 2015 CM 1001.

III. Position of the parties regarding the motions to quash and dismiss the appeals

A. *The applicants/respondents*

[40] In their motion to quash and dismiss the appeals, the respondents submit that an accused has a constitutional right to an independent prosecutor, a right that, in their opinion, is a principle of fundamental justice recognized and protected by section 7 of the Charter. According to them, the Minister is not an independent prosecutor.

[41] They are of the view that the report by the Special Advisory Group on Military Justice and Military Investigation Services entitled Report on Quasi-Judicial Role of the Minister of National Defence[2] (second Dickson report) supports the finding that the Minister must play no quasi-judicial role in the Canadian military justice system, including commencing an appeal.

[42] It is worthwhile to note that initially, in his memorandum, the respondent Gagnon argued that only the Attorney General could act in a criminal proceeding, which, according to him, covers the charge against him under section 130 of the NDA. However, at the outset of the hearing, he limited the scope of his argument to the principle of prosecutorial independence, as stated in the memorandum of the respondent Thibault.

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2 CANADA, DEPARTMENT OF NATIONAL DEFENCE, Report of the Special Advisory Group on Military Justice and Military Police Investigation Services: *Report on Quasi-Judicial Role of the Minister of National Defence* (Ottawa, July 25, 1997) (Advisory Group).

B. *The Minister (respondent/appellant)*

[43] The Minister's arguments can be summarized fairly simply.

[44] The principle of prosecutorial independence is not a right of the accused, but instead a constitutional convention that binds the prosecutor.

[45] Decisions concerning the nature and extent of prosecutions may be assigned to ministers other than the Attorney General who, like the Attorney General, must act independently. The principles underlying prosecutorial discretion apply to other ministers who have been assigned responsibilities similar to those of the Attorney General in prosecutorial matters.

[46] Prosecutorial discretion and the principle of prosecutorial independence are connected to the prosecuting function and not to the identity of the person who exercises that function.

[47] Furthermore, the legitimacy of the Canadian military justice system was recognized by the Supreme Court of Canada in *R. v. Généreux*[3] and is entrenched in section 11(*f*) of the Charter. The system exists independently and in parallel to the regular criminal justice system. The *Code of Service Discipline* provides for service offences, not criminal offences. Parliament acts within its jurisdiction when it confers on the Minister a prosecutorial power, in this case, commencing an appeal.

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3 [1992] 1 S.C.R. 259.

IV. Analysis

A. *The impugned statutory provision: history and purpose*

[48] Section 230.1 of the NDA reads as follows:

Appeal by Minister	**Appel par le ministre**
230.1 The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:	**230.1** Le ministre ou un avocat à qui il a donné des instructions à cette fin peut, sous réserve du paragraphe 232(3), exercer un droit d'appel devant la Cour d'appel de la cour martiale en ce qui concerne les décisions suivantes d'une cour martiale :
(a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;	*a)* avec l'autorisation de la Cour d'appel ou de l'un de ses juges, la sévérité de la sentence, à moins que la sentence n'en soit une que détermine la loi;
(a.1) the decision not to make an order under subsection 745.51(1) of the *Criminal Code*;	*a.1)* la décision de ne pas rendre l'ordonnance visée au paragraphe 745.51(1) *du Code criminel*;
(b) the legality of any finding of not guilty;	*b)* la légalité de tout verdict de non-culpabilité;
(c) the legality of the whole or any part of the sentence;	*c)* la légalité de la sentence, dans son ensemble ou tel aspect particulier;
(d) the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;	*d)* la légalité d'une décision d'une cour martiale qui met fin aux délibérations ou qui refuse ou fait défaut d'exercer sa juridiction à l'égard d'une accusation;

(e) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;	*e)* relativement à l'accusé, la légalité d'un verdict d'inaptitude à subir son procès ou de non-responsabilité pour cause de troubles mentaux;
(f) the legality of a disposition made under section 201, 202 or 202.16;	*f)* la légalité d'une décision rendue aux termes de l'article 201, 202 ou 202.16;
(f.1) the legality of an order for a stay of proceedings made under subsection 202.121(7);	*f.1)* la légalité d'une ordonnance de suspension d'instance rendue en vertu du paragraphe 202.121(7);
(g) the legality of a decision made under any of subsections 196.14(1) to (3); or	*g)* la légalité de la décision prévue à l'un des paragraphes 196.14(1) à (3);
(h) the legality of a decision made under subsection 227.01(2).	*h)* la légalité de la décision rendue en application du paragraphe 227.01(2).

[49] Section 165.11 of the NDA reads as follows:

165.11 The Director of Military Prosecutions is responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The Director of Military Prosecutions also acts as counsel for the Minister in respect of appeals when instructed to do so.	**165.11** Le directeur des poursuites militaires prononce les mises en accusation des personnes jugées par les cours martiales et mène les poursuites devant celles-ci; en outre, il représente le ministre dans les appels lorsqu'il reçoit des instructions à cette fin.
[Emphasis added]	[Je souligne]

[50] Subsection 245(2) of the NDA provides for a similar right of appeal by the Minister to the Supreme Court.

[51] Before 1991, the prosecution had no right of appeal.[4] When it was recognized, it was conferred on the Minister in the context of the military justice system then in place.

[52] Section 230.1 was enacted in 1991.[5] It is helpful to specify the context surrounding its enactment to properly discern Parliament's intention.[6]

[53] Since 1985, there have been many statutory amendments to the NDA.[7]

[54] The most significant reforms followed the adoption of the Charter:[8] the Supreme Court decision in *R. v. Généreux*[9] in 1992, a major military justice reform following the events during the Canadian Forces intervention in Somalia and Bill C-25, which came into force in September 1999.[10]

[55] The enactment of section 230.1 was part of a series of reforms to the Canadian military justice system in a process of convergence with the *civilian* criminal justice system after the adoption of the *Canadian Charter of Rights and Freedoms* in 1982.

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4 W.J. Lawson, "Canadian Military Law" (1951) 29 *Can. Bar. Rev.* 241, at pp. 253-254; H.G. Oliver, "Canadian Military Law" (1975) 23 *Chitty's Law Journal* 109, at pp. 117-118; James B. Fay, "Canadian Military Law: An Examination of Military Justice" (1975) 23 *Chitty's Law Journal* 228, at p. 228.

5 S.C. 1991, c. 43. Came into force February 4, 1992, P.C. 1992-116, SI/1992-9.

6 *Wood v. Schaeffer*, 2013 SCC 71, [2013] 3 S.C.R. 1053, para. 99.

7 See Jerry S.T. Pitzul and John C. Maguire, "A Perspective on Canada's Code of Service Discipline" in *Evolving Military Justice*, E.R. Fidell and D.H. Sullivan (Annapolis: Naval Institute Press, 2002) at pp. 239 to 245; David McNairn, "A Military Justice Primer" (2002) 7 *Can. Crim. L. Rev.* 299, at pp. 300-301; Chris Madsen, *Military Law and Operations*, volume 1, Canada Law Book, loose-leaf, updated July 2015, at pp. 1-36 to 1-47.

8 Amendments to the *National Defence Act*, Schedule 1 to *An Act to amend certain Acts having regard to the Canadian Charter of Rights and Freedoms*, R.S.C. 1985, 1st Supplement, c. 31; See Erin Shaw and Dominique Valiquet, Legislative Summary of Bill C-15: *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, Publication no. 41-1-C15-E, Ottawa: Library of Parliament, Parliamentary Information and Research Service, 24 April 2012, revised 2 May 2013, at pp. 2-7; Andrew D. Heard, "Military Law and the Charter of Rights" (1987-88) 11 *Dalhousie L.J.* 514 at pp. 532-533.

9 [1992] 1 S.C.R. 259.

[56] That convergence is described as follows by former Judge Advocate General Pitzul in a text that he co-wrote:

> What followed was a relatively intense process of review, both internal and judicial, during which the Canadian Forces was called upon to reconcile its military justice provisions and processes with the constitutional protections embodied in the *Charter*. That process, which is still ongoing, resulted in an unprecedented series of amendments to the *Code of Service Discipline* and subordinate regulations and orders as well as what has been appropriately characterized as the "rapid convergence between military and civilian criminal justice processes."
>
> Some of the more significant changes implemented between 1982 and 1992 include:
>
> > establishing a process under which an accused who had been found guilty at court-martial and sentenced to a term of incarceration could apply for judicial interim release;
> >
> > developing a *Charter*-compliant scheme for dealing with mentally disordered accused;
> >
> > creating a truly comprehensive civilian appellate review process in respect of both courts-martial findings and sentences accessible by both the Crown and the accused; and
> >
> > enhancing the independence of courts-martial by (1) separating the functions of convening courts-martial and appointing judges and panel members; (2) adopting a random methodology for selecting courts-martial panel members; and (3) implementing reforms to ensure the security of tenure, financial security, and institutional independence of military judges, including appointing judges for fixed terms, adopting the civilian "cause-based" removal standard and discontinuing the use of career evaluations as a measure of judicial performance.[11]
>
> [Emphasis added.]

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[10] S.C. 1998, c. 35.

[11] Jerry S.T. Pitzul and John C. Maguire, "A Perspective on Canada's Code of Service Discipline" in *Evolving Military Justice*, E.R. Fidell and D.H. Sullivan (Annapolis: Naval Institute Press, 2002) at p. 239.

[57] In his work entitled *Canada's Military Lawyers*, Colonel (retired) R. Arthur McDonald described the reasons for the change to the right of appeal:

> One of the changes corrected a long-standing imbalance. For the first forty-three years of its existence, only the accused could appeal to the Court Martial Appeal Court. The prosecution had no right of appeal. This was in keeping with the paternalistic philosophy that the Forces, with its greater resources, should get it right the first time. Otherwise it might seem more like persecution than prosecution. However, as the legal rights of the individual expanded and the consequences of incorrect court martial decisions in favour of an accused became more serious, this philosophy changed to the civilian one of balanced rights of appeal. When the Généreux decision was released and the system had to be shut down until appropriate amendments were made, the decision was taken that this was the time to insert a right of appeal by the prosecution as well. Since 1993 the military appeal system has taken on most of the characteristics of the civilian system of appeal used for a criminal conviction.[12]
>
> [Emphasis added.]

[58] The creation of the prosecution's right of appeal arises from that expedited convergence and it was imperative to provide a right of appeal to the prosecution even if, in Canada, that type of right of appeal is limited.[13] Conferring that right of appeal on the Minister was completely natural in the context of the military justice system in place in 1991. In fact, the NDA at the time provided for and conferred several quasi-judicial powers on the Minister.[14]

[59] The Supreme Court decision in *Généreux*—which involves the constitutionality of general court martial proceedings—and the events surrounding the Canadian Forces intervention

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12 R. Arthur McDonald., *Canada's Military Lawyers* (Ottawa, Ont.: The Office of the Judge Advocate General, Minister of Public Works and Government Services Canada, 2002) at p. 147.

13 *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

14 Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, 1997.

in Somalia triggered, however, a reassessment of all quasi-judicial powers attributed to the Minister.

[60] In fact, in his judgment, Chief justice Lamer made the following comments:

> Many of the aspects of the General Court Martial that Décary J., dissenting in the Court Martial Appeal Court, found troubling relate to the tribunal's institutional independence. After a careful review of the relevant legislative provisions, Décary J. observed (at p. 372):
>
> > This review of the manner of proceeding in a General Court Martial indicates that the system created by the **Act** and by the **Q.R.O.C.F.** clearly establishes close links of institutional dependence between the Minister of National Defence, the commanding officer who signs the charge sheet, orders custody, receives the investigation report and decides to proceed with the charge, the military authority who convenes the court, appoints its members and decides on its dates of hearing, the officers who make up the court and for all practical purposes sit as a jury, the officer who prosecutes and of course the accused. I note that the **Act** and the **Orders** do not expressly require that the judge advocate also be a member of the Canadian Forces, although in the case at bar the record indicates that he was. I nevertheless take account of this officer on the tribunal, whether or not he was an officer of the Canadian Forces, in the conclusion I have arrived at of an objective institutional dependence, since under the **Act** and the **Orders** his function and duties lead him to maintain close ties with the Canadian Forces.
>
> I agree with the essence of Décary J.'s observations. An examination of the legislation governing the General Court Martial reveals that military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement is, in my opinion, inconsistent with s. 11(*d*) of the *Charter*. It undermines the notion of institutional independence that was articulated by this Court in *Valente*. The idea of a separate system of military tribunals obviously requires substantial relations between the

military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. It is important that military tribunals 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.

In my opinion, certain characteristics of the General Court Martial system would be very likely to cast into doubt the institutional independence of the tribunal in the mind of a reasonable and informed person. First, the authority that convenes the court martial (the "convening authority") may be **the Minister**, the Chief of the Defence Staff, an officer commanding a command, upon receipt of an application from a commanding officer, or another service authority appointed by the Minister (art. 111.05 Q.R. & O.). The convening authority, **an integral part of the military hierarchy and therefore of the executive**, decides when a General Court Martial shall take place. The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. The convening authority, or an officer designated by the convening authority, also appoints, with the concurrence of the Judge Advocate General, the prosecutor (art. 111.23 Q.R. & O.). This fact further undermines the institutional independence of the General Court Martial. It is not acceptable, in my opinion, that the convening authority, i.e., the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the executive, the "convening authority," appoints both the prosecutor and the triers of fact, the requirements of s. 11(*d*) will not be met.

Secondly, the appointment of the judge advocate by the Judge Advocate General (art. 111.22 Q.R. & O.), undermines the institutional independence of the General Court Martial. The close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive, are obvious. To comply with s. 11(*d*) of the *Charter*, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence and impartiality of the tribunal. However, as I have concluded above, I consider that the new arts. 4.09 and 111.22 of

> the amended Q.R. & O. have largely remedied this defect to the extent required in the context of military tribunals.[15]
>
> [Emphasis and boldface added.]

[61] On March 20, 1995, the Commission of Inquiry into the Deployment of Canadian Forces to Somalia was created. It presented its recommendations in 1997.

[62] In January 1997, the Minister of Defence, Douglas Young, created the Special Advisory Group on Military Justice and Military Police Investigation Services (Advisory Group).

[63] The Advisory Group was chaired by former Supreme Court Chief Justice Brian Dickson, a member of the Canadian Forces in World War II.[16] The other members were Lieutenant-General (retired) Charles H. Belzile and J.W. Bud Bird, a former Member of Parliament.

[64] In March 1997, the Advisory Group made 35 recommendations for improving the efficiency and independence of the military justice system and the military police. Several of those recommendations were part of Bill C-25, which came into force on September 1, 1999.

[65] Minister Young then mandated the Advisory Group to examine the quasi-judicial powers of the Minister under the NDA, including the power to commence an appeal under section 230.1.

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15 *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 307-308.

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

[66] In July 1997, the Advisory Group submitted its report entitled Report on Quasi-Judicial Role of the Minister of National Defence (second Dickson report) to the new Minister, Arthur Eggleton.

[67] The constitutional question raised by the motion to have the appeals quashed and dismissed justifies a careful analysis of the second Dickson report in a persuasive and compelling manner.

B. *Report on Quasi-Judicial Role of the Minister of National Defence*

[68] In its report, the Advisory Group described its study as follows:

> Our purpose in conducting this study has essentially been two-fold. First, we have looked at every one of the quasi-judicial powers currently in the hands of the Minister and considered whether there is an inherent advantage to the Minister exercising it or whether it would be better performed by another authority. Secondly, we have considered the issue of whether the Minister is constrained in his/her ability to discharge his/her mandate to manage and direct the Canadian Forces because of some or all of these quasi-judicial powers. Where we believed that another authority could exercise the power better, or where the Minister's executive authority could be compromised, we have recommended a transfer of that power to ensure the Minister maximum flexibility in conducting the affairs of the Department of National Defence as well as enhancing further the impartiality of the military judicial process.[17]

[69] The second Dickson report also pointed out that, even if the Minister had no quasi-judicial powers, the Minister must be careful when making public statements. It states the following:

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[17] Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, July 25, 1997, at pp. 2 and 3.

> Therefore, even without any powers to get involved directly in the military judicial system, such as those discussed below, the Minister will have to ensure that his/her public statements or actions relating to events that may lead to accusations before service tribunals are measured. Notwithstanding this general counsel of prudence, distancing the Minister from the military judicial system would assist in providing some increased flexibility in discharging the Minister's executive responsibilities under the National Defence Act (NDA).18

[70] For the purposes of its analysis, the Advisory Group looked at "the situation in other countries with similar military and legal traditions as our own, namely, England, Australia and the United States, and found that in none of them does the Minister or Secretary responsible for defence retain as many quasi-judicial powers as in Canada".[19]

[71] The second Dickson report also briefly examined the quasi-judicial powers conferred on other ministers and noted the unique position of the Minister of Defence in the following terms:

> Finally, we considered quasi-judicial powers conferred upon Ministers by other federal statutes. Again, because of time constraints, it was not possible to research this question exhaustively. It is obvious, however, that various other Ministers must assume quasi-judicial roles, and many of them are responsible for quasi-judicial tribunals. We do not believe, however, that any other Minister is responsible for a complete and separate system of justice designed to govern the conduct of personnel for whom he/she is also responsible within his/her department.
>
> It follows that the Minister of National Defence in Canada is in a unique position. The Minister is responsible not only for a department and military force but also for a separate, full-fledged military justice system applicable to that force. The central issue raised by the combination of the Minister's executive and quasi-

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18 Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, July 25, 1997, at p. 4.

19 *Ibid.*, at p. 5.

> judicial powers is whether it is appropriate and desirable in all the circumstances.[20]
>
> [Emphasis added.]

[72] The Advisory Group was unable to determine the *raison d'être* for all of the powers given to the Minister. It stated the following:

> It has been difficult to ascertain with full accuracy the rationale or *raison d'être* for the myriad quasi-judicial powers that are found in the *NDA*. Indeed, our research does not permit us to determine categorically why specific quasi-judicial powers were granted to the Minister. We can only surmise that the legislative drafters, steeped in the British military tradition, tacitly assumed that the executive branch of government and the chain of command were the proper authorities to supervise the military justice system and, indeed, to be involved in making decisions relating to individual cases.[21]

[73] Moreover, the second Dickson report noted recent statutory and jurisprudential evolution that led to both legal challenges and legislative reforms:

> Since the enactment of the *NDA*, however, the law and the jurisprudence have evolved toward a greater independence of service tribunals from the executive power and the chain of command, particularly where courts martial are concerned. This process culminated in the Supreme Court of Canada decision in *Genereux* requiring that courts martial conform with section 11(d) of the *Canadian Charter of Rights and Freedoms*, which states that everyone has a right to be judged by an "independent arid impartial tribunal".[22]
>
> . . .
>
> Thus, the confluence of the executive and quasi-judicial functions of the Minister became problematic with the increasing requirements for a military judicial system which had to be and

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[20] Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, July 25, 1997, at pp. 5 and 6.

[21] *Ibid.*, at p. 6.

[22] *Ibid.*, at p. 7.

> appear to be independent in order to reflect the values of the civilian judicial system and the need of the Minister to exercise his/her managerial responsibilities.[23]
>
> [Emphasis added.]

[74] The second Dickson report considered all of the Minister's quasi-judicial powers, in both pre-trial and post-trial decisions. In some cases, it recommended either simple abolition, or the transfer to an office holder like a military judge or the independent Director of Prosecutions.

[75] In the case of section 230.1, the Advisory Group recommended that that power be exercised by the independent Director of Prosecutions, whom it recommended the establishment of in its first report, submitted in March 1997. It was of the opinion that it is more appropriate for an independent prosecutor than the Minister to exercise prosecutorial powers.

[76] The second Dickson report states that the Minister "should be distanced as much as possible from the military justice system, at any point…"[24] The independence of the military justice system and the appearance of justice justify distancing the Minister from that type of quasi-judicial power.

[77] The second Dickson report confirms that approach several times. According to the report, "the Minister should not be involved in prosecution decisions; such decisions should be left to

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[23] *Ibid.*

[24] Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, July 25, 1997, at p. 15.

the independent Director of Prosecutions",[25] as they are "inherently…prosecutorial decision[s]".[26]

[78] The second Dickson report therefore supported the idea that preserving the independence and impartiality of the military justice system required the Minister to stop exercising quasi-judicial powers within a justice system that could lead to the imprisonment of his or her personnel. Essentially, the independence of the military justice system with respect to the executive branch and the chain of command justified those changes.

[79] Thus, according to the Advisory Group, the Minister could fully perform his or her managerial responsibilities under the NDA while ensuring that, according to the NDA, the powers otherwise exercised by the Minister, are exercised by a judge or an independent Director of Prosecutions, holders more apt than the Minister for duties of that nature.

[80] The recommendations in the second Dickson report were not ignored.

[81] Bill C-25 integrates most of them, but the one that involved transferring the Minister's power to commence an appeal was never implemented.[27]

[82] The bill came into force on September 1, 1999.[28] The summary reads as follows:

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25 *Ibid*., at p. 16.
26 *Ibid*., at p. 23.
27 *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, Bill C-25 (Assented - December 10, 1998), 1st Session, 36th Parliament (Can.)
28 *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35, coming into force of certain sections on September 1, 1999 (Order), (1999) 133 Can. Gaz. II, 1999.

> This enactment reforms and modernizes the *National Defence Act* and, in particular, the Code of Service Discipline. Key components of the enactment include:
>
> > clarification of the roles and responsibilities of the principal actors in the military justice system, including the Minister of National Defence and the Judge Advocate General, and the establishment of clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions;
> >
> > establishment of a Director of Military Prosecutions who prefers all charges to be tried by court martial and has conduct of all prosecutions at court martial;
> >
> > establishment of a Canadian Forces Grievance Board to make findings and provide recommendations to the Chief of the Defence Staff on grievances by members of the Canadian Forces;
> >
> > establishment of a Military Police Complaints Commission to investigate complaints as to military police conduct and interference with military police investigations;
> >
> > abolition of the death penalty and substitution of the punishment of life imprisonment; and
> >
> > increased reporting through the release of annual reports by the Canadian Forces Grievance Board, the Military Police Complaints Commission and the Judge Advocate General.
> >
> > [Emphasis added.]

[83] In 2003, former Chief Justice Lamer was mandated to lead the first independent review of the provisions and operation of Bill C-25. He made three comments on the subject of the objective of Bill C-25 regarding prosecutorial independence in respect of the chain of command:

> One of the overriding goals of Bill C-25 was to clarify the roles, responsibilities and duties of the key actors in the military justice system. This clarification included the introduction of new positions within the military justice system in order to enhance the

> independence of the judiciary, prosecution and defence from the chain of command.[29]
>
> . . .
>
> In order to provide greater assurance that prosecution decisions would be made free from external influences and to reduce the potential for conflict of interest, Bill C-25 enhanced the separation between the prosecution function and the chain of command. These changes were made pursuant to comments by the Supreme Court in *R v. Généreux* which highlighted the lack of institutional independence that existed in the court martial process at the time[.][30]
>
> . . .
>
> Bill C-25 was intended to create the necessary legislative buffers around the DMP to ensure that the proper exercise of prosecutorial discretion is not inadvertently interfered with by the military chain of command.[31]

[84] Former Chief Justice Lamer did not specifically comment on section 230.1.

[85] The record submitted by the parties does not provide any source behind the decision to not address the second Dickson report recommendation that pertains to section 230.1. I could not find any.

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29 The Right Honourable Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 35*, Submitted to the Minister of National Defence on September 3, 2002, at p. 11.

30 *Ibid.*, at p. 13.

31 *Ibid.*

[86] Curiously, the final report by the Minister's monitoring committee on change in the Department of National Defence and the Canadian Forces, which was responsible for monitoring reforms, suggested that that recommendation be addressed.[32]

[87] With this historical context in mind, I will now analyze the issues raised by the motions to dismiss the appeal.

C. *Issues*

[88] The issues are as follows:

(1) Is the right to an independent prosecutor a principle of fundamental justice?

(2) If so, is the power to commence an appeal conferred on the Minister contrary to that principle of fundamental justice and does it violate section 7 of the Charter?

(3) If yes, is it a reasonable limit that is justifiable in a free and democratic society?

(4) If not, does a declaration of invalidity with respect to section 230.1 lead to the dismissal of the Minister's appeals?

(1) Is the constitutional right to an independent prosecutor a principle of fundamental justice protected by section 7 of the Charter?

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[32] Canada, Department of National Defence, *Minister's monitoring committee on change in the Department of National Defence and the Canadian Forces Report*, Ottawa, December 1999, at p. 112.

(a) *Violation of a s. 7 interest*

[89] The first issue is whether the respondents' right to life, liberty and security of the person is at issue. The answer is simple. The Supreme Court noted in *R. v. Malmo-Levine* that "the availability of imprisonment . . . is sufficient to trigger scrutiny under s.7".[33] Such availability exists according to section 139 of the NDA.

(b) *Principles of fundamental justice*

[90] Since *R. v. D.B.*,[34] the analytical framework for identifying a principle of fundamental justice has been well established.

[91] Justice Cromwell summarized it in *Canada (Attorney General) v. Federation of Law Societies of Canada*:[35]

> [87] Principles of fundamental justice have three characteristics. They must be legal principles, there must be "significant societal consensus" that they are "fundamental to the way in which the legal system ought fairly to operate" and they must be sufficiently precise so as "to yield a manageable standard against which to measure deprivations of life, liberty or security of the person": *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113, per Gonthier and Binnie JJ.; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, per Abella J.; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 29, per Moldaver J.

[92] Prosecutorial discretion in prosecutorial matters and the principle of independence that it involves have been the subject of a series of decisions by the Supreme Court of Canada in the

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[33] 2003 SCC 74, [2003] 3 S.C.R. 571, para. 84; *R. v. Moriarity*, 2015 SCC 55, paras. 17-19.
[34] 2008 SCC 25, [2008] 2 S.C.R. 3.

last 25 years: *Nelles v. Ontario*,[36] *R. v. T. (V.)*,[37] *R. v. Cook*,[38] *Krieger v. Law Society of Alberta*,[39] *Miazga v. Kvello Estate*,[40] *R. v. Nixon*,[41] *R. v. Anderson*,[42] and more recently *Hinse v. Canada (Attorney General)*[43] and *Henry v. British Columbia (Attorney General)*.[44]

[93] In *Hinse*, Justice Wagner and Justice Gascon described the principle of independence in the exercise of prosecutorial discretion as follows:

> [40] First, although it is possible, in rare cases, to hold Crown prosecutors liable for malicious prosecution, there are policy reasons that justify an extremely high threshold for success in such an action: *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 43; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, at para. 4; *Nelles v. Ontario*, [1989] 2 S.C.R. 170. As a result, an action for malicious prosecution must be based on malice or on an improper purpose: *Miazga*, at paras. 56 and 81. The decision to initiate or continue criminal proceedings lies at the core of the Crown prosecutor's powers, and the principle of independence of the prosecutor's office shields prosecutors from the influence of improper political factors: *Miazga*, at para. 45; see also *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. Prosecutors must be able to act independently of any political pressure from the government and must be beyond the reach of judicial review, except in cases of abuse of process. This independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched: *Miazga*, at para. 46; *Krieger*, at paras. 30-32.
>
> [Emphasis added.]

[94] In *Anderson*, Justice Moldaver stated the following:

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35 2015 SCC 7, [2015] 1 S.C.R. 401.
36 [1989] 2 S.C.R. 170.
37 [1992] 1 S.C.R. 749.
38 [1997] 1 R.C.S. 1113.
39 2002 SCC 65, [2002] 3 S.C.R. 372.
40 2009 SCC 51, [2009] 3 S.C.R. 339.
41 2011 SCC 34, [2011] 2 S.C.R. 566.
42 2014 SCC 41, [2014] 2 S.C.R. 167.
43 2015 SCC 35.

> [37] This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p. 410; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 758-62; *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, "not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as 'ministers of justice'". More recently, in *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 27, this Court observed that "[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law".
>
> [Emphasis added.]

[95] In my opinion, these two passages are sufficient to establish that the independence of the prosecutor is a principle of fundamental justice.

[96] In fact, it is a legal principle, which is sufficiently precise, and about which there is a significant societal consensus that it is fundamental to the way in which the criminal justice system ought fairly to operate.

[97] The broad principles set out by the Supreme Court on independence in the exercise of prosecutorial discretion can be summarized as follows:

(1) The broad powers of prosecutors are at the very heart of the adversarial process;[45]

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[44] 2015 SCC 24.

[45] *R. v. Cook*, [1997] 1 S.C.R. 1113, para. 19.

(2) The fact that prosecutors must have fairly broad discretion is a general principle for the good operation of the criminal justice system. Discretion is an essential feature of the criminal justice system;[46]

(3) The existence of prosecutorial discretion does not offend the principles of fundamental justice;[47]

(4) The principle of prosecutorial independence shields prosecutors from the influence of improper political factors,[48] partisan concerns[49] or any political pressure from the government;[50]

(5) Prosecutorial independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched;[51]

(6) The duty of a Crown Attorney to respect his or her "Minister of Justice" obligations of objectivity and independence is fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system.[52]

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46 *Ibid*., *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 758 to 762.

47 *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 411; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, para. 32. See H. Stewart, *Fundamental Justice: section 7 of the Canadian Charter of Rights and Freedoms* (Irwin Law, 2012) at p. 123 where Professor Stewart states that it is fairer to claim that prosecutorial discretion is a principle of fundamental justice. See also R. J. Frater, *Prosecutorial Misconduct* (Aurora, Ont.: Canada Law Book, 2009).

48 *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, para. 62; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, para. 40.

49 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, paras 3 and 30.

50 *Hinse v. Canada (Attorney General)*, 2015 SCC 35, para. 40.

51 *Ibid*.

52 *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, paras 151-160 and para. 166 (Justice Binnie dissenting on another point); *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, paras 30 and 48; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, para. 46.

[98] All of these principles support the finding that independence in the exercise of prosecutorial discretion is a principle of fundamental justice.[53]

[99] It is also essential that the prosecutor can be reasonably perceived as being independent.

[100] Although that criteria was made with regard to judicial independence,[54] prosecutorial independence would be a meaningless principle of fundamental justice if it did not also have to be assessed from the objective standpoint of a reasonable person fully apprised of the relevant circumstances.

[101] In their study on prosecutorial independence in the Canadian Forces, Professor James W. O'Reilly and Professor Patrick Healy provided the following perspective:

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

[102] They noted the importance of considering "the set of attributes defining the office of the person exercising the prosecution authority".[55]

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53 I adopt the expression [TRANSLATION] "independence in the exercise of prosecutorial discretion is a principle of fundamental justice" from James W. O'Reilly and Patrick Healy, *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion*, a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997) at p. 43. However, I also use other equivalent expressions.

54 [1992] 1 S.C.R. 259, at pp. 286-287; James W. O'Reilly and Patrick Healy, *supra* note 55, at p. 39.

55 James W. O'Reilly and Patrick Healy, *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion*, a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997) at p. 39.

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

[104] The criteria of the perception of a reasonable person was applied recently in another context by the Supreme Court in *Canada (Attorney General) v. Federation of Law Societies of Canada*.[56]

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

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

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

[107] The issue of the constitutional protection given to prosecutorial independence requires two clarifications.

[108] First, it is true that in the case law of the Supreme Court, reference is mainly to the Attorney General. It may be asked whether that principle extends to any prosecutor in the penal justice system,[57] and whether the protection of that independence is limited to the Attorney General and to those who act on his or her behalf.

[109] Suffice it to state that the terminology used by the Supreme Court refers to not only the discretion of the Attorney General, but also the discretion of the prosecution[58] or the prosecutor's discretion.[59] The terminology is of little importance because the principle of independence applies to all prosecutors.

[110] I will return to this later in examining some of the Minister's arguments.

[111] Second, the basis for that constitutional protection must be identified.

[112] Justice Charron's description of it in *Miazga* is as follows:

> [46] The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political

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56 2015 SCC 7, [2015] 1 S.C.R. 401.

57 I use this expression as meaning a justice system that can lead to a true penal consequence, like imprisonment. See *Guindon v. Canada*, 2015 SCC 41.

58 *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, para. 2.

59 *R. v. Nur*, 2015 SCC 15, para. 94; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, para. 37; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] S.C.R. 3, para. 136.

pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):

> It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada [Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990)], at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).
>
> This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. . . .
>
> . . .
>
> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. . . . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

See also *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 166, *per* Binnie J., dissenting on another issue.

[Emphasis added by Justice Charron.]

[113] In this passage, Justice Charron bases the principle of independence in the exercise of prosecutorial discretion both on the rule of law and on the separation of powers.

[114] Furthermore, she refers to Justice Binnie's opinion in his dissent in *Regan*.

[115] In *Regan*, Justice Binnie stated the following in paragraphs 157-158:

> 157 In *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22, at para. 24, we held that "the right to effective assistance of counsel" in the criminal justice system reflects a principle of fundamental justice within the meaning of s. 7 of the *Charter*. The duty of a Crown Attorney to respect his or her "Minister of Justice" obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria first established in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513:
>
> > Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.
>
> 158 These requirements set a high standard. The courts rightly presume, such are the high traditions of the prosecutorial service in this country, that they are met in the thousands of decisions taken every day that so vitally impact the lives of those who find themselves in trouble – rightly or wrongly – with the law. Unfounded or trivial allegations will be given short shrift. In this case, however, the trial judge found that the departure from the expected standard was neither unfounded nor trivial. The extent of the departure was deeply troubling. The trial judge has much experience in the practicalities of criminal prosecutions. We are thus confronted in this case with a very exceptional set of facts.

> [Emphasis added.]

[116] In my opinion, it is fairly clear from Justice Binnie's comments in *Regan* that prosecutorial independence is a principle of fundamental justice under section 7 of the Charter.

[117] That interpretation was adopted by the Supreme Court in several decision even if the Court has not, to date, formally described the principle of prosecutorial independence as a principle of fundamental justice under section 7 of the Charter.

[118] In this regard, in *Miazga*, Justice Charron clearly pointed out the connection between the principle of independence and the exercise of prosecutorial discretion:

> [47] In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as "ministers of justice": *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25, *per* Locke J.
>
> [Emphasis added.]

[119] In *R. v. Gill*, Justice Doherty of the Ontario Court of Appeal also expressed the opinion that prosecutorial independence is a principle of fundamental justice. He stated the following:

> 57 The distinction between prosecutorial decisions that engage the core prosecutorial discretion and other prosecutorial decisions is important because the former are reviewable only for abuse of process. Thus, if an accused challenges a prosecutorial exercise of discretion under s. 7 of the Charter, and that decision is said to go to the core prosecutorial power, it can offend the principles of

> fundamental justice only if it constitutes an abuse of process. Put in a more positive way, prosecutorial independence, itself a principle of fundamental justice, forecloses judicial review of core decisions under s. 7 for anything other than abuse of process.[60]
>
> [Emphasis added.]

[120] It is true that, in *Anderson*, Justice Moldaver did not adopt the judicial review test set out by Justice Doherty in *Gill*. In fact, he stated the following: "[t]o the extent the *Gill* test suggests that conduct falling short of abuse of process may form a basis for reviewing prosecutorial discretion, . . . it should not be followed".[61]

[121] However, that does not bring into question Justice Doherty's opinion that prosecutorial independence is a principle of fundamental justice. The passage from *Anderson* cited in paragraph 94 of my reasons seems to confirm this.

[122] Independence in the exercise of prosecutorial discretion is a principle of fundamental justice under section 7 of the Charter.

[123] Nevertheless, I will address some of the Minister's arguments. If I understand them correctly, even if it is found that prosecutorial independence is a principle of fundamental justice, that principle does not apply to the Canadian military justice system for several reasons.

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60 *R. v. Gill*, (2012), 96 C.R. (6th) 172 (C.A. Ont.), at p. 192.
61 *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, para. 51.

(c) *Is the principle of prosecutorial independence simply a constitutional convention that concerns only the Attorney General?*

[124] The Minister first argues that prosecutorial independence is a constitutional convention that protects the Attorney General and that is not enforceable by the courts.

[125] On this point, he relies on the opinion expressed on this subject in a report published by the Law Reform Commission in 1990, entitled *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*.[62]

[126] The independence of the Crown prosecutor with regard to criminal prosecutions is not a mere constitutional convention,[63] as compliance with this principle can be the subject of litigation leading, in certain circumstances, to a stay of criminal proceedings or a civil lawsuit for abuse of process.[64]

[127] As I stated above, several decisions of Supreme Court rendered after the Law Reform Commission's report establish that prosecutorial independence is protected by the Constitution.

[128] The prosecution must objectively be able to act independently of any influence, political or otherwise.

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62 CANADA, LAW REFORM COMMISSION OF CANADA, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa, 1990) pages 8 and 14.

63 *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; Peter W. Hogg, *Constitutional Law of Canada*, Fifth Edition Supplemented, Volume 1 (Toronto: Carswell) at p. 1-22.1; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel*, 6th ed. (Éditions Yvon Blais, 2014) para. I.151, at p. 45.

64 S. Penney, V. Rondirelli and J. Stribopoulos, *Criminal Procedure in Canada* (LexisNexis, 2011) at pp. 457-62.

[129] Historically, it was the independence of the Attorney General that guaranteed this principle.

[130] The fact that the Attorney General is a member of Cabinet does not diminish the importance of the principle of independence, as Justice Iacobucci and Justice Major note in *Krieger*:[65]

> 29 The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. See *Edwards*, *supra*, at pp. 174-76. Unlike the U.K., Cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.

[131] In this respect, the Minister's proposed parallel between the role of the Attorney General in prosecutions and other Cabinet ministers to whom such prosecutorial powers have been granted is inadequate.

[132] Although the Attorney General, being a member of Parliament, does not hold office during good behaviour and may be dismissed by the Prime Minister, "custom, tradition and

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65 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372.

constitutional usage" have charged the Attorney General with the administration of justice as his or her primary duty.[66]

[133] However, even if prosecutorial powers are granted to other ministers, it does not follow that the Attorney General's recognized attributes of independence are granted to them as well and that they are afforded the same constitutional protection.

[134] In *Krieger*, the Supreme Court recognized "the unique and important role of the Attorney General"[67] and the fact that "the office of the Attorney General is one with constitutional dimensions".[68] In addition, one of the duties of the Attorney General is to "advise the heads of the several departments of the Government on all matters of law connected with such departments".[69]

[135] Together, all these factors establish that the Attorney General may reasonably be regarded as independent in the eyes of a reasonable person.

[136] There is simply no possible equivalence between the constitutional protection given to the Attorney General's independence with regard to prosecutorial powers and the recognized protections afforded to other Cabinet ministers.[70]

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66 *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, para. 35.
67 *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, para. 23.
68 *Ibid*., para. 26.
69 Paragraph 5(*b*) of the *Department of Justice Act*, R.S.C., 1985, c. J-2.
70 *Hinse v. Canada (Attorney General)*, 2015 SCC 35, paras. 42-44; K. Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006), 31 *Queen's L.J.* 598, at p. 609.

[137] Established before the advent of the Charter as a constitutional convention regarding the independence of the Attorney General,[71] the principle of the independence of the prosecutor is now a matter of consensus, such that it can be recognized as a principle of fundamental justice under section 7 of the Charter.

[138] The creation of independent prosecutor positions held during good behaviour for a fixed term is proof of this consensus. For example, such is the case with the Director of Military Prosecutions in the Canadian military justice system, who holds office during good behaviour for a term of not more than four years subject to renewal.[72] The Director of Public Prosecutions of Canada is holds office for good behaviour for a term of seven years,[73] as does the Director of Criminal and Penal Prosecutions of Quebec.[74]

[139] I note that the primary objective of the *Director of Public Prosecutions Act*[75] is "to ensure that prosecutions under federal law operate independently of the Attorney General of Canada and the political process".[76] This statute was enacted by Part III of the *Federal Accountability Act*.[77]

[140] Authors Sylvestre and Lapointe describe this evolution in the following terms:

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71 K. Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006), 31 *Queen's L.J.* 598, at p. 610. Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2008-2009) 34 *Queen's L.J.* 813.

72 Subsection 165.1(2) of the NDA.

73 Section 5 of the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121.

74 Section 4 of the *Act respecting the Director of Criminal and Penal Prosecutions*, CQLR c. D-9.1.1.

75 S.C. 2006, c. 9, s. 121.

76 Legislative Summary (LS-522E), *Bill C-2: The Federal Accountability Act* (Parliamentary Information and Research Service, Library of Parliament, April 21, 2006, revised December 18, 2006); Wade Riordan Raaflaub, *The Possible Establishment of a Federal Director Of Public Prosecutions in Canada* (Law and Government Division, Library of Parliament) PRB 05-067E.

77 S.C. 2006, c. 9.

[TRANSLATION]

> **12** . **Creation of independent prosecution services** — The creation of the [Public Prosecution Service of Canada] and the [Director of Criminal and Penal Prosecutions] in 2006 and 2007, respectively, is the product of a process of consideration, carried out in several common law jurisdictions, regarding the effects of that combining the functions of Attorney General and Minister of Justice may have on prosecutorial independence. Each of these entities comes under the umbrella of its own framework legislation and policies. Directors of the PPSC and the DCPP are charged with acting as prosecutor on behalf of their respective attorneys general. Some institutional links between the prosecution service directors and their respective attorneys general remain, particularly in respect of budgets and the duty to inform. In addition, the attorney general has the power to issue general or specific directives regarding a file, which the director of public prosecutions must follow. These directives must be given in writing and be published.[78]

[141] There is a clear consensus in the case law regarding the principle of prosecutorial independence, and this principle has crystallized in contemporary legislation with all the statutes that have created independent prosecutor positions.

[142] This development demonstrates not only that there is a consensus that the principle of prosecutorial independence is an essential component of the criminal or penal justice system such that it constitutes a principle of fundamental justice, but also that adhering to this principle has fostered the enactment of statutes that now offer an objective guarantee that prosecutors can hold office during good behaviour for a fixed term, thereby protecting their independence.

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[78] Marie-Ève Sylvestre and Manon Lapointe, "Introduction à la preuve et à la procédure pénales", in JurisClasseur Québec, coll. "Droit penal", *Preuve et procédure pénales*, fasc. 1 (Montréal: LexisNexis Canada, looseleaf, updated October 1, 2014) para. 12.

[143] The existence of the consensus according to which prosecutorial independence must be protected through an office during good behaviour for a fixed term, at least where the prosecutor is not the Attorney General, is a question that goes far beyond the subject matter of the motions to quash and dismiss the appeals before us, which deal with the independence of the Minister in the context of the NDA and the Minister's power to appeal.

[144] I make these observations simply to confirm the importance of the principle of prosecutorial independence in recent Canadian legislation. It is not essential to resolve the issue of whether protecting the principle of prosecutorial independence requires holding office during good behaviour for a fixed term. It is more prudent to respect "[t]he policy which dictates restraint in constitutional cases".[79]

(d) *Legislative jurisdiction to grant the Minister the power to appeal*

[145] The Minister stresses that the NDA and the *Code of Service Discipline* fall within the legislative jurisdiction of Parliament under subsection 91(7) in the areas of "Militia, Military and Naval Service, and Defence", not criminal law. He also states that offences within the meaning of the NDA are service offences, not criminal offences.

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[79] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 9. I note that it should go without saying that the principles laid down in this judgment do not apply to private prosecutors, as any private prosecution may be stayed at the discretion of the relevant director of public prosecutions or, as the case may be, the Attorney General: see *R. v. McHale* (2010), 256 C.C.C. (3d) 26 (Ont. C.A.), leave to appeal refused [2010] 3 S.C.R. vi.

[146] These arguments are not relevant in determining whether there is a principle of fundamental justice guaranteeing prosecutorial independence that applies to Canada's military justice system.

[147] The issue is not whether Parliament has legislative jurisdiction to grant the Minister the power to appeal. It clearly does.[80] At issue is whether this is consistent with section 7 of the Charter.

[148] It is helpful to bear in mind that these are separate issues. Chief Justice McLachlin explained this in *Canada (Attorney General) v. PHS Community Services Society,*[81] in which she wrote as follows:

> More broadly, the principle that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution is of no assistance in dealing with division of powers issues on the one hand, and *Charter* issues on the other. There is no conflict between saying a federal law is validly adopted under s. 91 of the *Constitution Act, 1867*, and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the *Charter*. The *Charter* applies to all valid federal and provincial laws. Indeed, if the *CDSA* were *ultra vires* the federal government, there would be no law to which the *Charter* could apply. Laws must conform to the constitutional division of powers and to the *Charter*.
>
> [Emphasis added.]

(e) *Service offence or criminal offence*

[149] The Minister also stresses the distinction between a service offence and criminal offence.

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[80] *MacKay v. The Queen*, [1980] 2 S.C.R. 370; David McNairn, "Introduction au système de justice militaire" (2002) 7 *Can. Crim. L. Rev.* 299, at p. 301.

[150] If I understand the Minister's argument correctly, since the principle of prosecutorial independence arose in a criminal law context, it should not apply in a military justice context.

[151] The dichotomy or opposition proposed by the Minister does not adequately account for the public nature of the *Code of Service Discipline*.

[152] Chief Justice Lamer noted this aspect in *Généreux*:

> It is clear to me that the proceedings of the General Court Martial in this case attract the application of s. 11 of the *Charter* for both reasons suggested by Wilson J. in *Wigglesworth*. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the *Narcotic Control Act*. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*). For these reasons, I find that the appellant, who is charged with offences under the Code of Service Discipline and subject to the jurisdiction of a General Court Martial, may invoke the protection of s. 11 of the *Charter*.[82]
>
> [Emphasis added.]

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81 2011 SCC 44, [2011] 3 S.C.R. 134.

82 [1992] 1 S.C.R. 259, at pp. 281-82.

[153] In its recent judgment in *R. v. Moriarity*,[83] the Supreme Court confirmed the public function of the CSD. This provides a complete answer to the objection raised by the Minister.

[154] I recognize at the outset, as Chief Justice Lamer did in *Généreux*, that the content of a constitutional guarantee "may well be different in the military context than it would be in the context of a regular criminal trial".[84] Chief Justice Lamer also noted that "[t]he idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system".[85] However, like him, I am of the opinion that if the structure of the Canadian military justice system violates the basic principles of section 7 of the Charter, "it cannot survive unless the infringements can be justified under s. 1".[86]

[155] Prosecutorial independence is a principle of fundamental justice that applies to the Canadian military justice system.

[156] Indeed, it would be more accurate to say that this principle has largely been recognized and respected in the NDA since the position of Director of Military Prosecutions was created in 1999, but that the specific issue is whether this principle should apply to the power to appeal under section 230.1 of the NDA.

[157] Just how independent is the Minister of Defence when exercising this power?

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83 2015 SCC 55, para. 43
84 *Ibid.*, at p. 296.
85 *Ibid.*
86 *Ibid.*

(2) Is the Minister an independent prosecutor?

[158] According to section 4 of the NDA, the Minister is responsible for the management and direction of the Canadian Forces and all matters relating to national defence. The Minister holds office during pleasure.[87]

[159] Under the direction of the Minister, the Chief of the Defence Staff is charged with the control and administration of the Canadian Forces.[88] Orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister are issued by or through the Chief of the Defence Staff.[89]

[160] The Minister is at the apex of the chain of command in the Canadian Forces.[90]

[161] In *Anderson*, Justice Moldaver drew up a list of decisions that fall within the nature and extent of a prosecution and stated that the decision to initiate an appeal is one of these decisions.[91]

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87 *Halsbury's Laws of Canada - Military*, 1st ed., by Natalie Venslovaitis and Catherine Morin (eds.) with the collaboration of the Office of the Judge Advocate General for the Canadian Armed Forces (Markham, Ont.: LexisNexis Canada, 2011, updated December 15, 2013) p. 315, para. HMI-22; Chris Madsen, *Military Law and Operations*, volume 1 (Canada Law Book, looseleaf, updated July 2015) para. 3:20.20, at pp. 3-9 to 3-12.

88 Section 18 of the NDA.

89 Subsection 18(2) of the NDA. *Halsbury's Laws of Canada – Military*, above, note 93, p. 317, para. HMI-26.

90 James W. O'Reilly and Patrick Healy, *Independence in the prosecution of offences in the Canadian Forces – military policing and prosecutorial discretion*, a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997) at p. 61.

91 *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, para. 44; see also *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 192.

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

[163] In *Larouche*, this Court noted that the DMP's discretion "must be exercised in an autonomous and independent manner that is free from any intervention from the chain of command".[92] This conclusion conflicts with granting prosecutorial discretion, such as the power to appeal, to the Minister.

[164] This incompatibility with the power to appeal against an acquittal or a stay of proceedings becomes even more apparent when we consider the power to initiate the process to release an officer or a non-commissioned member from military service for example, in a case of service misconduct.[93] Although this power is not specifically granted to the Minister, it is ultimately under the Minister's authority that it can be exercised.

[165] In *R. v. Tupper*,[94] Justice Trudel wrote:

> [68] Members of the Canadian Forces can be subject to both administrative and disciplinary sanctions. If a Canadian Forces member has been charged with an offence under the NDA, Criminal Code or other federal statute, the chain of command may, regardless of the outcome of the offence charged, take administrative action to address any conduct or performance

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92 2014 CMAC 6, para. 16.

93 Chapter 15 of Volume 1 of the QR&O. See also *Halsbury's Laws of Canada - Military*, 1st ed., by Natalie Venslovaitis and Catherine Morin (eds.) with the collaboration of the Office of the Judge Advocate General for the Canadian Armed Forces, Markham, Ont., LexisNexis Canada, 2011, updated December 15, 2013, pp. 360-63, para. HMI-56.

94 *R. v. Tupper*, 2009 CMAC 5.

> deficiencies arising from the same circumstances (DAOD 5019-0, Conduct and Performance Deficiencies).
>
> [69] According to Dr. Chris Madsen (*Military Law and Operations*, looseleaf, Aurora: Canada Law Book, 2008 at 2:20.40), administrative action may be initiated against convicted soldiers especially in the case of repeat and habitual offenders. He notes:
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> > Release as no longer suitable for military service is one common outcome, which either compounds or supplants the punishment awarded at trial.

[166] The military justice system must be independent of the chain of command.[95]

[167] I note the following observation in the second Dickson report regarding the unique position of the Minister:

> We do not believe, however, that any other Minister is responsible for a complete and separate system of justice designed to cover the conduct of personnel for whom he/she is also responsible within his/her department.
>
> It follows that the Minister of National Defence is in a unique position. The Minister is responsible not only for a department and a military force but also for a separate, full-fledged military justice system applicable to that force.

[168] Although the reforms introduced by Bill C-25 did abolish most of the Minister's quasi-judicial powers, this description of the Minister's unusual position with regard to the military justice system governing the conduct of its personnel is as apt as ever.

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95 *R. v. Généreux*, [1992] 1 S.C.R. 259; *R. v. Larouche*, 2014 CMAC 6.

[169] The Minister purports to be bound by the principle of prosecutorial independence when deciding whether to bring an appeal.

[170] He cites the words of Justice Ritchie in 1980, in *Mackay v. The Queen*, where he wrote with regard to charges brought before a military court that "in this context the Minister of National Defence stands in the place of the Attorney General".[96]

[171] I find that this conclusion no longer applies, as it has not survived *Généreux*[97] and the reforms made since that decision.

[172] Although the issue in *Généreux* concerned the process of constituting the General Court Martial, the general observations of Chief Justice Lamer regarding the role of the executive and the military hierarchy in the military justice system are still just as relevant. The wisdom behind his conclusions applies to the power to appeal.

[173] I note that the military justice system in its current form is profoundly different from what it was at the time of the Supreme Court's judgment in *MacKay*. In this respect, I think it wise to limit my observations solely to the issue before us,[98] namely, the constitutionality of section 230.1. I will therefore not comment on issues that are not raised in this case.

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96 [1980] 2 S.C.R. 370, at p. 394.
97 [1992] 1 S.C.R. 259, at pp. 292-93.
98 *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 9.

[174] The Minister also relies on the Federal Court of Appeal's decision *Quebec North Shore & Labrador Railway Co. v. Canada (Minister of Labour)*[99] to demonstrate that he is an independent prosecutor and will act as such.

[175] In that case, the Court of Appeal concluded that the Minister of Labour's consent required under section 148 of the *Canada Labour Code* to institute penal proceedings was a "preliminary decision which is similar to a decision of the Attorney General to authorize a prosecution".[100]

[176] It is not enough, as the Minister suggests, to conclude that he must respect the principles of prosecutorial independence when exercising the power to appeal.

[177] Admittedly, if ministers or office holders other than the Attorney General are granted discretionary powers with regard to prosecutions, no matter relating to the exercise of their discretionary powers can be subject to judicial review except to the extent recognized by the Supreme Court.

[178] More specifically, with regard to the DMP, this Court wrote as follows in *Wehmeier*:

> [31] Although the penal military justice system possesses its own system of prosecution, defence and tribunals, the role played by the DMP is similar to that exercised by the Attorney General. We are satisfied on the record before us that, while there are differences between the position of the Attorney General and the DMP (see: *R. v. JSKT*, 2008 CMAC 3, [2008] C.M.A.J. No. 3 at paragraph 98), these differences do not justify the conclusion that a different scope of prosecutorial discretion applies to the DMP. The

[99] [1996] F.C.J. No. 545.
[100] *Ibid.*, para. 3.

> principles articulated in the jurisprudence set out above with regard to the nature of the role of the prosecutor, prosecutorial discretion and the circumstances, which may warrant the review of a prosecutorial decision, find application to the DMP and the exercise of prosecutorial discretion by the DMP.[101]

[179] However, the independence of ministers or other office holders who act as prosecutors is a distinct issue that must be assessed in light of their individual characteristics, their specific statutory responsibilities, their ability to act independently and whether they may reasonably be seen as independent in the legislative framework in which they exercise prosecutorial powers.

[180] On this point, I think it is helpful to consider the remarks of Justice Cory in *R. v. Bain*,[102] in which the constitutionality of the prosecution's right to stand potential jurors aside was challenged.

[181] That decision is interesting because it was also argued in that case that the quasi-judicial role of the prosecution protected the accused against abuses of the power to stand jurors aside under the *Criminal Code*.

[182] Justice Cory made the following observation, writing on behalf of Chief Justice Lamer and Justice LaForest:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to

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[101] *R. v. Wehmeier*, 2014 CMAC 5, para. 31, leave to appeal refused [2014] 3 S.C.R. x.
[102] [1992] 1 S.C.R. 91.

> monitor or control. Rather the offending statutory provision should be removed.[103]

[183] In the Supreme Court's recent decision in *R. v. Nur*,[104] Chief Justice McLachlin cited with approval the opinion of Justice Cory in *Bain*. She wrote that "the constitutionality of a statutory provision [cannot] rest on an expectation that the Crown will act properly".[105]

[184] In light of *Nur*, the Federal Court of Appeal's decision in *Quebec North Shore & Labrador Railway Co.* is not determinative in assessing the constitutionality of section 230.1 and the Minister's independence when exercising the power to appeal.

[185] Regarding whether the Minister's office is compatible with the power to appeal, I again reproduce a passage from the opinion of Chief Justice Lamer in *Généreux*:

> I agree with the essence of Décary J.'s observations. An examination of the legislation governing the General Court Martial reveals that military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement is, in my opinion, inconsistent with s. 11(*d*) of the *Charter*. It undermines the notion of institutional independence that was articulated by this Court in Valente. The idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. It is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the

[103] [1992] 1 S.C.R. 91, at pp. 103-4.
[104] 2015 SCC 15.
[105] *R. v. Nur*, 2015 SCC 15, para. 95. See also *R. v. Appulonappa*, 2015 SCC 59, para. 74.

> persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces.[106]
>
> [Emphasis added.]

[186] Although in this passage, Chief Justice Lamer was addressing the institutional independence of the judicial function, these observations are just as relevant when assessing the independence of the prosecution in the military justice system.

[187] Indeed, the principle of independence with regard to decisions to prosecute requires that such decisions also be protected as much as possible from interference by members of the military hierarchy. When a member of the military hierarchy, like the Minister, is entrusted with decisions of this sort, the problems are substantial.

[188] Since the DMP's discretion must be exercised autonomously and independently and must be free of any interference from the chain of command, this principle cannot be respected if the exercise of a discretional prosecutorial power, such as the power to appeal, is granted to someone like the Minister who is at the apex of the chain of command.

[189] The reforms to the Canadian military justice system led to the creation of the position of Director of Military Prosecutions whose independence is guaranteed by the fact that it is an office held during good behaviour for a term of four years.

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[106] *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 308.

[190] I would point out that although such is not the case with the Minister, I am not basing my finding that the Minister is not an independent prosecutor on the fact that the Minister does not hold office during good behaviour as the DMP does.

[191] It is wiser to adopt "[t]he policy which dictates restraint in constitutional cases"[107] and rather keep to the more restricted conclusion that Minister's functions under the NDA and position as final authority in the chain of command are incompatible with playing any role whatsoever in prosecutions under the NDA.

[192] I will add two comments before concluding.

[193] The fact that the DMP, an independent prosecutor, represents the Minister in appeals has no bearing on my finding. The Minister's independence is not enhanced or better protected because the Minister is represented by independent counsel. In this role, the DMP is simply the Minister's alter ego.

[194] Moreover, although the Minister may consult the Attorney General[108] or the Judge Advocate General[109] regarding a question of law, this has no bearing on the fact that the Minister's office is incompatible with a prosecutorial role.

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[107] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 9.

[108] Paragraph 5(*b*) of the *Department of Justice Act*, R.S.C., 1985, c. J-2. The Attorney General has no authority under the CSD. Charges are preferred by the DMP, who is likewise responsible for withdrawing a charge that has been preferred: see section 165.12.

[109] Section 9.1 of the *National Defence Act*.

[195] The Minister quite simply does not have the objective institutional independence required to exercise, with complete independence, a function that may lead to the imprisonment or even dismissal of a member of the Minister's personnel. The Minister cannot be regarded as an independent prosecutor. Accordingly, section 230.1 infringes section 7 of the Charter.

(3) Is section 230.1 of the NDA a reasonable limit that can be demonstrably justified in a free and democratic society?

[196] Before answering this question, it should be noted at the outset that it is difficult to justify a law that violates the principles of fundamental justice.[110]

[197] I will now consider the test established in *R. v. Oakes*: (a) Is the purpose for which the limit is imposed pressing and substantial? (b) Is the means by which the goal is furthered proportionate: 1- Is the limit rationally connected to the purpose? 2- Does the limit minimally impair the right?; and 3- Is the law proportionate in its effect?

(a) *Is the purpose for which the limit is imposed pressing and substantial?*

[198] In *Alberta v. Hutterian Brethren of Wilson Colony*,[111] Chief Justice McLachlin stated that the objective that justifies the infringement of the right must not be overstated. She wrote as follows:

> [137] At the first stage of the analysis, the government must demonstrate that it has a "pressing and substantial" objective that justifies the infringement of the right. In *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. cautioned that "[c]are must be taken not to overstate the objective.

[110] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, para. 129.
[111] 2009 SCC 37, [2009] 2 S.C.R. 567.

> The objective relevant to the s. 1 analysis is the objective of the infringing measure . . . . If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised" (para. 144 (emphasis in original)).

[199] In the case at hand, the matter of identifying the objective of the infringing measure, section 230.1, arises in a rather unusual context.

[200] As I mentioned above in my reasons, the intention in enacting section 230.1 in 1991 was to create a right of appeal for the prosecution. This power was granted to the Minister, in light of the multiple quasi-judicial powers that the Minister exercised in the military justice system at that time. This was the natural course of action.

[201] However, when Bill C-25 was enacted, from its coming into force in 1999 and with the creation of the position of Director of Military Prosecution, all prosecutorial powers were given to the DMP, except the power to appeal.

[202] The respondents note, with good reason, that Parliament's clear intention at that time was to have the Minister retain that power.

[203] They also argue that the Minister's right of appeal did not exist before 1991. In their view, this supports the conclusion that this right of appeal did not serve any pressing and substantial purpose. I disagree.

[204] I will consider, first of all, whether creating a right to appeal served a pressing and substantial purpose and, second, whether the same justification was made with regard to the decision in 1999 to have the Minister retain this power.

[205] Two remarks are in order.

[206] First, the Minister made no written submissions to justify the infringement of section 7 under section 1. He did not really try to demonstrate that this infringement was justified at the hearing either. Essentially, he simply argued that no infringement of section 7 had been proven and that enacting section 230.1 was an option that was available to Parliament.

[207] Second, the record contains no information that would allow us to understand why in 1999 it was deemed important to leave the power to appeal with the Minister. Parliament's intention to do so is crystal clear, but the pressing and substantial objective is not.

[208] At this stage of the section 1 Charter analysis, it is important not to confuse the justification for the power to appeal with the question of who is exercising that power.

[209] I have already described the context in which section 230.1 was adopted, namely, a convergence between the military justice system and the regular criminal justice system. This convergence is largely the reason for granting the prosecution the right to appeal, to ensure uniformity in the development of Canadian military law.

[210] The objective in establishing the right to appeal under section 230.1 becomes clearer when we examine the constitutional challenge of the prosecution's right to appeal under the *Criminal Code* in *Morgentaler*.[112]

[211] In that case, the Ontario Court of Appeal had to determine whether the prosecution's right to appeal from an acquittal on a question of law alone was inconsistent with section 7 and paragraphs 11(*d*), 11(*f*) and 11(*h*) of the Charter. After consider the issue, the Court of Appeal concluded that there were judicial policy reasons justifying the recognition of such a right of appeal. It wrote:

> There are valid policy reasons for permitting the Crown to appeal from an acquittal on questions of law alone to ensure the correct and uniform interpretation of the criminal law.
>
> Accordingly, in our view, s. 605(1)(*a*) of the *Code* conferring on the Crown the right of appeal on a question of law alone from an acquittal does not contravene the *Charter*.[113]

[212] The Supreme Court affirmed the judgment of the Ontario Court of Appeal on the issue of the right to appeal:

> It was contended that s. 605(1)(*a*), giving the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone offended ss. 7 and 11(*d*), (*f*) and (*h*) of the Charter. Reliance was placed primarily on s. 11(*h*). There is a simple answer to this argument. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally". There is no merit in this ground. I would dispose of this question for the reasons given by the Court of Appeal.[114]

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[112] (1985), 22 C.C.C. (3d) 353 (Ont. C.A.).
[113] *R. v. Morgentaler* (1985), 22 C.C.C. (3d) 353 (Ont. C.A.), at p. 410
[114] *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 155-56.

[213] The right of appeal provided under section 230.1 is justified by the same intention to ensure a uniform application of Canadian military law.

[214] In this context, I find that it responds to a pressing and substantial objective that does not require complex evidence. Indeed, in this case, "certain elements of the s. 1 analysis are obvious or self-evident".[115]

[215] The creation of this right to appeal can easily be explained by the ongoing convergence between the Canadian military justice system and the ordinary criminal justice system, as well as the newly recognized rights of military members subject to the Code of Service Discipline.

[216] However, this does not resolve the issue raised by the decision to reserve the power to appeal for the Minister. As Chief Justice McLachlin noted in *Hutterian Brethren*, it is the objective of the infringing measure that is important.

[217] Since the infringement of section 7 stems from the fact that the power to appeal has been granted to the Minister, it is the objective of this measure that has to be a pressing and substantial one.

[218] As I have already stated, we have no information on this subject. The NDA provides no obvious explanation, nor does the legislative history.

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[115] *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, para. 18; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, paras. 100-103 (Justice Fish).

[219] At best, there is the conclusion of the second Dixon report, according to which "[w]e can only surmise that the legislative drafters, steeped in the British military tradition, tacitly assumed that the executive branch of government and the chain of command were the proper authorities to supervise the military justice system and, indeed, to be involved in making decisions relating to individual cases".

[220] Moreover, it is very difficult to see how granting the power of appeal to the Minister can be reconciled with the legislative intent surrounding the reforms made in 1999, which was to ensure that the military justice system remained independent of the chain of command.

[221] In my view, we are faced with an extremely rare situation, similar to the one which the Supreme Court had to confront in *Vriend v. Alberta*.[116] In that case, in the course of its section 1 analysis, the Court found that the explanations for the Legislature's choice to exclude sexual orientation from the scope of the human rights legislation at issue did not provide evidence of a goal or purpose to be achieved,[117] and that these explanations were, moreover, "on [their] face the very antithesis of the principles embodied in the legislation as a whole".[118] Apart from the clear and manifest intention to retain the power to appeal at the apex of the chain of command, no other pressing and substantial objective can be identified that would explain why this choice was made in the context of the reforms implemented by Bill C-25.

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[116] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras. 113-16.
[117] *Ibid*., para. 114.
[118] *Ibid*., para. 116.

[222] Since no pressing and substantial objective can be identified, I find that granting the Minister the power to appeal does not meet an identifiable objective that is pressing and substantial.

(b) *Is the means by which the goal is furthered proportionate?*

[223] I will nonetheless address the question of proportionality in a summary manner and find that the means chosen is not proportionate.

[224] Essentially, this is not the least intrusive means available. Parliament could grant the power to appeal to the DMP, the Director of Public Prosecutions of Canada or the Attorney General. This choice is up to Parliament.

[225] The Minister did not prove that countries with military and legal traditions similar to our own grant the power to appeal to their defence ministers. Such proof would have been impossible, given the convergence between military justice and regular criminal justice that has been observed in England and Australia[119]. For example, in England, the Service Prosecution

[119] See E. R. Fidell and D.H. Sullivan *Evolving Military Justice* (Annapolis: Naval Institute Press, 2002) at pp. 208 to 270; Stephen S. Strickey, "'Anglo-American' Military Justice Systems and the Wave of Civilianization: Will Discipline Survive?" (2013) 2 Cambridge Journal of International and Comparative Law 763; Victor Hansen, "The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences" (2013) 21 Michigan State International Law Review 230, at pp. 238-43. Generally speaking, and with regard to rights of appeal, the military justice system in the United States is structured so differently that it is of no assistance here: David A. Schlueter, "The Military Justice Conundrum: Justice or Discipline?" (2013) 215 Military Law Review 1, at pp. 13-14.

Authority acts under the authority of the Attorney General and is totally independent of the chain of command.[120]

[226] The Minister has not discharged his burden of proving that granting him the power to appeal is a reasonable limit that can be demonstrably justified in a free and democratic society. Instead, the Minister simply stated that this was a choice that was available to Parliament. In my opinion, this is clearly not enough to justify violating a principle of fundamental justice.

(4) Outcome of the appeals: If section 230.1 is declared invalid, must the Minister's appeals be dismissed?

[227] Before hearing the appeals, the panel noted that the parties envisaged the outcome of the appeals as a choice between quashing and dismissing the appeals and suspending the effect of the declaration of invalidity regarding section 230.1.

[228] Although this is not, strictly speaking, a new issue, and being mindful of the spirit of the Supreme Court's decision in *R. v. Mian*[121] and the principles laid down in it, the panel deemed it preferable to ask the parties whether, in the event of a declaration of invalidity, the panel could allow the DMP to go on exercising these powers instead.[122]

[229] The parties filed written submissions on this issue, as well as on whether the effect of the declaration of invalidity should be suspended. They also addressed these issues at the hearing.

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[120] Maj. Gen. M. D. Conway, "Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law" (2012) *Military Law Rev.* 212, at p. 220; Attorney General's Office, *The Governance of Britain: A Consultation on the Role of the Attorney General* (July 26, 2007) para. 1.25, at p. 8.

[121] 2014 SCC 54, [2014] 2 S.C.R. 689, paras. 29-35.

(a) *Positions of the parties*

(i) The applicants

[230] The applicants argue that the criteria established in *Schachter*[123] to justify suspending a declaration of invalidity have not been met.

[231] In their view, an immediate declaration of invalidity poses no danger to the public and will not create a situation of impunity because the courts martial can continue sitting. For the same reasons, the rule of law is not threatened.

[232] However, they state that the Minister's lack of independence [TRANSLATION] "consequently obliterates the independence and impartiality of [this] Court". In their view, [TRANSLATION] "the fundamental flaw in a suspension would be to allow an appellate court that is neither independent nor impartial to review the decisions of independent courts martial on appeal". This would be inconsistent with the rule of law.

[233] Relying on the Supreme Court's decision in *R. v. Powley*,[124] they add that there must be obvious reasons for suspending a declaration of a statute's invalidity where the declaration concerns an accused's defence against a criminal charge.

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[122] See by analogy *R. c. Tshiamala*, 2011 QCCA 439, 299 C.C.C. (3d) 345, paras. 173-79.
[123] [1992] 2 S.C.R. 679.
[124] 2003 SCC 43, [2003] 2 S.C.R. 207, paras. 51-52.

[234] Finally, in accordance with *R. v. Guignard*[125] and *Eurig Estate (Re)*,[126] they declare that they should be able to benefit personally from the declaration of invalidity and seek an exemption from the suspension of the declaration of invalidity should one be granted.

[235] In the event that the DMP is charged with prosecuting appeals, they argue that such a remedy falls under section 24, not subsection 52(1), that this is in fact an unjustifiably broad interpretation and that this authorization is contrary to Parliament's intention to grant the Minister the power to appeal.

(ii) The Minister

[236] The Minister argues that the effect of a declaration of invalidity must be suspended because invalidating section 230.1 would threaten the rule of law and could pose a danger for the public.

[237] A declaration of invalidity would deprive the prosecution of the power to appeal. In addition, the accused's right of appeal would be affected because the Minister would no longer be able to act on his own or instruct the DMP to represent him in these cases.

[238] The Minister argues that this would redefine the nature of his relationship with the DMP. This would also change the DMP's role in a way that is contrary to Parliament's intention, which was to entrust the Minister with this responsibility, thereby creating a vacuum with regard to his

[125] [2002] 1 S.C.R. 472, 2002 SCC 14, paras. 32 and 34.
[126] [1998] 2 S.C.R. 565, paras. 44 and 48.

accountability to Parliament. Moreover, the DMP would no longer have to answer to anyone whatsoever for his decisions.

[239] In the Minister's view, it is up to Parliament to determine whether the DMP should be completely independent and to review, if necessary, the position, role and duties of the DMP.

(b) *Suspension of the effect of a declaration of invalidity*

[240] In *Schachter v. Canada*,[127] Chief Justice Lamer described three situations that justify suspending the effect of a declaration of invalidity:

> A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R. v. Swain, supra) or otherwise threatens the rule of law (Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth.[128]

[241] Professor Roach take the view that these are not rigid, hermetic categories. Here is how he describes this power:

> Courts have often been attracted to suspended declarations of invalidity because of their recognition that legislatures have a legitimate role and a broader range of options in devising constitutional responses to court decisions. At the same time, the Supreme Court in *Schachter* warned that suspended declarations of invalidity should not become routine and that they can force matters back on the legislative agenda. A number of commentators have criticized the Court for routinely suspending declarations of invalidity and not justifying its decisions. These criticisms have

[127] [1992] 2 S.C.R. 679.
[128] *Ibid*., at p. 684.

> some validity, but the answer is not to abandon the useful technique of a suspended declaration of invalidity or to retreat to the three limited categories or pigeonholes outlined in *Schachter*. Rather, courts should justify the use of suspended declarations in each case on the basis of remedial principles.
>
> Suspended declarations should be used where an immediate declaration could cause a significant social harm including but not limited to threats to the rule of law and public safety. Suspended declarations should also be used in cases of unconstitutionally under-inclusive legislation where legislatures have a range of remedial options such as extending but also reducing benefits that are not open to the court. More generally, they should be used in cases where legislatures can select among a number of options in complying with the court's interpretation of the Charter. This latter principle is in tension with Lamer C.J.C.'s statement in *Schachter* that the use of suspended declarations of invalidity should "turn not on considerations of the role of the courts and legislatures" but rather on the three listed categories. Nevertheless, the need to respect the roles of courts and legislatures has emerged as important principles that govern constitutional remedies in the Court's subsequent remedial jurisprudence and indeed in its own decision in *Schachter* with respect to when reading in would be an appropriate subsection 52(1) remedy.[129]
>
> [Emphasis added.]

[242] In my opinion, it is clear that the declaration of section 230.1's invalidity must be suspended because not suspending it would have consequences on the exercise of all rights of appeal under the NDA.

[243] The immediate effect of a declaration of invalidity would be to deprive the Minister of the ability to act[130] in cases of appeals by an accused, including the ability to instruct the DMP to

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[129] Kent Roach, "Enforcement of the Charter - Subsections 24(1) and 52(1)", in Errol Mendes and Stéphane Beaulac, *Canadian Charter of Rights and Freedoms*, 5th ed. (Markham: LexisNexis Canada, 2013) p. 1123, at p. 1155.

[130] See section 19 of the *Rules of Appeal Practices and Procedures of the Court Martial Appeal Court of Canada*.

represent him in such appeals, which would in practice prevent this Court from hearing appeals by the accused and any related motions.

[244] The prosecution would also be deprived of its own right of appeal. It is important to note that "an assessment of the fairness of the trial process must be made 'from the point of view of fairness in the eyes of the community and the complainant' and not just the accused".[131]

[245] The obstacles created by not suspending the effect of the declaration of invalidity are thus likely to compromise access to the courts, which is a pillar of the rule of law.[132] It is true that this is a matter of the exercise of rights of appeal that are statutory in nature, but the rule of law justifies maintaining equitable access to these rights for all parties.

[246] These concerns are enough to conclude that an order suspending the declaration of invalidity is needed.

[247] Finally, I will summarily dispose of the respondents' argument that this Court is not an independent court because the Minister is not an independent prosecutor. All members of this Court enjoy the essential conditions of judicial independence as described by the Supreme Court, and they have no ties to the Minister. This argument is without merit.[133]

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131 *R. v. Mills*, [1999] 3 S.C.R. 668, para. 72.

132 *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, paras. 38-40.

133 The Right Honourable Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25,* An Act to amend the National Defence Act and to make consequential amendments to other Acts, *as required under section 96 of Statutes of Canada 1998, c.35*, submitted to the Minister of National Defence, September 3, 2003, at p. 124.

[248] This leaves only one issue to be examined, namely, whether the respondents should benefit personally from section 230.1 being declared invalid, which would lead to dismissal of the Minister's appeals.

(c) *Should the respondents benefit from the invalidity of section 230.1?*

[249] The respondents are correct in arguing that the Supreme Court has rendered certain decisions in which the parties challenging the constitutionality of a law benefited from a declaration of invalidity.

[250] In *the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,*[134] Chief Justice Lamer wrote:

> In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality: see, e.g., *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Feeney*, [1997] 2 S.C.R. 117.

[251] However, this principle has not been applied in all cases.[135] *R. v. Demers*[136] provides one such example.

[252] In that case, the Supreme Court concluded that, because of the combined effect of sections 672.33 and 672.54 and subsection 672.81(1) of the *Criminal Code*, which at the time provided that accused persons found unfit to stand trial would remain subject to the "regime"

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134 [1998] 1 S.C.R. 3, para. 20.

135 Kent Roach, "Enforcement of the Charter - Subsections 24(1) and 52(1)",in Errol Mendes and Stéphane Beaulac, *Canadian Charter of Rights and Freedoms*, 5th ed. (Markham, LexisNexis Canada, 2013) p. 1123, at p. 1156.

established under Part XX.1 of the Code until they became fit, "persons who are permanently unfit to stand trial and do not pose a significant threat to public safety suffer a breach of their liberty interest under s. 7 of the Charter because they are subject to indefinite appearances before the Review Board and to the exercise of its powers over them".[137]

[253] Mr. Demers was also seeking an immediate remedy, namely, a stay of proceedings.

[254] The Supreme Court decided that an immediate remedy was not possible during the period of suspended invalidity but that a prospective remedy was.

[255] The majority of the Supreme Court made the following remarks regarding the grant of an additional remedy based on subsection 24(1) of the Charter:

> 63 Although the rule in *Schachter*, *supra*, precludes courts from combining retroactive remedies under s. 24(1) with s. 52 remedies, it does not stop courts from awarding <u>prospective</u> remedies under s. 24(1) in conjunction with s. 52 remedies. Therefore, if Parliament does not amend the invalid legislation within one year, those accused who do not pose a significant threat to the safety of the public can ask for a stay of proceedings as an individual remedy under s. 24(1) of the *Charter*. This will quash the criminal charge and liberate them from what will remain of the impugned regime.

[256] The disposition of the majority judgment in that case was as follows:

> 66 For the above reasons, we would allow the appeal, set aside the judgment of the Superior Court, and declare that ss. 672.33, 672.54 and 672.81(1) Cr. C. are overbroad, thus violating the s. 7 rights of permanently unfit accused who do not pose a significant threat to society. Because we find the impugned provisions

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136 2004 SCC 46, [2004] 2 S.C.R. 489.
137 *Ibid.*, para. 2.

> unconstitutional as violating s. 7 of the *Charter*, it is unnecessary for us to consider the other *Charter* questions posed. The most appropriate remedy in this case is a suspended declaration of invalidity for a period of twelve months. If after twelve months Parliament does not cure the unconstitutionality of the regime, accused who qualify can ask for a stay of proceedings.
>
> [Emphasis added.]

[257] In *R. v. Ferguson*,[138] Chief Justice McLachlin confirmed that, in exceptional cases, it is possible to combine a declaration of invalidity made under subsection 52(1) with an additional relief under subsection 24(1) to provide a claimant with an effective remedy. She wrote the following:

> [63] The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489. However, the argument that s. 24(1) can provide a stand-alone remedy for laws with unconstitutional effects depends on reading s. 24(1) in isolation, rather than in conjunction with the scheme of the *Charter* as a whole, as required by principles of statutory and constitutional interpretation. When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function primarily as a remedy for unconstitutional government acts.
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> [Emphasis added.]

[258] How is such a remedy identified? In *Vancouver (City) v. Ward*,[139] the Supreme Court summarized the relevant factors:

> [20] The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly,

[138] 2008 SCC 6, [2008] 1 S.C.R. 96.
[139] 2010 SCC 27, [2010] 2 S.C.R. 28.

> an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet Boudreau*, at paras. 55-58.

[259] Although, in *Demers*, Justice LeBel would have favoured a different additional remedy from the one chosen by his colleagues, he did provide an analytical framework that is helpful in the case now before this Court. He wrote:

> 104 The crafting of a remedy is highly contextual and is intimately linked to the nature of the violation and the facts of the particular case. In determining when to combine remedies under ss. 52 and 24(1), the following questions should be considered. First, from the perspective of the public role of the *Charter*, what remedy or remedies would most effectively foster compliance with the *Charter* and deter future infringements without unduly interfering with the effective operation of government and the implementation of legitimate public policy? Second, from the perspective of the claimant, what remedy or remedies would most effectively redress the wrong he or she has suffered, putting him or her in the position he or she would have been in had his or her rights not been violated? This will often call for the consideration of the adequacy of a s. 52 remedy standing alone. At this stage, a court may also weigh the deleterious effects of delay to the claimant against the salutary effects of delay to the public. Third, can the courts effectively implement the proposed remedy or remedies? See M. L. Pilkington, "Monetary Redress for Charter Infringement", in R. J. Sharpe, ed., *Charter Litigation* (1987), 307, at pp. 308-9; and Shandal, *supra*, at pp. 196 ff.

[260] I note the following factors in Justice LeBel's analysis that are similar to those set out in *Doucet-Boudreau*: (1) the remedy is linked to the context and nature of the violation; (2) it must foster compliance with the Charter without interfering with the effective operation of the justice system; (3) the remedy redresses the wrong suffered or prevents it from occurring; (4) the court

weighs the deleterious effects of delay to the claimant against the salutary effects of delay to society; and (5) the court can effectively implement the proposed remedy.

[261] In my opinion, *Doucet-Boudreau*, *Demers* and *Ferguson* allow this Court to grant the respondents an additional, effective remedy based on subsection 24(1) even if it suspends the effect of the declaration of section 230.1's invalidity. This remedy must be prospective, fair and reasonable, which means that it must be consistent with the nature of the violated constitutional right and the context in which the violation occurred.

[262] The right at issue in this case is the right to an independent prosecutor in the context of the exercise of a right to appeal against the acquittal of respondent *Gagnon* and of the conclusion that the Court Martial did not have jurisdiction in the case of respondent *Thibault*.

[263] This case is different from the usual situations where a declaration of invalidity is made in the context of a criminal trial. A declaration of invalidity normally addresses (1) the offence; (2) the impugned independence of the court or of a procedure governing its constitution; (3) certain rules of evidence; or (4) sentencing.

[264] In most of these scenarios, the fate of the appeals is dictated by the usual outcomes of criminal appeal proceedings: an order for a new trial, the acquittal of the accused or a stay of proceedings, if need be. It is for this reason that it can be said that the accused is granted an

immediate remedy in these situations, as "[n]o one should be subjected to an unconstitutional law".[140]

[265] The respondents' situation more closely resembles the situation in *Demers* than other situations.

[266] Indeed, section 230.1 is of no force or effect, not because the right of appeal *per se* is unconstitutional (see *Morgentaler*), but because the person exercising that right is not independent within the meaning of section 7 of the Charter.

[267] In the context of an appeal where the constitutional challenge concerns the right of appeal itself, it is impossible to make an order equivalent to an order for a new trial. Moreover, the circumstances do not warrant a stay of proceedings based on an abuse of process. An approach that takes the context of the violation into account is therefore justified.

[268] Since, according to *Demers*, the suspension of the effect of declaration of section 230.1's invalidity applies to the respondents,[141] it must be asked whether the remedy they seek, the dismissal of the appeals, is an appropriate solution.

[269] Contrary to the respondents' argument based on *Powley*, in which the Supreme Court stated "that it is particularly important to have a clear justification for a stay where the effect of

[140] *R. v. Nur*, 2015 SCC 15, para. 51.
[141] 2004 SCC 46, [2004] 2 S.C.R. 489, paras. 61-62

that stay would be to suspend the recognition of a right that provides a defence to a criminal charge",[142] their situation is different here.

[270] The respondents do not necessarily have a right to any particular defence[143] or to a specific result, namely the dismissal of the appeals, but rather to an additional remedy that is effective, fair and reasonable, which in the circumstances does not include the dismissal of the appeals.

[271] In my opinion, there is no link between the dismissal of the appeals and the right to an independent prosecutor who makes the decision to appeal and acts in that appeal. I am troubled by the fact that the dismissal of the appeals could be seen as a windfall[144] that has no link to the constitutional right they are trying to have enforced.

[272] What would be an effective, fair and reasonable additional remedy in this case?

[273] We must consider the possibility of allowing the DMP to continue exercising powers independently from the Minister's instructions. The parties gave compelling reasons for opposing such an order. They note, with good reason, the numerous stumbling blocks posed by this possible solution, the most important of which would be that such an order is entirely contrary to Parliament's clear intention to reserve the power to appeal for the Minister, as evidenced by the recent reforms to the military justice system. Such an order poses very real

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[142] *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, para. 52.
[143] *R. v. Irwin* (1998), 123 C.C.C. (3d) 316 (C.A. Ont.), para. 37, at p. 330.
[144] *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, para. 43; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, para. 211, Binnie J. (dissenting on another point).

problems in terms of a DMP's duty of commitment to the cause of his or her client, the Minister, regardless of the instructions received.[145] This solution must be rejected.

[274] In practice, however, dismissing the appeals before this Court has even ruled on the merits of those appeals is tantamount to a stay of proceedings.[146] This similarity prompts me to assess the situation with which we are confronted using the analytical framework recently set out by the Supreme Court in *R. v. Babos*.[147]

[275] For this reason, the determination of whether dismissing the appeals is an effective, fair and reasonable additional remedy within the meaning of *Ferguson, Doucet-Boudreau* and *Demers* requires a balancing or weighing similar to the exercise described by Justice Moldaver in *Babos* in a stay of proceedings.

[276] In my opinion, dismissing the Minister's appeals would amount to an exemption from the period of suspended invalidity. Such a remedy is prohibited by *Demers*, *Ferguson* and *Carter v. Canada (Attorney General)*.[148] Moreover, this result is disproportionate to the societal interest in having the merits of the appeals considered by this Court.[149]

[277] The lack of an immediate remedy is not an injustice if it is possible to devise another remedy that is less drastic than a dismissal of the appeals[150] so that an independent prosecutor

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[145] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401. The DMP's duty of commitment is to a client who does not have the necessary independence.
[146] *R. v. Jewitt*, [1985] 2 S.C.R. 128, at p. 148.
[147] 2014 SCC 16, [2014] 1 S.C.R. 309.
[148] See also 2015 SCC 5, [2015] 1 S.C.R. 331, paras. 124-25 and 129.
[149] *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, para. 44.
[150] *Ibid.*, paras. 39-40.

might act in appeals which, when they were brought, were entirely consistent with the law then in force.

[278] In my opinion, the solution is instead to adjourn the hearing of the appeals on the merits until after the end of the period of suspended invalidity for section 230.1. Adjournment is an appropriate remedy in other contexts, for example, in the case of a violation of the right to disclosure.[151] I think this remedy is suited to the specific context of the present case.

[279] It is reasonable to believe that Parliament will act to find a solution and designate an independent prosecutor to exercise the prosecution's right of appeal under the NDA, one that will give the respondents the effective remedy referred to in *Ferguson*, a case which I mentioned above. This remedy is consistent with the approach adopted in *Demers*.

[280] Clearly, the timeframe for implementing this remedy is not the perfect or ideal solution, but the Constitution does not require perfect remedies.[152]

[281] However, when we consider the nature of the claimed constitutional right, namely, the right to have an independent prosecutor exercise the right to appeal, dismissing the appeals would in my view be disproportionate to the societal interest in having appeals heard and judged on the merits. In my opinion, an assessment of the fairness of the appeal process is made not only

[151] *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, paras. 3 and 24-27.
[152] *R. v. Mills*, [1999] 3 S.C.R. 668, para. 72.

from the point of view of the accused, but also from the point of view of society and complainants.[153]

V. Conclusion

[282] I would dismiss the respondent's motions. Section 230.1 of the NDA should be invalidated.

[283] The declaration of invalidity should be suspended for a period of six months from the date of this judgment.

[284] The hearing of the appeals on the merits is therefore adjourned. The parties shall confer with the Chief Justice to set a new hearing date.

"Guy Cournoyer"
J.A.

"I agree.
Alexandre Deschênes, J.A."

[153] *Ibid.*

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-577
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. WARRANT OFFICER J.G.A. GAGNON
AND DOCKET:	CMAC-581
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CORPORAL A.J.R. THIBAULT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 12, 2015
REASONS FOR JUDGMENT BY:	COURNOYER J.A.
CONCURRED IN BY:	DESCHÊNES J.A.
PARTIALLY CONCURRING REASONS:	BELL C.J.
DATED:	DECEMBER 21, 2015

APPEARANCES:

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