Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20210611

Dockets: CMAC-606
CMAC-607
CMAC-608
CMAC-609

Citation: 2021 CMAC 2

CORAM: **CHIEF JUSTICE BELL**
RENNIE J.A.
PARDU J.A.

CMAC-606

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEADING SEAMAN C.D. EDWARDS

Respondent

CMAC-607

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN C.M.C. CRÉPEAU

Respondent

CMAC-608

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

GUNNER K. FONTAINE

Respondent

CMAC-609

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN M.J. IREDALE

Respondent

Heard in person at Ottawa, Ontario and by online videoconference

hosted by the Registry, on January 29, 2021.

Judgment delivered at Ottawa, Ontario, on June 11, 2021.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT

THE COURT

I. Overview

[1] In a series of Court Martial decisions, military judges have held that they lack institutional independence. As a result, they conclude the right of accused persons appearing before them to a hearing by an independent and impartial tribunal, guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (*Charter*), is violated.

[2] The consistent theme of the trial decisions is that the possibility that a military judge could be prosecuted for an offence under the *National Defence Act*, R.S.C., 1985, c. N-5 (NDA), leaves a military judge vulnerable to coercive or vengeful prosecution by persons disgruntled with their handling of a case. It follows that military judges must be immune from prosecution under military law while they hold office. While the issue is framed in different manners in several of the matters under appeal, each finds its genesis from the decision of Military Judge Pelletier in *Her Majesty the Queen v. Master Corporal K.G. Pett*, 2020 CM 4002 [*Pett*].

[3] In *Pett*, the accused contended that an order by the Chief of Defence Staff dated October 2, 2019 (the "impugned order"), regarding the designation of a commanding officer for purposes of considering disciplinary matters for military judges was of no force or effect. Master Corporal Pett contended that the impugned order violated his right to a hearing before an independent and impartial tribunal as guaranteed by section 11(*d*) of the *Charter*. The impugned order reads, in part, as follows:

> "1. I, J. H. Vance, Chief of the Defence Staff, pursuant to subsection 18(1) of the National Defence Act and for the purposes of the definition of "commanding officer" contained in article 1.02 of the Queen's Regulations and Orders for the Canadian Forces, hereby:

> a) revoke the previous designation order of 19 January 2018 with respect to this unit;
>
> b) designate the officer who is, from time to time, appointed to the position of Deputy Vice Chief of Defence Staff (DVCDS) and who holds a rank not below Major General / Rear-Admiral, to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge;
>
> […]
>
> 2. The next superior officer in matters of discipline to whom the DVCDS is responsible, when acting as a commanding officer referred to in paragraph (b) shall be the Vice Chief of the Defence Staff (VCDS)" […]

[4] The Crown appeals from stays of proceedings issued in each of the matters before this Court. The ultimate question in these appeals is whether the role of a military judge "given the *Charter* right to a hearing before an independent tribunal", is incompatible with the role of an officer within the Canadian Armed Forces. Put another way, does the application of the Code of Service Discipline to the military judiciary lead "[…] an informed person, viewing the matter realistically and practically—and having thought the matter through […]" to conclude that there is any apprehension of bias. (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 at p. 394 [*Committee for Justice and Liberty*]).

[5] For the reasons that follow, we allow the appeals, vacate the stay orders, dismiss the cross-appeal in *Capitaine C.M.C. Crépeau c. Sa Majesté la Reine*, 2020 CMAC 607 and direct each of the matters proceed to trial.

[6] By way of overview, there are two errors of law in the decisions under appeal.

[7] The assertion of the military judges in the decisions under appeal is fundamentally incompatible and inconsistent with the well-established, and recently confirmed precedents of the Supreme Court of Canada. The Supreme Court has recognized the unique and dual role of the military justice system. The premise upon which the decisions under appeal is based - that one cannot be both a military judge and an officer – is simply inconsistent with binding precedent, and if correct, defies the very purpose and rationale of the military justice system. See, *Her Majesty the Queen v. Généreux*, [1992] 1 S.C.R. 259, 133 N.R. 241 [*Généreux*]; *R. v. MacKay*, [1980] 2 S.C.R. 370, [1980] S.C.J. No. 79 [*MacKay*]; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983 [*Cawthorne*]; *R v. Stillman*, 2019 SCC 40, [2019] S.C.J. No 40 [*Stillman*]; *R. v. Royes*, 2016 CMAC 1 [*Royes*], leave to appeal refused, 37054 (2 September 2016); *Beaudry v. R.* 2018 CMAC 4 [*Beaudry*].

[8] Military justice exists for a purpose; namely, to promote the discipline, efficiency, and morale of the Canadian Armed Forces. The government of Canada requires, and its citizens expect, an operationally ready force for the defence of Canadian interests. This includes an operationally ready and portable courts martial system, which includes respect for, and compliance with, the Code of Service Discipline, by military judges while they are in office.

[9] The second error relates to the application of the test of whether a reasonably informed person, looking at the matter objectively and fully informed, would conclude that the institutional independence of the courts martial is compromised. The military judges did not consider the context or purpose of the military justice system, they did not look at the matter "realistically and practically" as required by the Supreme Court and they failed to take into

account the contextual considerations which safeguard the independence and impartiality of military judges.

[10] When the impugned order is situated in its proper, broader context, it is readily apparent that no reasonably informed person would conclude there was an apprehension of bias or that the independence of the courts martial was compromised. In assessing the impugned order in isolation, divorced from the legal and conventional guarantors of independence and impartiality, the court martial judges failed to follow the guidance of the Supreme Court of Canada.

II. Responses to the Impugned order

A. *Pett*

[11] In *Pett*, the accused was charged with behaving with contempt toward a superior officer and ill-treatment of a subordinate in violation of sections 85 and 95, respectively, of the *NDA*. The accused contended that the impugned order violated his section 11(*d*) *Charter* right to appear before an independent and impartial tribunal. After concluding that the *NDA* contemplates that the Code of Service Discipline applies to military judges, Military Judge Pelletier then turned his mind to the legislative framework designed to ensure judicial independence and impartiality.

[12] Military Judge Pelletier concluded the impugned order violated the accused's section 11(*d*) *Charter* rights and declared it "to be of no force or effect as it pertains to paragraphs 1(b) and 2, applicable to any disciplinary matter involving a military judge".

[13] Military Judge Pelletier considered the following factors which militate in favour of military judges' independence and impartiality, although he found them insufficient to overcome the constitutional norm:

a) A military judge can only be removed for cause (ss. 165.21 (3) of the *NDA*) following a recommendation to the Governor in Council from the Military Judges Inquiry Committee (MJIC). This, effectively, ensures their security of tenure;

b) A military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction (s. 165.231 of the *NDA*);

c) Only the Chief Military Judge can assign duties to a military judge, and, those duties must be compatible with their judicial duties (ss. 165.23 (2) of the *NDA*);

d) Military judges have a separate pay scheme (s. 165.33 of the *NDA* and the *Queen's Regulations and Orders for the Canadian Forces* (*QR&O*) Chapter 204) and their compensation, including pay and other benefits are fixed by the Military Judges Compensation Committee which reports every four (4) years ;

e) Pursuant to section 165.21(3)-(5) of the *NDA*, a military judge holds office until he or she is removed for cause, voluntarily released, attains the age of 60 or resigns having given written notice to the Minister.

f) A military judge cannot be the object of a Relief from Performance of Military Duty (*QR&O* article 19.75);

g) Military judges have a separate scheme for grievances (s. 29(2.1) of the *NDA*); and

h) No personal report, assessment or other document shall be completed for a military judge if such a document can be used in whole or in part to determine the training, posting or

rate of pay of the officer, or whether the officer is qualified to be promoted (*QR&O* articles 26.10 and 26.12).

[14] Later in his reasons Military Judge Pelletier also referred to section 179 of the *NDA* which clothes military judges, in part, with the "[…]powers, rights and privileges […] as are vested in a superior court of criminal jurisdiction […] necessary or proper for the due exercise of its jurisdiction".

[15] We note here that Military Judge Pelletier did not enumerate the Oath of Office taken by military judges as a factor militating in favour of a finding of independence and impartiality. That oath, found at subsection 165.21(2) of the *NDA*, reads as follows:

Oath	**Serment**
(2) Every military judge shall, before commencing the duties of office, take the following oath of office: I _____, solemnly and sincerely promise and swear (or affirm) that I will impartially, honestly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as a military judge. (And in the case of an oath: So help me God.)	(2) Avant d'entrer en fonctions, le juge militaire prête le serment suivant : Moi, _____, je promets et jure (ou j'affirme solennellement) que j'exercerai fidèlement, sans partialité et de mon mieux les attributions qui me sont dévolues en ma qualité de juge militaire. (Dans le cas du serment, ajouter : Ainsi Dieu me soit en aide.)

[16] Military Judge Pelletier concluded, importantly, that a military judge cannot be treated as any other officer for purposes of discipline as this would violate judicial impartiality. Furthermore, he concluded that the MJIC, established pursuant to sections 165.31-165.32 of the

NDA ousts the role of the executive (sometimes referred to as the "chain of command" in these reasons), with respect to the discipline of military judges. In this regard, Military Judge Pelletier opined: "[…] the impugned order, by targeting military judges specifically, imposes a system of discipline without due consideration of the system of discipline preferred by the legislator. That, itself, violates judicial impartiality." (*Pett*, at para. 116). The preferred system to which he refers is the MJIC.

[17] Military Judge Pelletier concluded that military judges enjoy an absolute immunity from the application of the Code of Service Discipline while they are judges. That said, he conceded that former military judges could be charged with offences under the Code of Service Discipline once retired, voluntarily discharged or removed from office following proceedings before the MJIC.

[18] Although he concluded the impugned order violated the *Charter*, Military Judge Pelletier did not grant the second remedy sought by Master Corporal Pett, that of a stay of proceedings. In refusing the application for a stay, Military Judge Pelletier concluded the declaration of invalidity, when combined with other comments about the limited application of the Code of Service Discipline to military judges, would ensure that "[…]no reasonable and well-informed observer might form the perception […]" that the presiding military judge would be independent and impartial.

B. *R. v. D'Amico*

[19] Subsequent to *Pett*, Military Judge Sukstorf considered a similar constitutional argument in *R. v. D'Amico,* 2020 CM 2002 [*D'Amico*]. She framed the issue as follows:

> The crux of the issue before the Court is not whether the dual roles of officer and military judge are incompatible because both Parliament, and the Supreme Court of Canada (SCC) in *R. v. Généreux*, [1992] 1 S.C.R. 259, have recognized the role of Military judges as both judges and serving officers. Rather, the issue before the Court requires it to consider what constitutes a permissible degree of connection between the military chain of command and its judges that still ensure that every accused appearing before a court martial does so before an independent and impartial tribunal as guaranteed by section 11(*d*) of the *Charter*. (*D'Amico* at para. 7)

[20] Importantly, Military Judge Sukstorf, asked, among others, the following question: Did Military Judge Pelletier go too far in concluding that military judges may not be held accountable under the Code of Service Discipline while they are serving as military judges?

[21] Military Judge Sukstorf applied the principle of comity and, in a slightly nuanced decision as it relates to the extraterritorial application of the Code of Service Discipline, seemed to agree with Military Judge Pelletier's "pragmatic approach" that would see civilian courts and the MJIC as the preferred mechanisms to deal with infractions by military judges.

[22] Subsequent to the decisions in *Pett* and *D'Amico*, the Chief of Defence Staff did not amend the impugned order. This led military judges to take a different approach. Some abandoned the restraint shown in *Pett* and *D'Amico* with respect to remedy. In addition to declaring the impugned order to be of no force or effect, Military Judges Pelletier and d'Auteuil started to grant stays of proceedings. Those stays have resulted, in part, in the within appeals.

C. *R. v. Edwards, R. v. Crépeau, R. v. Fontaine, R. v. Iredale*

[23] Leading Seaman Edwards was charged with one (1) count of conduct to the prejudice of good order and discipline, contrary to section 129 of the *NDA*, for having used cocaine contrary to article 20.04 of the *QR&O*s. During a pre-trial motion in the matter of *R. v. Edwards*, 2020 CM 3006 [*Edwards*], Military Judge d'Auteuil concluded the impugned order violated the accused's right to be tried by an independent and impartial tribunal as required by section 11(*d*) of the *Charter*. By way of remedy, he ordered a stay of proceedings pursuant to section 24(1) of the *Charter*.

[24] Military Judge d'Auteuil held that a reasonable and informed observer would conclude that the impugned order was an attempt to extend the disciplinary regime dealing with service offences to military judges. This despite the provision of the *NDA* that, according to him, grants that power exclusively to the MJIC. As such, he ordered a stay of proceedings.

[25] On the same day that Military Judge d'Auteuil rendered his decision in *Edwards*, he also rendered a similar decision in *R. v. Crépeau*, 2020 CM 3007 [*Crépeau*] wherein he ordered a stay of proceedings due to the perceived lack of independence of military courts (para. 83). Following this, Military Judge d'Auteuil issued another stay, for the same reasons, in *R. v. Fontaine*, 2020 CM 3008 [*Fontaine*]. His colleague, Military Judge Pelletier issued a similar stay in *R. v. Iredale*, 2020 CM 4011 [*Iredale*]. Military Judge Pelletier was of the view that a stay was the only adequate remedy given that the Chief of Defence Staff had not rescinded the impugned order. We note here that rescission had been called for in *Pett* at paragraph 146 and *D'Amico* at

paragraph 28. The position of Military Judge Pelletier could be stated no more clearly than as set out in his decision in *Iredale*, the last in this series of appeals currently before the Court:

> My position to the effect that a military judge should never be brought before a court martial while in office remains. I am also still of the view that an officer who has relinquished or been stripped of his judicial office by a decision of the Military Judges Inquiry Committee could be subsequently brought before a court martial without concern for judicial independence and impartiality given that he or she is no longer a judge (*Iredale* at para. 37).

[26] On August 18, 2020, the Deputy Director of Military Prosecutions filed a notice of appeal in *Edwards*. This was followed by notices of appeal in *Crépeau*, *Fontaine*, and *Iredale*. On September 26, 2020, counsel for Captain Crépeau filed a cross appeal contending that the military judge erred in not finding articles 12, 18 and 60 of the *NDA* unconstitutional.

III. Relevant Issues Raised in the Within Appeals

[27] As at the time Military Judge Pelletier rendered his decision in *Iredale*, the impugned order had not been rescinded. In *Crépeau*, the respondent cross-appealed, contending that the whole of sections 12, 18 and 60 of the *NDA* are unconstitutional. She contends those sections also violate her right to be tried by an independent and impartial tribunal as required by section 11(*d*) of the *Charter*. This, because those sections target members of the Canadian Armed Forces, including military judges, who are also officers.

[28] The issues on the within appeals are therefore:

a. Whether the impugned order violates section 11(*d*) of the *Charter*;

b. Whether sections 12, 18, and 60 of the *NDA* violate section 11(*d*) of the *Charter*.

[29] The significance of these issues, particularly the first one set out above, is evident in the position advanced by Military Judge Pelletier in *Iredale*. He states:

> My reasons in *Pett* have been complemented since by decisions of my colleagues d'Auteuil and Sukstorf, JJ.M. For instance, I very much support the statement in paragraph 54 of *Edwards*, to the effect that the perception of conflicting roles and status of military judges as both judicial and executive officers can be deconflicted by viewing appointment to the office of military judge by the Governor in Council as the transfer of a military officer from the executive to the judicial branch of government. That manner of seeing things fits well with the finding in *Pett* to the effect that a military judge cannot be charged as an officer under the CSD while he is in the office of military judge. (para. 34)
>
> […]
>
> My position to the effect that a military judge should never be brought before a court martial while in office remains. I am also still of the view that an officer who has relinquished or been stripped of his judicial office by a decision of the Military Judges Inquiry Committee could be subsequently brought before a court martial without concern for judicial independence and impartiality given that he or she is no longer a judge. Of course, it may be difficult to distinguish between the conduct of the officer and the military judge in the circumstances. However, this issue would be best left for the court to determine in the course of a trial. (para. 37)

IV. Relevant statutes, regulations and policies

[30] The relevant statutory, regulatory and policy provisions, except as set out in the text of these reasons for judgments, are attached as Appendix A.

V. Analysis

A. *Position of the appellant*

[31] The appellant contends that military judges are liable to be tried under the Code of Service Discipline. Section 60(2) of the *NDA* states that, "[e]very person subject to the Code of Service Discipline […] at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect to that offence under the Code of Service Discipline [...]". The only limitation found in the *NDA* is at section 164(1.3), which states that military judges cannot be tried by summary trial.

[32] The appellant argues that it is the stated expectation of Parliament that officers perform judicial duties. She alludes to the many safeguards built into the system to protect military judges from potential conflicts. These include those listed above in paragraphs 9-11.

[33] The appellant contends that the MJIC is not a disciplinary body and that Justice d'Auteuil erred in *Edwards* in stating that the MJIC replaces the court martial for dealing with service offences. The appellant contends that the application of the Code of Service Discipline to military judges is no different than the application of the *Criminal Code* or other provincial or federal statutes, to a civilian judge. The perceived violations of section 11(*d*) of the *Charter* flow from an improper presumption that actors within the military justice system will act improperly, unlawfully or in bad faith. This is contrary to the presumption that statutory actors will act in good faith (*Cawthorne*) and that there are safeguards in place to protect against improper action.

[34] The appellant says that the impugned order does not place military judges under any new command structure. The impugned order simply provides the mechanism necessary for the processing of charges and a fulsome consideration of the public interest.

B. *Position of the respondents – Edwards and Iredale*

[35] The respondents submitted two (2) written memoranda: one for *Edwards* and *Iredale* and one for *Crépeau* and *Fontaine*.

[36] The respondents in *Edwards* and *Iredale* contend that the impugned order would lead a reasonable and well-informed person to conclude that the Executive presumes it is clothed with the authority to discipline military judges, *qua* military judges, and that such intrusion into judicial independence cannot be tolerated. Citing Military Judge d'Auteuil in *Edwards*, the respondents Edwards and Iredale contend that once military judges are appointed, they are transferred from the Executive Branch to the judicial branch and would only transfer back to the Executive Branch upon ceasing to enjoy the benefits of their appointment.

[37] The respondents further contend that the appellant's presumption that statutory actors exercise their powers in good faith is not a sufficient safeguard for judicial independence. Judicial independence should not rest on the shoulders of good faith actors. The respondents cite Military Judge Sukstorf in *D'Amico* at paragraphs 46-47 where she states:

> […] it is imperative to demonstrate to all serving CAF members that military judges can and do decide their cases independently from the prosecution and the chain of command
>
> […]
>
> An accused person needs to know that the military judge hearing his or her case is truly independent and not under any undue influence by the chain of command in any way. [...]

[38] The respondents rely upon *R. v. Lippé*, [1991] 2 S.C.R. 114, 128 N.R. 1 p. 138 [*Lippé*] where the Supreme Court of Canada held that the Barreau du Québec could not discipline municipal judges as this would give the perception of a lack of independence for municipal courts. They contend that the MJIC is responsible for disciplining military judges. According to the respondents, subjecting military judges to the Code of Service Discipline would subvert the will of Parliament.

C. *Position of the respondents - Crépeau and Fontaine*

[39] Captain Crépeau and Gunner Fontaine, in a separate response, contend that this Court has already considered the principles of independence and impartiality in *R. v. Lauzon*, 1998 CACM 415 and *R c. Leblanc*, 2011 CACM 2. They say that in both cases, this court affirmed the importance of judicial independence and impartiality as essential in order to ensure that both the accused and the public retain confidence in the military justice system. According to them, the fundamental issue is one of trial fairness.

[40] As to the question of whether military judges should be treated as anyone else subject to the Code of Service Discipline, the respondents Crépeau and Fontaine contend there can be no compromise. Executive involvement in the disciplinary process must never be available as a tool to coerce military judges. Institutional independence and impartiality require that military judges be free of any exterior pressures, including the potential influence of the chain of command, through application of the Code of Service Discipline.

[41] All respondents agree, erroneously, in our view, with the military judges that it is the role of the MJIC to enforce the Code of Service Discipline with respect to military judges. Specifically, the respondents point to the prosecution of Chief Military Judge Dutil as outlined in (*Canada (Canadian Armed Forces, Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge*), 2020 FC 330, [2020] F.C.J. No. 299) to support their assertion that the military hierarchy is unwilling to respect the recommendations of the MJIC. Former Chief Military Judge Dutil had been the subject of a complaint before the MJIC. That complaint was eventually dismissed by the MJIC. However, approximately three years after the dismissal of the complaint, new evidence emerged which led the Director of Military Prosecutions to charge Chief Military Judge Dutil with several offences contrary to the Code of Service Discipline, including fraud-related offences. There were no allegations of fraud before the MJIC.

D. *Military justice overview*

[42] *Généreux* is the seminal case which defined the current parameters of the independence of military judges. The Court in *Généreux* referred to *MacKay*, the pre-*Charter* case concerning the right of an accused to an impartial and independent decision maker. In *Généreux*, Chief Justice Lamer makes the following observations:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depend considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service

> Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military (*Généreux* at para. 60).

[43] Justice Lamer's conclusion finds its roots in the *NDA* where one of the principles of sentencing codified at section 203.1 is defined as promoting the "[...] operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale [...]".

[44] For obvious reasons, the civilian criminal justice system does not include, as a principle of sentencing, the operational effectiveness of the Canadian Armed Forces. Second, the civilian criminal justice system is rarely called upon to deal with its own employees. That being said, public servants, including police officers and prosecutors and, yes, even judges, may be the subject of prosecution in the civilian criminal justice system.

[45] Military justice, in whatever form, promotes the discipline, efficiency and morale of the Canadian military for the development of operationally ready and effective forces wherever deployed in the world. This mission concept and declaration of purpose is unknown to the civilian criminal justice system.

[46] In *Cawthorne*, the Supreme Court considered a distinct but related argument: that the Minister of National Defence's authority to appeal a court martial or Court Martial Appeal Court

decision violated sections 7 and 11(*d*) of the *Charter*. The Court dismissed the respondents' section 11(*d*) argument (*Cawthorne* at para. 32). With respect to their section 7 argument, the respondents had pled that "the Minister is a member of Cabinet not bound by the conventions of independence that apply to the Attorney General, and that the Minister's 'quasi-judicial' role is incompatible with his control and administration of the Canadian Forces" (*Cawthorne* at para. 31). The Court dismissed this argument as well, noting that:

> The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General — also a member of Cabinet — can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard (*Cawthorne* at para. 32).

[47] The Supreme Court's most recent pronouncements on the *Charter*-compliance of the military justice system, in *Stillman*, does not concern the section 11(*d*) right to an independent and impartial tribunal. However, the majority does address a number of important reforms – including the enactment of Bill C-25 in 1998, which included "a statutory basis for independent military judges, in terms of tenure, remuneration, and removal only through an inquiry committee process", the latter point constituting a reference to the MJIC procedure (Stillman at para. 48). Moldaver and Brown JJ., writing for the majority, quoted the Draft Internal Report – Court Martial Comprehensive Review, of January 17, 2018 ("CMCR Interim Report") wherein the authors observed that military justice now benefits from "established institutions and independence mechanisms within the system that substantially aligned it with Canada's civilian criminal justice system, while preserving many of the historic aspects of a court martial, such as the involvement of a panel of military members as fact-finders" (*Stillman* at para. 48).

[48] Having considered recent Supreme Court of Canada jurisprudence related to independence of the courts martial, we will now briefly set out the structure of the military justice system as a whole. It operates differently than the civilian criminal justice system. This is both intentional and necessary.

[49] The military justice system is comprised of two (2) tiers: summary trials and courts martial. The *NDA* Divisions 5 and 6 provide the legislative authority for each system. The *QR&O*s outline the procedures for disposing of charges in either tribunal at Volume II – Disciplinary, Chapters 108 and 111.

[50] Summary trials are the most common form of service tribunal and are used to dispose of minor offences that can be tried at the unit level by members of the chain of command. Presiding Officers, themselves subject to the Code of Service Discipline, serve as judges for these trials. Importantly, these Presiding Officers are neither lawyers nor judges. In a summary trial, the accused is not entitled to a lawyer, but to an assisting officer who may assist in the preparation of the defence as well as any post trial reviews.

[51] The powers of punishment at the summary trial level are limited to reflect the relatively minor nature of the offences. A member of the Canadian Armed Forces found guilty of a service offence at summary trial retains the right to apply for a review of the findings, the punishment or both. A review may be undertaken by a review authority at the member’s request or on the initiative of the review authority himself or herself. The review authority is an officer holding a rank senior to the officer who presided over the summary trial. The review authority may quash

the findings, substitute the findings of guilt or mitigate, commute, or remit any punishment awarded (see, *QR&O*s article 108.45). The decision of the review authority is subject to judicial review before the Federal Court.

[52] The court martial, by contrast, is a formal military court possessed of jurisdiction to try more serious offences. It has the power to impose punishment up to and including, imprisonment for life. In terms of procedures and rules, courts martial are similar to civilian criminal courts and have immunity, rights, powers and privileges of a superior court of criminal justice (*NDA*, sections 165.231 and 179).

[53] There are two (2) types of courts martial: General Courts Martial and Standing Courts Martial. A General Courts Martial is composed of a military judge who sits with a panel of five (5) members of the Canadian Armed Forces (CAF), each of whom are subject to the Code of Service Discipline. This panel serves as the trier of fact and makes findings of guilty or not guilty. The military judge instructs the panel in the same manner as a superior court trial judge, in one of the provinces or territories, instructs a jury. The military judge decides legal questions in the course of the trial. On a finding of guilty, the military judge imposes the sentence.

[54] A Standing Court Martial consists of one judge who sits alone as the trier of fact and law, determines whether the accused is guilty or not guilty and imposes a sentence accordingly. At a court martial trial, the Director of Military Prosecutions has carriage of the prosecution. The accused has the right to counsel provided by the Director of Defence Counsel Services or by civilian counsel.

[55] Pursuant to section 230 of the *NDA*, appeals from Courts Martial are to this Court, with a further possibility of appeal, pursuant to section 245(1) of the *NDA*, to the Supreme Court of Canada.

[56] Courts martial are conducted by military judges who have formal legal training and experience. Summary trials do not deal with major offences; courts martial do not deal with minor offences. However, between the two (2), there is an array of offences for which the accused may elect to be tried by either court martial or summary trial. Pursuant to section 162.1 of the *NDA*, except in certain circumstances, an accused triable by summary trial has the right to elect trial by court martial.

E. *Subject to the constitutional challenge presently before the Court, military judges are liable to be tried by Court Martial for alleged violations of the Code of Service Discipline while they hold office as a military judge.*

[57] The Code of Service Discipline is the foundation of the military justice system. It sets out the standard of conduct of all members of the Canadian Armed Forces, including military judges, which is essential to the maintenance of discipline, efficiency and morale. These characteristics are essential to mission success and the safety and security of military personnel and the civilians they are committed to protect.

[58] Section 68 of the *NDA* states that every person alleged to have committed an offence under that Code of Service Discipline may be tried in Canada or outside Canada. This applies to both summary trials and courts martial. Section 61(1) of the *NDA* extends the Code of Service

Discipline to civilians. This would include members of this Court conducting an appeal in an operational theatre. This latter possibility is contemplated under section 235(1) of the *NDA*.

[59] The Code of Service Discipline not only sets out substantive offences, it also sets out processes and procedures related to the prosecution and defence of members of the military; including, the standard of proof beyond a reasonable doubt, verdict options, ranges of punishment, judicial interim release, release by commanders, pleas of *autrefois acquit* and *autrefois convict*, appeal mechanisms, and release pending appeal.

[60] A service offence, as defined in the *NDA*, is "an offence under the Act, the *Criminal Code*, or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline" (*NDA* at s.2). Potential infractions of the Code of Service Discipline may be unique to the profession of arms, such as conduct to the prejudice of good order and discipline, disobedience of a lawful command and absence without leave; or they may constitute conduct in contravention of the broader law such as the *Criminal Code* or any other Act of Parliament. (*NDA*, s.130).

[61] Section 60(1) of the *NDA* provides that the Code of Service Discipline applies to, among others, "officers" of the regular force and, in carefully enumerated circumstances "officers" of the reserve force. All military judges are officers to whom that section applies. Section 60(2) reads:

(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged	(2) Quiconque était justiciable du code de discipline militaire au moment où il aurait commis une infraction d'ordre

commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).	militaire peut être accusé, poursuivi et jugé pour cette infraction sous le régime du code de discipline militaire, même s'il a cessé, depuis que l'infraction a été commise, d'appartenir à l'une des catégories énumérées au paragraphe (1)

[62] There is good reason for these requirements. A Commander, the Chief Executive in a theatre of operation, is responsible for mission success and the safety of everyone within his or her unit or element. Adherence to orders that could include standing orders related to responses in the event of an attack, might be the difference between life and death. Anyone to whom the Code of Service Discipline does not apply presents a risk to the mission and the safety of those around him or her. In a theatre of operation, if a commander is unable to compel compliance with the Code of Service Discipline, mission success and lives are at risk.

[63] Unlike other citizens or even any other servants of the Crown, members of the Canadian Armed Forces have a unique and unlimited duty to serve in the defence of Canada. As such, members of the Canadian Armed Forces, including military judges, are liable to be ordered into harm's way, up to and including actions that could result in injury or death. All officers and non-commissioned members of the Regular Force are, at all times, liable to perform any lawful duty (*NDA*, s. 33). This, in the profession of arms, is considered unlimited liability.

[64] Discipline is essential to the military. The most powerful weapons at the government's disposal are entrusted to members of the Canadian Armed Forces. The responsible use of those weapons depends upon maintaining the highest standards of discipline.

[65] Having briefly discussed the concepts of unlimited liability and discipline, it is useful to set out some concrete examples of conduct expected of those who serve in the CAF, which conduct is not expected of civilians. Members of the military are not permitted to take part in political activities, though they can vote, attend political meetings and run for minor political office (B-GG-005-027/AF-011 *Military Justice at the Summary Trial Level* – V2.2 1/11 at 1-7). "Universality of service" found in the *Defence Administrative Orders and Directives*, 5023-0 at sections 2.3 and 2.4 requires that every serving member meet basic physical fitness standards and limits a member's equality rights available through anti-discrimination legislation.

[66] All serving members are expected to be able to conduct general defence and security duties as well as the specific duties of their trade, profession or calling within the CAF. These requirements apply to all, including officers who are also military judges.

F. *Is the role of a military judge incompatible with his or her role as an officer?*

[67] Subsection 165.21(1) of the *NDA* states that, "The Governor in Council may appoint any officer who is a barrister or advocate of at least 10 years' standing at the bar of a province and who has been an officer for at least 10 years to be a military judge." The requirement for a prospective military judge to have been a member of the bar for 10 years is the norm across jurisdictions in Canada for federally appointed judges. With this comes the expected breadth of

legal experience and knowledge necessary to render credible judicial service. The requirement that a prospective military judge must also have been a commissioned officer for a period of at least 10 years, is unique to the military justice system. It speaks to the expectation of experience in the military, knowledge of the role of officers and a commitment to the military ethos.

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

[69] Sitting civilian judges are often asked to chair or participate in commissions of inquiry at both the federal and provincial levels. Make no mistake, those commissions and inquiries are executive branch functions, conducted at the behest of the executive branch (see *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)*, [1997] 3 F.C. 169, [1997] F.C.J No. 985 at para. 13); *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] S.C. J. No. 83, [1997] 3 S.C.R. 440). Recent examples of past and current inquiries are: the Long-Term Care COVID-19 Commission where the Chairperson held a judicial position until his retirement in November 2020 ; The Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar and the Walkerton Inquiry, both chaired by an Associate Chief Justice of Ontario; the Desmond Fatality Inquiry , chaired by a Judge of the

Provincial Court of Nova Scotia; and the Commission of Inquiry into Money Laundering in British Columbia chaired by a British Columbia Supreme Court Judge.

[70] Similarly, several Federal Court judges sit on boards and tribunals. For example, a Federal Court judge chairs the Copyright Board of Canada and a Federal Court judge is Chairperson of the Canadian Competition Tribunal. We would add that s. 77.013(2) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 provides that sitting judges of superior courts are eligible to sit on binational panels such as that contemplated by paragraphs 1 to 4 of Annex 10-B.1 of the Canada United States Mexico Accord. Also, s. 20.7(1) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 provides that all members of the tribunal must be judges of the Federal Court or a superior court of a province. As stated, such panels and commissions of inquiry constitute part of the executive branch of government. People serve in both judicial and executive functions at the same time. All of the Canadian Judicial Council's work on discipline constitutes executive rather than judicial functions. (see *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2018] F.C.J. No 904, aff'd by 2019 FCA 148)

[71] We hasten to add that the executive branch appoints judges and sometimes elevates them to Courts of Appeal and the Supreme Court of Canada. One might view such appointments as "promotions". Should those who seek such office declare the whole system bereft of independence and impartiality because of the Executive's role in accepting or rejecting their application for such a position?

[72] Finally, we note the current Chief Justice of Canada, is, as at the time of writing, the Administrator of the Government of Canada, until the next governor general is installed. He is the official representative of the Queen of Canada. In that capacity, his office is part of every information and indictment filed in criminal court. Would a reasonable person, being aware of all of the facts, including the protections afforded to the Chief Justice of Canada regarding salary and tenure, consider him incapable of sitting and deciding cases involving the government of Canada, given his dual roles of Chief Justice and Administrator? We think not.

[73] To conclude, these examples demonstrate that, on occasion, members of the judicial branch perform executive functions without compromising institutional independence or giving rise to a concern about impartiality. Is it ideal? Perhaps not. Is it part of the conventions that comprise our system of governance? Yes. The reason why this is acceptable and does not contravene either s. 11(*d*) or the test for bias is because, when these functions are situated in their broader statutory context, the constitutional requirements that guarantee independence and impartiality are present. We will discuss those later in these reasons.

[74] The Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75 and *Committee for Justice and Liberty* instructs us that the assessment of institutional independence and impartiality is both objective and contextual. This requires a consideration of the role and functions being performed by the courts martial, the principles which underlie the military justice system and other factors that bear on the institutional independence of the courts martial and the impartiality of its judges. Those factors include, but are not limited to, the oath of office, statutory protections

on the tenure of judges, their remuneration, the conventions governing the exercise of prosecutorial discretion and the extent to which our Westminster model of constitutional democracy permits members of the judicial branch to perform executive functions.

[75] Institutional independence of the judiciary cannot be absolute. In *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 142, Lamer C.J. stated that "the Constitution does not always guarantee the 'ideal'. Perhaps the ideal system would be to have a panel of three (3) or five (5) judges hearing every case; that may be the ideal, but it certainly cannot be said to be constitutionally guaranteed." In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 [*MacKeigan*], McLachlin J. (as she then was) observed that a complete separation of the judiciary from other branches of government is not practicable:

> It is impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government. Statutes govern the appointment and retirement of judges; laws dictate the terms upon which they sit and are remunerated. Parliament retains the power to impeach federally-appointed judges for cause, and enactments such as the *Supreme Court Act*, R.S.C. 1970, c. S-19, stipulate on such matters as the number of judges required for a quorum. It is inevitable and necessary that relations of this sort exist between the judicial and legislative branches of government. (*MacKeigan* at 827)

G. *The role of the Military Judges Inquiry Committee*

[76] The respondents contend there exist several solutions to the ills they have identified. First, military judges are liable to be prosecuted before the civilian courts for civilian offences committed by them while in office. This, according to them, is one means of maintaining respect for the system. Second, military judges may be charged under the Code of Service Discipline

once they are no longer in the position of military judge; namely, after their removal from office, voluntary release or retirement. The third option, according to all military judges who addressed the topic, is the MJIC. We refer to observations by Military Judge Pelletier in *Pett* at para. 131 and *Iredale* at para. 33; Military Judge Sukstorf in *D'Amico* at paras. 59, 68 and 70; and Military Judge D'Auteuil in *Edwards* at para. 46.

[77] The genesis and role of the MJIC is as follows. Following *Généreux*, retired Chief Justice Lamer was tasked to conduct an enquiry to provide recommendations on amendments to the *NDA* that would create a more independent and impartial court martial system. As a result, the legislator amended the *NDA* to include, at section 165.31, the establishment of the MJIC. A military judge may only be removed from office following compliance with section 165.32(7) which provides as follows:

Recommendation to the Governor in Council	**Recommandation au gouverneur en conseil**
(7) The inquiry committee may recommend to the Governor in Council that the military judge be removed if, in its opinion:	(7) Le comité peut recommander au gouverneur en conseil de révoquer le juge militaire s'il est d'avis que celui-ci, selon le cas :
(a) the military judge has become incapacitated or disabled from the due execution of his or her judicial duties by reason of	a) est inapte à remplir ses fonctions judiciaires pour l'un ou l'autre des motifs suivants :
(i) infirmity,	(i) infirmité,
(ii) having been guilty of misconduct,	(ii) manquement à l'honneur et à la dignité,

(iii) having failed in the due execution of his or her judicial duties, or	(iii) manquement aux devoirs de la charge de juge militaire,
(iv) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her judicial duties; or	(iv) situation d'incompatibilité, qu'elle soit imputable au juge militaire ou à toute autre cause;
(b) the military judge does not satisfy the physical and medical fitness standards applicable to officers.	b) ne possède pas les aptitudes physiques et l'état de santé exigés des officiers.
Report	**Rapport**
(8) The inquiry committee shall provide to the Minister a record of each inquiry and a report of its conclusions. If the inquiry was held in public, the inquiry committee shall make its report available to the public.	(8) Le comité transmet le rapport de ses conclusions et le dossier de l'enquête au ministre et, si l'enquête a été tenue en public, rend le rapport accessible au public.

[78] Paragraph 7(a)(ii) is illuminating. One cannot be found guilty unless one has been judged; one cannot be judged without having been tried; one cannot be tried without having been accused. We are of the view a plain reading and contextual interpretation of that provision contemplates a conviction under the Code of Service Discipline, the *Criminal Code* or some other statute. (Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016 at pp 7-8).

[79] Paragraph 7(b) speaks to the possibility that a military judge could be removed for having failed to meet the physical fitness standards of officers. As stated above (*supra* at para. 62)

universality of service is an expectation of all serving members. This speaks to Parliament's intention that military judges are to be held to the same standards, physical or otherwise, as their fellow soldiers.

[80] The MJIC established under the *NDA* plays a role similar to that of an Inquiry Committee established through the Canadian Judicial Council. The most recent pronouncement of the function of the Canadian Judicial Council Inquiry Committee can be found in *Girouard v. Canada (Attorney General)*, 2019 FC 1282, [2019] F.C.J. No. 1154 [*Girouard*]. Justice Rouleau explains the responsibilities and limits of the committee as follows:

> The Council and the courts have dealt with the Council's function on many occasions. It has been established that the Council is not a forum before which two opponents appear for a final verdict on the penalties to be imposed on a judge. Two previous inquiry committees have had the following to say in this regard:
>
> [An inquiry committee] does not adjudicate disputes between parties and does not render legally enforceable decisions; its purpose is to conduct an inquiry and report to the Council.
>
> The Inquiry Committee has no power to impose penalties of any kind. It cannot establish civil liability or criminal guilt on the part of the judge. The same goes for the Council after receiving the Committee's report. Thus, whatever the outcome of the process, it is certain that it does not expose the judge who is the subject of the inquiry to penalties of a criminal nature (*Girouard* at para. 59).

[81] The Inquiry Committee does not deliver final judgment. The Inquiry Committee does not impose any penalties. The Inquiry Committee does not make a finding of civil or criminal liability. The Inquiry Committee provides a recommendation to the Minister.

[82] *Girouard*, by extrapolation, provides a clear understanding of the purpose and limits of the MJIC. Like an Inquiry Committee established by the Canadian Judicial Council, the MJIC does not impose any penalties, does not establish civil liability nor does it make findings of criminal guilt or innocence. Importantly from a potential respondent's perspective, there is no requirement of proof beyond a reasonable doubt and the rules of evidence, if any, are relaxed.

[83] In our view, there are several fundamental errors in the analysis undertaken by the military judges in the cases under appeal. First, Military Judge Sukstorf is incorrect when she asserts in paragraph 68 of *D'Amico* that the role of the MJIC vis-à-vis military judges is the same as the role of the courts martial. As noted above, the MJIC decides nothing. It makes recommendations. The MJIC makes its recommendations based upon a preponderance of evidence that falls far short of proof beyond a reasonable doubt. The MJIC has no power to impose any discipline or make a recommendation regarding discipline, short of recommending removal.

[84] Second, Military Justice Sukstorf is incorrect when she asserts in paragraph 70 of *D'Amico* that the same allegations considered and dealt with by the MJIC in the case of Chief Military Judge Dutil, became the subject of a court martial. There is no evidence the allegations before the MJIC in *Dutil* were the same as those for which he was prosecuted. In fact, based upon a reading of the decision in *Dutil*, it is evident that the Canadian Forces National Investigative Service (CFNIS), some three (3) years after the MJIC dealt with the matter, had different information, including new allegations of fraud that were not before the MJIC.

H. *Quasi-judicial manner of exercising prosecutorial discretion*

[85] We now turn to the potential prosecution of military judges, which, quite frankly, we equate to the prosecution of a judge of one of Her Majesty's civilian courts. This is an element of the context which frames part of the test an informed observer would take into account in considering whether the impartiality or independence of a court is compromised.

[86] No rule of law protects sitting judges from prosecution during their appointment as a judge. Nor should there be. Judges may be the subject of a search warrant obtained by members of the executive branch. They may be arrested by members of police forces who appear before them on a regular basis. They may have their actions reviewed by a prosecutor clothed with the constitutional mandate to assess the prospect of conviction and consider the public interest in deciding whether to prosecute. Judges may, by necessity, be tried by one of their own. These are all features and hallmarks of living in a democratic society where the rule of law prevails. No one is above the law, not civilian judges, not military judges.

[87] In our view, that is precisely how our society should operate. We consider this principle so fundamental that it would be an embarrassment to attempt to use a provision of the *Charter*, the Bill of Rights, the Magna Carta or some other constitutional principle or legislative enactment to justify the position. To be required to do so would fundamentally weaken the indisputable concept that no one in our democracy is above the law. There is no reason to maintain that a military judge who, for example, drives while impaired or commits an assault should be immune from prosecution in the military justice system. The fact that judges are subject to criminal, civil and disciplinary constraints does not lead a reasonably informed person,

looking at the matter objectively, to conclude that a judge would violate his or her oath, and fail to be impartial.

[88] The respondents attempt to justify their position that military judges must be immune from prosecution under the Code of Service Discipline because of the risk of bad faith on the part of prosecutors and commanders. They rely upon *Her Majesty the Queen. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 [*Nur*] for the proposition that prosecutorial discretion cannot save an unconstitutional law. However, *Nur* is distinguishable. In *Nur*, the prosecution attempted to save a provision which purported to impose a minimum sentence by relying upon prosecutorial discretion to proceed with a summary offence rather than the indictable offence. There the Crown argued that the wise and prudent exercise of prosecutorial discretion would attenuate the effects of mandatory minimum sentences imposing disproportionate sentences. The Supreme Court held that one cannot rely upon prosecutorial discretion to save an otherwise unconstitutional law.

[89] The present appeals are different. The respondents rely on the thesis that the possibility a disgruntled prosecutor could bring charges against a military judge, to coerce him or her, or exact retribution for unwelcome decisions, undermines the institutional independence of a military judge.

[90] It is appropriate in considering the context of the potential prosecution of military judges, to be cognizant of, and expect behaviour consistent with, the constitutional norm that prosecutors and commanders will exercise prosecutorial discretion in a quasi-judicial manner and

independent of partisan concerns. The Supreme Court addressed this issue, albeit in a different context, in *Cawthorne*:

> […] The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General — also a member of Cabinet — can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard. (*Cawthorne* at para. 32).

[91] The Supreme Court of Canada has recently reiterated this principle in *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [2021] S.C.J. No 18 at paras. 32-33,

> [32] This means that the responsibility of the Crown includes the obligation to act objectively, independently and fairly toward the accused. These imperatives are "not confined to the courtroom and attac[h] to the Crown Attorney in all dealings in relation to an accused" more generally (Regan, at paras. 155-56, per Binnie J., dissenting). In *R. v. Cawthorne*, [2016] 1 S.C.R. 983, this Court recognized that an accused person has a constitutional right, as a principle of fundamental justice under s. 7 of the *Charter* , to be tried by a prosecutor who acts independently of improper purposes (paras. 23-26, per McLachlin C.J.).
>
> [33] The Attorney General and its agents are also required to act as protectors of the public interest in the discharge of their prosecutorial functions (*Cawthorne*, at para. 27). They act in "the interest of the community to see that justice is properly done" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, per L'Heureux-Dubé J.). Their ultimate task "is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts" (Regan, at para. 159, per Binnie J., dissenting in the result, quoting *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Report"), at p. 117 (emphasis deleted).

[92] There is no evidence that any military judge has ever been prosecuted for improper purposes. Nor is there any evidence that the manner in which judicial proceedings have been conducted has ever led to charges under the Code of Service Discipline. In any event, the remedies for malicious prosecution and abuse of process are sufficient to deal with that unlikely prospect. The commanding officer would no doubt stop frivolous accusations from other sources. We readily acknowledge these prosecutorial norms serve to protect the interests of the military judge, and are not directly relevant to the issue raised in this appeal; namely, the s. 11(*d*) rights of an accused. However, the existence of these tools, including their lawful, quasi-constitutional and practical constraints on the exercise of prosecutorial discretion, must form part of the contextual matrix within which the current analysis is undertaken.

VI. Do sections 12, 18, and 60 of the *NDA* compromise the respondents' section 11(*d*) *Charter* rights?

[93] Captain Crépeau, by way of cross-appeal, challenges the constitutionality of sections 12, 18 and 60 of the *NDA*. She contends those provisions constitute an infringement of an accused's *Charter* rights in that they provide the military hierarchy with the tools to exert undue pressure on military judges.

[94] The Supreme Court of Canada has affirmed repeatedly the constitutionality of military members being tried by military officers (see *Généreux* at 336 and *Stillman* at para. 70). There is no merit to the cross-appeal. We would dismiss it for the reasons already offered. Military judges are officers within the CAF and subject to the Code of Service Discipline.

VII. Application to admit fresh evidence

[95] Just as this court was about to release its reasons on these appeals, the respondents filed a notice of motion seeking to introduce fresh evidence which they submit suggests that this court is not "constitutionally independent and as such, may not be in a position to render judgment in the present appeals."

[96] The fresh evidence consists of presentations made on May 10 and 11, 2021 before the Judicial Compensation and Benefits Commission Hearings by Chief Justice Bell of the Court Martial Appeal Court of Canada (CMACC) and Justice Scanlan, a member of the same court. The evidence generally was about challenges to the CMACC work of the Chief Justice caused by his position as a judge of the Federal Court, and the competing demands for judicial resources by both courts. The evidence related mostly to difficulties the Chief Justice had in carrying out the administrative duties demanded by the CMACC when, at the same time, the Federal Court was also demanding his time and resources. The evidence did not relate to adjudication of cases before the CMACC. There is no suggestion that the needs of both courts for judicial resources had any effect on any matter before the CMACC.

[97] The respondents say they now have a reasonable apprehension that this court lacks the independence it requires under the Constitution and ask this court to admit the fresh evidence and allow the issue of this Court's independence to be raised.

[98] The criteria for the admission of fresh evidence are well known and set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
3. The evidence must be credible in the sense that it is reasonably capable of belief; and,
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[99] We would not admit the evidence. The dual role of the Chief Justice of the CMACC is established by statute.

[100] Section 234 of the NDA mandates:

(2) the judges of the Court Martial Appeal Court are	(2) La Cour d'appel de la cour martiale est composée de la façon suivante :
(a) not fewer than four judges of the Federal court of appeal or the Federal Court to be designated by the Governor in Council; and	a) au moins quatre juges de la Cour fédérale ou de la Cour d'appel fédérale désignés par le gouverneur en conseil;
(b) any additional judges of a superior court of criminal jurisdiction who are	b) tout autre juge d'une cour supérieure de juridiction

appointed by the Governor in Council.	criminelle nommé par le gouverneur en conseil.
[…]	[…]
(3) The Governor in council shall designate one of the judges of the Court Martial Appeal; Court to be the Chief Justice thereof, who shall preside, when present, at any sittings of the Court and shall, subject to subsection (4), appoint another judge to preside at any sittings of the Court at which the Chief Justice is not present.	(3) Le gouverneur en conseil désigne le juge en chef. Celui-ci préside les séances de la Cour d'appel de la cour martiale et nomme, sous réserve du paragraphe (4), un autre juge pour assumer la présidence en son absence.

[101] All of the members of the CMACC are also members of other courts. That there could be competing demands on their time is readily apparent from the statutory arrangement.

[102] This evidence would have been available with reasonable diligence in advance of the hearing of this appeal. These appeals were heard on January 29, 2021. This motion was not served until May 18, 2021. The particular form of the ongoing differences, relating to administrative matters, as revealed in the testimony before the Quadrennial Commission is not significant. The possibility of competing demands on judges' time has always been present.

[103] This evidence has no bearing on the merits of the appeals now before this court.

[104] This would be a sufficient basis to dismiss the motion to admit fresh evidence.

[105] We would go further and observe that the proposed evidence is not capable of raising any question as to the institutional independence of the CMACC. One would expect a chief justice of any court to seek resources for his or her court. Where this is done appropriately and in a proper setting this is for the benefit of the litigants who appear in that court and in the public interest.

[106] The constitutional guarantee of judicial independence "is not for the benefit of the judiciary, but for the public": *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 89.

[107] The CMACC judges' home courts – the independence of which is rightly unchallenged – have no conceivable interest in the matters before this court. Moreover, to the extent these courts may place competing demands on CMACC judges' time, there is no suggestion in the proposed fresh evidence that this results in pressures that "bear directly and immediately on the exercise of the judicial function": *Valente v. The Queen*, [1985] 2 S.C.R. 673, at para. 52.

[108] An informed person, viewing the matter realistically and practically would not conclude that there was any risk that adjudicative fairness would be compromised by the differences revealed before the Quadrennial Commission. The proposed fresh evidence is not capable of raising a doubt as to this court's institutional independence.

[109] Lastly, the interests in finality militate against accepting fresh evidence after this matter has been fully argued on the merits. Proceedings in the trial court are at a standstill and many cases have been delayed to await the outcome of this appeal. The public interest weighs heavily

against any further delay in this matter. We are not satisfied that any miscarriage of justice would result from a refusal to admit the fresh evidence, particularly where the argument now proposed could have been advanced at the hearing before this court.

[110] The respondents filed a further motion on June 4, 2021 asking this Court to admit, by way of fresh evidence, the Honourable Morris J. Fish, *Report of the Third Independent Review Authority to the Minister of National Defence: Pursuant to subsection 273.601(1) of the National Defence Act, RSC 1985, c N-5* of June 1, 2021. He was asked to study the structure and operation of the military justice system and he has made recommendations to the Minister of Defence for improvement of that system.

[111] We would not admit that evidence. It is irrelevant to this Court's task of determining whether the challenges made in these appeals establish that the trial courts lack institutional independence and are hence constitutionally infirm.

[112] Further delay in issuing a decision in this case would cause intolerable delay. For the reasons expressed earlier, concerns about finality outweigh the limited value that admission of the report would have for determination of the issues now before this court.

[113] The motion to adduce fresh evidence is dismissed.

VII. Conclusion

[114] An informed person, viewing the matter realistically and practically—and having thought the matter through could, in our respectful view, reach no other conclusion than military judges meet the minimum constitutional norms of impartiality and independence as required by section 11(*d*) of the *Charter*. Military judges are subject to the Code of Service Discipline while they hold office. The impugned order does not a compromise the respondents' section 11(*d*) *Charter* rights. There is no merit to the cross appeal.

[115] For these reasons, we allow the appeals and dismiss the cross-appeal of Captain Crépeau.

"B. Richard Bell"
Chief Justice

"Donald J. Rennie"
J.A.

"Gladys I. Pardu"
J.A.

ANNEX

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	***Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11**
11 Any person charged with an offence has the right	11 Tout inculpé a le droit :
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal	d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable
***National Defence Act,* R.S.C., 1985, c. N-5**	***Loi sur la défense nationale*, L.R.C. (1985), ch. N-5**
2. **service offence** means an offence under this Act, the Criminal Code or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline;	2**. infraction d'ordre militaire** Infraction — à la présente loi, au Code criminel ou à une autre loi fédérale — passible de la discipline militaire
12 (1) The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.	12 (1) Le gouverneur en conseil peut prendre des règlements concernant l'organisation, l'instruction, la discipline, l'efficacité et la bonne administration des Forces canadiennes et, d'une façon générale, en vue de l'application de la présente loi.
(2) Subject to section 13 and any regulations made by the	(2) Sous réserve de l'article 13 et des règlements du

Governor in Council, the Minister may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.

gouverneur en conseil, le ministre peut prendre des règlements concernant l'organisation, l'instruction, la discipline, l'efficacité et la bonne administration des Forces canadiennes et, d'une façon générale, en vue de l'application de la présente loi.

(3) The Treasury Board may make regulations

(3) Le Conseil du Trésor peut, par règlement :

(a) prescribing the rates and conditions of issue of pay of military judges, the Director of Military Prosecutions and the Director of Defence Counsel Services;

a) fixer les taux et conditions de versement de la solde des juges militaires, du directeur des poursuites militaires et du directeur du service d'avocats de la défense;

(b) prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and

b) fixer, en ce qui concerne la solde et les indemnités des officiers et militaires du rang, les suppressions et retenues;

(c) providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.

c) prendre toute mesure concernant la rémunération ou l'indemnisation des officiers et militaires du rang qu'il juge nécessaire ou souhaitable de prendre par règlement pour l'application de la présente loi.

(4) Regulations made under paragraph (3)(a) may, if they so provide, have retroactive effect. However, regulations

(4) Tout règlement pris en vertu de l'alinéa (3)a) peut avoir un effet rétroactif s'il comporte une disposition en

that prescribe the rates and conditions of issue of pay of military judges may not have effect

ce sens; il ne peut toutefois, dans le cas des juges militaires, avoir d'effet :

(a) in the case of an inquiry under section 165.34, before the day referred to in subsection 165.34(3) on which the inquiry that leads to the making of the regulations is to commence; or

a) dans le cas de l'examen prévu à l'article 165.34, avant la date prévue au paragraphe 165.34(3) pour le commencement des travaux qui donnent lieu à la prise du règlement;

(b) in the case of an inquiry under section 165.35, before the day on which the inquiry that leads to the making of the regulations commences.

b) dans le cas de l'examen prévu à l'article 165.35, avant la date du début de l'examen qui donne lieu à la prise du règlement.

18 (1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.

18 (1) Le gouverneur en conseil peut élever au poste de chef d'état-major de la défense un officier dont il fixe le grade. Sous l'autorité du ministre et sous réserve des règlements, cet officier assure la direction et la gestion des Forces canadiennes.

(2) Unless the Governor in Council otherwise directs, all 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 shall be issued by or through the Chief of the Defence Staff.

(2) Sauf ordre contraire du gouverneur en conseil, tous les ordres et directives adressés aux Forces canadiennes pour donner effet aux décisions et instructions du gouvernement fédéral ou du ministre émanent, directement ou indirectement, du chef d'état-major de la défense.

29.101 Despite subsection 29.1(1), a grievance submitted by a military judge shall be considered and determined by the Chief of the Defence Staff.

29.101 Malgré le paragraphe 29.1(1), le grief déposé par le juge militaire est étudié et réglé par le chef d'état-major de la défense.

33 (1) The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.

33 (1) La force régulière, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang, sont en permanence soumis à l'obligation de service légitime.

(2) The reserve force, all units and other elements thereof and all officers and non-commissioned members thereof

(2) La force de réserve, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang, peuvent être :

(a) may be ordered to train for such periods as are prescribed in regulations made by the Governor in Council; and

a) astreints à l'instruction pour les périodes fixées par règlement du gouverneur en conseil;

(b) may be called out on service to perform any lawful duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.

b) soumis à l'obligation de service légitime autre que l'instruction, aux époques et selon les modalités fixées par le gouverneur en conseil par règlement ou toute autre voie.

(3) Nothing in subsection (2) shall be deemed to impose liability to serve as prescribed therein, without his consent, on an officer or non-commissioned member of the reserve force who is, by virtue of the terms of his enrolment,

(3) Le paragraphe (2) n'a pas pour effet d'imposer, sans son consentement, les obligations qui y sont décrites à un officier ou militaire du rang de la force de réserve qui, aux termes de son enrôlement,

liable to perform duty on active service only.

(4) In this section, duty means any duty that is military in nature and includes any duty involving public service authorized under section 273.6.

n’est astreint qu’au service actif.

(4) Pour l’application du présent article, service s’entend, outre des tâches de nature militaire, de toute tâche de service public autorisée sous le régime de l’article 273.6.

60 (1) The following persons are subject to the Code of Service Discipline:

60 (1) Sont seuls justiciables du code de discipline militaire :

(a) an officer or non-commissioned member of the regular force;

a) les officiers ou militaires du rang de la force régulière;

(b) an officer or non-commissioned member of the special force;

b) les officiers ou militaires du rang de la force spéciale;

(c) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is

c) les officiers ou militaires du rang de la force de réserve se trouvant dans l’une ou l’autre des situations suivantes :

(i) undergoing drill or training, whether in uniform or not,

(i) en période d’exercice ou d’instruction, qu’ils soient en uniforme ou non,

(ii) in uniform,

(ii) en uniforme,

(iii) on duty,

(iii) de service,

(iv) [Repealed, 1998, c. 35, s. 19]

(iv) [Abrogé, 1998, ch. 35, art. 19]

(v) called out under Part VI in aid of the civil power,

(v) appelés, dans le cadre de la partie VI, pour prêter main-forte au pouvoir civil,

(vi) called out on service,

(vi) appelés en service,

(vii) placed on active service,

(vii) en service actif,

(viii) in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,

(viii) à bord d'un navire, véhicule ou aéronef des Forces canadiennes ou dans — ou sur — tout établissement de défense ou ouvrage pour la défense,

(ix) serving with any unit or other element of the regular force or the special force, or

(ix) en service dans une unité ou un autre élément de la force régulière ou de la force spéciale,

(x) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;

(x) présents, en uniforme ou non, à l'exercice ou l'instruction d'une unité ou d'un autre élément des Forces canadiennes;

(d) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Canadian Forces;

d) sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes qui, d'après la loi ou un accord entre le Canada et l'État dans les forces armées duquel elles servent, sont affectées comme officiers ou militaires du rang aux Forces canadiennes ou détachées auprès de celles-ci;

(e) a person, not otherwise subject to the Code of Service Discipline, who is

e) les personnes qui, normalement non assujetties au code de

serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces;

discipline militaire, servent comme officiers ou militaires du rang dans toute force levée et entretenue à l'étranger par Sa Majesté du chef du Canada et commandée par un officier des Forces canadiennes;

(f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;

f) les personnes qui, normalement non assujetties au code de discipline militaire, accompagnent quelque unité ou autre élément des Forces canadiennes en service, actif ou non, dans un lieu quelconque;

(g) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;

g) sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes fréquentant un établissement créé aux termes de l'article 47;

(h) an alleged spy for the enemy;

h) les présumés espions pour le compte de l'ennemi;

(i) a person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody; and

i) les personnes qui, normalement non assujetties au code de discipline militaire, sont sous garde civile ou militaire pour quelque infraction d'ordre militaire qu'elles ont — ou auraient — commise;

(j) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian

j) les personnes qui, normalement non assujetties au code de discipline militaire, servent

Forces under an engagement with the Minister whereby the person agreed to be subject to that Code.

auprès des Forces canadiennes aux termes d'un engagement passé avec le ministre par lequel elles consentent à relever de ce code.

60(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

60(2) Quiconque était justiciable du code de discipline militaire au moment où il aurait commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé pour cette infraction sous le régime du code de discipline militaire, même s'il a cessé, depuis que l'infraction a été commise, d'appartenir à l'une des catégories énumérées au paragraphe (1).

61 (1) For the purposes of this section and sections 60, 62 and 65, but subject to any limitations prescribed by the Governor in Council, a person accompanies a unit or other element of the Canadian Forces that is on service or active service if the person

61 (1) Pour l'application du présent article et des articles 60, 62 et 65 mais sous réserve des restrictions réglementaires, une personne accompagne une unité ou un autre élément des Forces canadiennes qui est en service, actif ou non, si, selon le cas :

(a) participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operations;

a) elle participe, avec cet élément ou unité, à l'une quelconque de ses actions : mouvements, manoeuvres, aide au pouvoir civil, assistance en cas de catastrophe ou opérations de combat;

(b) is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council;

b) elle est logée ou pourvue d'une ration — à ses propres frais ou non — par cet élément ou unité en tout pays ou en tout lieu désigné par le gouverneur en conseil;

(c) is a dependant outside Canada of an officer or non-commissioned member serving beyond Canada with that unit or other element; or

c) elle est à la charge, à l'étranger, d'un officier ou militaire du rang servant au-delà des limites du Canada avec cet élément ou unité;

(d) is embarked on a vessel or aircraft of that unit or other element.

d) elle se trouve à bord d'un navire ou aéronef de cet élément ou unité.

68 Every person alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline, either in Canada or outside Canada.

68 Quiconque est présumé avoir commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé sous le régime du code de discipline militaire, tant au Canada qu'à l'étranger.

85 Every person who uses threatening or insulting language to, or behaves with contempt toward, a superior officer is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

85 Quiconque menace ou insulte verbalement un supérieur, ou se conduit de façon méprisante à son endroit, commet une infraction et, sur déclaration de culpabilité, encourt comme peine maximale la destitution ignominieuse du service de Sa Majesté.

95 Every person who strikes or otherwise ill-treats any

95 Quiconque frappe ou de quelque autre façon maltraite

person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

un subordonné — par le grade ou l'emploi — commet une infraction et, sur déclaration de culpabilité, encourt comme peine maximale un emprisonnement de moins de deux ans.

129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

129 (1) Tout acte, comportement ou négligence préjudiciable au bon ordre et à la discipline constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.

(2) An act or omission constituting an offence under section 72 or a contravention by any person of

(2) Est préjudiciable au bon ordre et à la discipline tout acte ou omission constituant une des infractions prévues à l'article 72, ou le fait de contrevenir à :

(a) any of the provisions of this Act,

a) une disposition de la présente loi;

(b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or

b) des règlements, ordres ou directives publiés pour la gouverne générale de tout ou partie des Forces canadiennes;

(c) any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

c) des ordres généraux, de garnison, d'unité, de station, permanents, locaux ou autres.

(3) An attempt to commit any of the offences prescribed in sections 73 to 128 is an act,

(3) Est également préjudiciable au bon ordre et à la discipline la tentative de

conduct, disorder or neglect to the prejudice of good order and discipline.

commettre l'une des infractions prévues aux articles 73 à 128.

(4) Nothing in subsection (2) or (3) affects the generality of subsection (1).

(4) Les paragraphes (2) et (3) n'ont pas pour effet de porter atteinte à l'application du paragraphe (1).

(5) No person may be charged under this section with any offence for which special provision is made in sections 73 to 128 but the conviction of a person so charged is not invalid by reason only of the charge being in contravention of this subsection unless it appears that an injustice has been done to the person charged by reason of the contravention.

(5) Le présent article ne peut être invoqué pour justifier une accusation relative à l'une des infractions expressément prévues aux articles 73 à 128; le fait que l'accusation contrevient au présent paragraphe ne suffit toutefois pas pour invalider la condamnation de la personne ainsi accusée, sauf si la contravention paraît avoir entraîné une injustice à son égard.

(6) The responsibility of any officer for the contravention of subsection (5) is not affected by the validity of any conviction on the charge in contravention of that subsection.

(6) La validité de la condamnation ne porte pas atteinte à la responsabilité d'un officier en ce qui a trait à la contravention.

162.1 Except in the circumstances prescribed in regulations made by the Governor in Council, an accused person who is triable by summary trial has the right to elect to be tried by court martial.

162.1 Sauf dans les cas prévus par règlement du gouverneur en conseil, un accusé qui peut être jugé sommairement peut choisir d'être jugé devant une cour martiale.

165.21(3) A military judge holds office during good

165.21(3) Le juge militaire est nommé à titre inamovible,

behaviour and may be removed by the Governor in Council for cause on the recommendation of the Military Judges Inquiry Committee.

sous réserve de révocation motivée par le gouverneur en conseil sur recommandation du comité d'enquête sur les juges militaires.

165.23(2) In addition to their judicial duties, military judges shall perform any other duties that the Chief Military Judge may direct, but those other duties may not be incompatible with their judicial duties.

165.23(2) Ils exercent en outre toute autre fonction que leur confie le juge militaire en chef et qui n'est pas incompatible avec leurs fonctions judiciaires.

165.231 A military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction.

165.231 Les juges militaires bénéficient de la même immunité de poursuite que les juges d'une cour supérieure de juridiction criminelle.

165.31 (1) There is established a Military Judges Inquiry Committee to which the Chief Justice of the Court Martial Appeal Court shall appoint three judges of the Court Martial Appeal Court.

165.31 (1) Est constitué le comité d'enquête sur les juges militaires, formé de trois juges de la Cour d'appel de la cour martiale nommés par le juge en chef de ce tribunal.

(2) The Chief Justice shall appoint one of the judges to act as Chairperson.

(2) Le juge en chef nomme un des juges à titre de président.

(3) The inquiry committee has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to

(3) Le comité d'enquête a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toute autre

question relevant de sa compétence, les mêmes attributions qu'une cour supérieure de juridiction criminelle, notamment le pouvoir de punir l'outrage au tribunal.

(a) the attendance, swearing and examination of witnesses;

(b) the production and inspection of documents;

(c) the enforcement of its orders; and

(d) all other matters necessary or proper for the due exercise of its jurisdiction.

165.32 (1) The Military Judges Inquiry Committee shall, on receipt of a request in writing made by the Minister, commence an inquiry as to whether a military judge should be removed from office.

165.32 (1) Si le ministre lui en fait la demande par écrit, le comité d'enquête sur les juges militaires entreprend une enquête sur la question de savoir si un juge militaire doit être révoqué.

(2) The inquiry committee may, on receipt of any complaint or allegation in writing made in respect of a military judge, commence an inquiry as to whether the military judge should be removed from office.

(2) Le comité peut enquêter sur toute plainte ou accusation relative à un juge militaire qui lui est transmise par écrit et qui porte sur la question de savoir si le juge militaire doit être révoqué.

(3) The Chairperson of the inquiry committee may designate a judge appointed to the committee to examine a complaint or allegation

(3) Le président peut charger un des membres du comité d'examiner toute plainte ou accusation transmise au titre du paragraphe (2) et de

referred to in subsection (2) and to recommend whether an inquiry should be commenced.

recommander au comité de procéder ou non à l'enquête.

(4) The military judge in respect of whom an inquiry is held shall be given reasonable notice of the inquiry's subject matter and of its time and place and shall be given an opportunity, in person or by counsel, to be heard at the inquiry, to cross-examine witnesses and to adduce evidence on his or her own behalf.

(4) Le juge militaire en cause doit être informé, suffisamment à l'avance, de l'objet de l'enquête, ainsi que des date, heure et lieu de l'audition, et avoir la possibilité de se faire entendre, de contre-interroger les témoins et de présenter tous éléments de preuve utiles à sa décharge, en personne ou par l'intermédiaire d'un avocat.

(5) The inquiry committee may hold an inquiry either in public or in private unless the Minister, having regard to the interests of the persons participating in the inquiry and the interests of the public, directs that the inquiry be held in public.

(5) Sauf ordre contraire du ministre fondé sur l'intérêt du public et des personnes prenant part à l'enquête, celle-ci peut se tenir à huis clos.

(6) The Chairperson of the inquiry committee may engage on a temporary basis the services of counsel to assist the committee and may, subject to any applicable Treasury Board directives, establish the terms and conditions of the counsel's engagement and fix their remuneration and expenses.

(6) Le président peut retenir, à titre temporaire, les services d'avocats pour assister le comité et, en conformité avec les instructions du Conseil du Trésor, définir leurs conditions d'emploi et fixer leur rémunération et leurs indemnités.

(7) The inquiry committee may recommend to the Governor in Council that the military judge be removed if, in its opinion,

(7) Le comité peut recommander au gouverneur en conseil de révoquer le juge militaire s'il est d'avis que celui-ci, selon le cas :

(a) the military judge has become incapacitated or disabled from the due execution of his or her judicial duties by reason of

(i) infirmity,

(ii) having been guilty of misconduct,

(iii) having failed in the due execution of his or her judicial duties, or

(iv) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her judicial duties; or

(b) the military judge does not satisfy the physical and medical fitness standards applicable to officers.

a) est inapte à remplir ses fonctions judiciaires pour l'un ou l'autre des motifs suivants :

(i) infirmité,

(ii) manquement à l'honneur et à la dignité,

(iii) manquement aux devoirs de la charge de juge militaire,

(iv) situation d'incompatibilité, qu'elle soit imputable au juge militaire ou à toute autre cause;

b) ne possède pas les aptitudes physiques et l'état de santé exigés des officiers.

(8) The inquiry committee shall provide to the Minister a record of each inquiry and a report of its conclusions. If the inquiry was held in public, the inquiry committee shall make its report available to the public.

(8) Le comité transmet le rapport de ses conclusions et le dossier de l'enquête au ministre et, si l'enquête a été tenue en public, rend le rapport accessible au public.

165.33 (1) There is established a Military Judges Compensation Committee consisting of three part-time members to be appointed by the Governor in Council as follows:

165.33 (1) Est constitué le comité d'examen de la rémunération des juges militaires, composé de trois membres à temps partiel nommés par le gouverneur en conseil sur le fondement des propositions suivantes :

(a) one person nominated by the military judges;

(b) one person nominated by the Minister; and

(c) one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

a) un membre proposé par les juges militaires;

b) un membre proposé par le ministre;

c) un membre proposé à titre de président par les membres nommés conformément aux alinéas a) et b).

(2) Each member holds office during good behaviour for a term of four years, and may be removed for cause at any time by the Governor in Council.

(2) Les membres sont nommés à titre inamovible pour un mandat de quatre ans, sous réserve de révocation motivée du gouverneur en conseil.

(3) A member is eligible to be reappointed for one further term.

(3) Leur mandat est renouvelable une fois.

(4) In the event of the absence or incapacity of a member, the Governor in Council may appoint, as a substitute temporary member, a person nominated in accordance with subsection (1).

(4) En cas d'absence ou d'empêchement d'un membre, le gouverneur en conseil peut lui nommer un remplaçant suivant la procédure prévue au paragraphe (1).

(5) If the office of a member becomes vacant during the member's term, the Governor in Council shall appoint a person nominated in accordance with subsection (1) to hold office for the remainder of the term.

(5) Le gouverneur en conseil comble toute vacance suivant la procédure prévue au paragraphe (1). Le mandat du nouveau membre prend fin à la date prévue pour la fin du mandat de l'ancien.

(6) All three members of the compensation committee together constitute a quorum.

(6) Le quorum est de trois membres.

(7) The members of the compensation committee shall be paid the remuneration

(7) Les membres ont droit à la rémunération fixée par le gouverneur en conseil et sont

fixed by the Governor in Council and, subject to any applicable Treasury Board directives, the reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.

indemnisés, en conformité avec les instructions du Conseil du Trésor, des frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel de résidence.

179 (1) A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to

179 (1) La cour martiale a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les mêmes attributions qu'une cour supérieure de juridiction criminelle, notamment le pouvoir de punir l'outrage au tribunal.

(a) the attendance, swearing and examination of witnesses;

(b) the production and inspection of documents;

(c) the enforcement of its orders; and

(d) all other matters necessary or proper for the due exercise of its jurisdiction.

(2) Subsection (1) applies to a military judge performing a judicial duty under this Act

(2) Chaque juge militaire a ces mêmes attributions pour l'exercice des fonctions judiciaires que lui confie la

other than presiding at a court martial.

présente loi, sauf lorsqu'il préside une cour martiale.

203.1 (1) The fundamental purposes of sentencing are

(a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and

(b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

203.1 (1) La détermination de la peine a pour objectifs essentiels de favoriser l'efficacité opérationnelle des Forces canadiennes en contribuant au maintien de la discipline, de la bonne organisation et du moral, et de contribuer au respect de la loi et au maintien d'une société juste, paisible et sûre.

(2) The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:

(a) to promote a habit of obedience to lawful commands and orders;

(b) to maintain public trust in the Canadian Forces as a disciplined armed force;

(c) to denounce unlawful conduct;

(2) L'atteinte de ces objectifs essentiels se fait par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) renforcer le devoir d'obéissance aux or-dres légitimes;

b) maintenir la confiance du public dans les Forces canadiennes en tant que force armée disciplinée;

c) dénoncer les comportements illégaux;

(d) to deter offenders and other persons from committing offences;

d) dissuader les contrevenants et autres personnes de commettre des infractions;

(e) to assist in rehabilitating offenders;

e) favoriser la réinsertion sociale des contrevenants;

(f) to assist in reintegrating offenders into military service;

f) favoriser la réinsertion des contrevenants dans la vie militaire;

(g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;

g) isoler, au besoin, les contrevenants des autres officiers et militaires du rang ou de la société en général;

(h) to provide reparations for harm done to victims or to the community; and

h) assurer la réparation des torts causés aux victimes ou à la collectivité;

(i) to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

i) susciter le sens des responsabilités chez les contrevenants, notamment par la reconnaissance des dommages causés à la victime et à la collectivité.

230 Every person subject to the Code of Service Discipline 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 Toute personne assujettie au code de discipline militaire 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 to make an order under subsection 745.51(1) of the Criminal Code;

a.1) la décision de rendre l'ordonnance visée au paragraphe 745.51(1) du Code criminel;

(b) the legality of any finding of guilty;

b) la légalité de tout verdict de 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 finding of unfit to stand trial or not responsible on account of mental disorder;

d) la légalité d'un verdict d'inaptitude à subir son procès ou de non-responsabilité pour cause de troubles mentaux;

(e) the legality of a disposition made under section 201, 202 or 202.16;

e) la légalité d'une décision rendue aux termes de l'article 201, 202 ou 202.16;

(f) the legality of a decision made under any of subsections 196.14(1) to (3);

f) la légalité de la décision prévue à l'un des paragraphes 196.14(1) à (3);

(g) the legality of a decision made under subsection 227.01(2);

g) la légalité de la décision rendue en application du paragraphe 227.01(2);

(h) the legality of an order made under section 147.1 or 226.2 and, with leave of the Court or a judge of the Court, the reasonableness of any period imposed under section 147.2;

h) la légalité de toute ordonnance rendue au titre des articles 147.1 ou 226.2 ou, avec l'autorisation de la Cour d'appel ou de l'un de ses juges, le caractère raisonnable du délai imposé au titre de l'article 147.2;

(i) the legality of an order made under section 148 and the legality or, with leave of the Court or a judge of the Court, the

i) la légalité de toute ordonnance rendue au titre de l'article 148 ou la légalité de toute condition imposée au

severity of any condition imposed under that section;	titre de cet article ou, avec l'autorisation de la Cour d'appel ou de l'un de ses juges, sa sévérité;
(j) the legality or, with leave of the Court or a judge of the Court, the severity of a restitution order made under section 203.9 or the legality of an order made under section 249.25; or	j) la légalité de toute ordonnance de dédommagement rendue au titre de l'article 203.9 ou, avec l'autorisation de la Cour d'appel ou de l'un de ses juges, sa sévérité, ou la légalité de toute ordonnance de restitution rendue au titre de l'article 249.25;
(k) the legality of a suspension of a sentence of imprisonment or detention and the legality or, with leave of the Court or a judge of the Court, the severity of any condition imposed under subsection 215(3).	k) la légalité de toute suspension d'une peine d'emprisonnement ou de détention ou la légalité de toute condition imposée au titre du paragraphe 215(3) ou, avec l'autorisation de la Cour d'appel ou de l'un de ses juges, sa sévérité.
235 (1) The Court Martial Appeal Court may sit and hear appeals at any place or places, and the Chief Justice of the Court shall arrange for sittings and hearings as may be required.	235 (1) La Cour d'appel de la cour martiale peut siéger et entendre les appels en tout lieu; son juge en chef prend les dispositions nécessaires pour la tenue de ses séances et audiences.
245 (1) A person subject to the Code of Service Discipline may appeal to the Supreme Court of Canada	245 (1) Toute personne assujettie au code de discipline militaire peut interjeter appel à la Cour suprême du Canada d'une

against a decision of the Court Martial Appeal Court

(a) on any question of law on which a judge of the Court Martial Appeal Court dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

décision de la Cour d'appel de la cour martiale sur toute question de droit, dans l'une ou l'autre des situations suivantes :

a) un juge de la Cour d'appel de la cour martiale exprime son désaccord à cet égard;

b) l'autorisation d'appel est accordée par la Cour suprême.

Queen's Regulations and Orders for the Canadian Armed Forces

19.75(1) This article does not apply to an officer or non-commissioned member to whom article 101.09 (Relief from Performance of Military Duty – Pre and Post Trial) applies, nor to a military judge, the Provost Marshal, the Director of Military Prosecutions or the Director of Defence Counsel Services.

Ordonnances et règlements royaux applicables aux Forces canadiennes

19.75(1) Le présent article ne s'applique pas aux officiers et militaires du rang assujettis à l'article 101.09 (Retrait des fonctions militaires – avant et après le procès), aux juges militaires, au grand prévôt, au directeur des poursuites militaires ni au directeur du service d'avocats de la défense.

26.10 - PERSONAL REPORTS AND ASSESSMENTS – EXCEPTIONS

No personal report, assessment or other document shall be completed in respect of a military judge, the Director of Military Prosecutions or the Director of Defence Counsel Services

26.10 - RAPPORTS ET APPRÉCIATIONS PERSONNELS – EXCEPTIONS

Aucun rapport ou appréciation personnels ni autre document ne doit être rempli à l'égard d'un juge militaire, du directeur des poursuites militaires ou du directeur du service d'avocats

for the period during which they performed their duties if such a document is to be used in whole or in part to determine the training, posting or rate of pay of the officer, or whether the officer is qualified to be promoted.

de la défense pour la période au cours de laquelle celui-ci exerce ses fonctions s'il sert en tout ou en partie à décider si l'officier a les qualifications pour être promu ou à prévoir la formation, l'affectation ou le taux de solde de l'officier.

20.04 - PROHIBITION

No officer or non-commissioned member shall use any drug unless:

the member is authorized to use the drug by a qualified medical or dental practitioner for the purposes of medical treatment or dental care;

the drug is contained in a non-prescription medication used by the member in accordance with the instructions accompanying the medication; or

the member is required to use the drug in the course of military duties.

20.04 - INTERDICTION

Il est interdit à un officier ou à un militaire du rang de faire usage de toute drogue, sauf dans les cas suivants :

un médecin ou dentiste qualifié a autorisé le militaire à faire usage d'une drogue à des fins de traitements médicaux ou de soins dentaires;

la drogue fait partie intégrante d'un médicament disponible sans ordonnance dont le militaire fait usage en conformité avec les instructions du médicament;

le militaire est tenu de faire usage d'une drogue dans l'accomplissement de ses tâches militaires.

26.12 - PERSONNEL EVALUATION REPORT FILE – EXCEPTIONS

The personnel evaluation report file of an officer who is a military judge, the Director

26.12 - DOSSIER RELATIF AUX RAPPORTS D'APPRÉCIATION DU PERSONNEL – EXCEPTIONS

Le dossier relatif aux rapports d'appréciation du personnel d'un officier qui est juge

of Military Prosecutions or the Director of Defence Counsel Services shall not be placed before a promotion board.

militaire, directeur des poursuites militaires ou directeur du service d'avocats de la défense ne doit pas être déposé devant un conseil de promotion au mérite.

108.45 – REVIEW OF FINDING OR PUNISHMENT OF SUMMARY TRIAL

(1) An officer or non-commissioned member found guilty of a service offence at a summary trial may request a review authority to:

(a) set aside the finding of guilty on the ground that it is unjust; and

(b) alter the sentence on the ground that it is unjust or too severe.

(2) For the purposes of this article:

(a) the review authority for a summary trial by delegated officer is the commanding officer of the unit;

(b) the review authority for a summary trial by a commanding officer is the next superior officer to whom the commanding officer of the unit is responsible in matters of discipline; and

108.45 – RÉVISION DU VERDICT OU DE LA PEINE D'UN PROCÈS SOMMAIRE

(1) Un officier ou militaire du rang qui a été reconnu coupable d'une infraction d'ordre militaire à un procès sommaire peut demander à l'autorité de révision :

a) d'annuler le verdict de culpabilité en raison de son caractère injuste;

b) de modifier la sentence en raison de son caractère injuste ou trop sévère.

(2) Pour l'application du présent article :

a) l'autorité de révision d'un procès sommaire présidé par un officier délégué est le commandant de l'unité;

b) l'autorité de révision d'un procès sommaire présidé par un commandant est l'officier immédiatement supérieur envers qui le commandant de l'unité est responsable pour les questions de discipline;

(c) the review authority for a summary trial by a superior commander is the next superior officer to whom the superior commander is responsible in matters of discipline.

c) l'autorité de révision d'un procès sommaire présidé par un commandant supérieur est l'officier immédiatement supérieur envers qui le commandant supérieur est responsable pour les questions de discipline.

(3) Where an officer referred to in paragraph (2) is of the opinion that it would be inappropriate for him to act as a review authority in a particular case, having regard to the interests of military justice and discipline, the officer shall:

(3) Si l'officier visé par l'alinéa (2) estime qu'il ne convient pas, dans l'intérêt de la justice militaire et de la discipline, qu'il agisse comme autorité de révision dans un cas donné, l'officier doit :

(a) not make any determination in respect of the request for review; and

a) s'abstenir de décider du bien-fondé de la demande de révision;

(b) refer the request for review to the next superior officer to whom he is responsible in matters of discipline.

b) renvoyer la demande de révision à l'officier immédiatement supérieur envers qui l'officier est responsable pour les questions de discipline.

(4) A request for review must be made in writing and state the relevant facts and the reasons why a finding is unjust or a punishment is unjust or too severe.

(4) Une demande de révision est présentée par écrit. Elle énonce les faits pertinents et les motifs démontrant le caractère injuste du verdict ou le caractère injuste ou trop sévère de la peine.

(5) A request for review must be delivered to the review authority, and a copy delivered to the officer who presided at the summary trial, within 14 days of the

(5) Dans les 14 jours suivant la fin du procès sommaire, une demande de révision doit être remise à l'autorité de révision et une copie de celle-ci doit être remise à l'officier

termination of the summary trial.

qui a présidé le procès sommaire.

(6) Within seven days of receiving a copy of a request for review, the officer who presided at the summary trial shall deliver his or her comments concerning the request to the review authority and a copy to the member who requested the review.

(6) Dans les sept jours suivant la réception d'une copie de la demande de révision, l'officier qui a présidé le procès sommaire remet ses commentaires touchant la demande à l'autorité de révision et en remet une copie au militaire qui a présenté la demande.

(7) An officer or non-commissioned member requesting a review may deliver further representations to the review authority within seven days of receiving a copy of the comments of the officer who presided at the summary trial.

(7) L'officier ou le militaire du rang qui a présenté une demande de révision peut remettre des représentations additionnelles à l'autorité de révision dans les sept jours suivant la réception d'une copie des commentaires de l'officier qui a présidé le procès sommaire.

(8) Before making a determination in respect of the request for review, a review authority shall obtain legal advice.

(8) Avant de décider du bien-fondé de la demande de révision, l'autorité de révision doit obtenir une opinion juridique.

(9) A legal officer who provided advice in respect of the laying of a charge or any summary proceedings relating to the charge shall not provide legal advice to the review authority in relation to that case.

(9) Un avocat militaire qui a donné une opinion juridique relativement au dépôt d'une accusation ou à toute procédure sommaire reliée à l'accusation ne doit pas donner d'opinion juridique à l'autorité de révision en rapport avec cette affaire.

(10) Within 21 days after receiving a request for review, the review authority shall review the summary trial and determine whether to set aside

(10) Dans les 21 jours suivant la réception d'une demande de révision, l'autorité de révision révise le procès sommaire et décide si le verdict doit être

any finding made or alter any punishment imposed.

annulé ou si toute peine infligée doit être modifiée.

(11) If a review authority is unable to make a determination under paragraph (10) because further information is required, the review authority shall:

(11) S'il est impossible à l'autorité de révision de prendre une décision en conformité avec l'alinéa (10) parce qu'elle a besoin de renseignements supplémentaires, elle doit à la fois :

(a) seek the necessary information;

a) les obtenir;

(b) notify the member requesting the review that further information has been sought; and

b) aviser le militaire qui a présenté la demande de révision, qu'une demande de renseignements supplémentaires a été faite;

(c) provide the member requesting the review with a copy of any information subsequently obtained.

c) fournir au militaire une copie de tout renseignement qui a été obtenu.

(12) An officer or non-commissioned member requesting a review may deliver further representations to the review authority within seven days of receiving a copy of the information referred to at paragraph (11).

(12) L’officier ou le militaire du rang qui a présenté une demande de révision peut remettre des représentations additionnelles à l’autorité de révision dans les sept jours suivant la réception d’une copie des renseignements visés par l’alinéa (11).

(13) If additional information is sought under paragraph (11), the review authority shall, within 35 days after receiving the request for review, review the summary trial and determine whether to set aside any finding made or alter any punishement imposed.

(13) Si des renseignements supplémentaires sont requis en application de l’alinéa (11), l’autorité de révision doit, dans les 35 jours suivant la réception de la demande de révision, réviser le procès sommaire et décider si tout verdict doit être annulé ou si la sentence doit être modifiée.

(14) As soon as practicable after the review authority has made a decision, the review authority shall:

(a) cause the officer or non-commissioned member making the request, the presiding officer and, where the review authority is not the member's commanding officer, the member's commanding officer to be notified in writing of the decision;

(b) comply with paragraph (6) of article 107.14 (Maintenance of Unit Registry of Disciplinary Proceedings); and

(c) cause the appropriate entries to be made to Part 7 of the original Record of Disciplinary Proceedings.

(15) When the officer or non-commissioned member's commanding officer receives written notification of a review authority's decision, the commanding officer shall:

(a) cause the appropriate entries to be made to the service records of the member, including the conduct sheet in any case where the finding or sentence has been altered (see DAOD 7006-0, Conduct Sheets); and

(14) Dès que possible après avoir pris sa décision, l'autorité de révision prend les mesures suivantes :

a) elle fait aviser par écrit de la décision l'officier ou le militaire du rang qui a présenté la demande, l'officier qui a présidé le procès sommaire et, lorsque l'autorité de révision n'est pas le commandant du militaire, son commandant;

b) elle se conforme à l'alinéa (6) de l'article 107.14 (Tenue d'un fichier des poursuites disciplinaires de l'unité);

c) elle fait consigner les inscriptions indiquées à la partie 7 du procès-verbal de procédure disciplinaire.

(15) Lorsque le commandant de l'officier ou du militaire du rang reçoit avis écrit de la décision de l'autorité de révision, il doit :

a) d'une part, faire consigner les inscriptions indiquées au dossier militaire de l'officier ou du militaire du rang, notamment à sa fiche de conduite (voir DOAD 7006-0, Fiches de conduite) lorsque le verdict ou la sentence ont été modifiés;

(b) take any other action necessary to give effect to the decision.

b) d'autre part, prendre toutes les mesures nécessaires pour la mise en œuvre de la décision.

(16) A review authority may, in the interests of military justice, extend the period for making a request for review to such period as that authority considers reasonable in the circumstances.

(16) L'autorité de révision peut, dans l'intérêt de la justice militaire, proroger le délai alloué pour faire une demande de révision, selon ce qu'elle estime être raisonnable dans les circonstances.

(17) In the case of a request for review by a non-commissioned member who has been sentenced to detention, the member's commanding officer shall, without delay after receiving the request or verifying that it has been made, suspend the punishment of detention under subsection 216(4) of the National Defence Act until the review is completed (see article 113.34 – Prescribed Suspending Authorities).

(17) Si la demande de révision est présentée par un militaire du rang à qui une peine de détention a été infligée, le commandant de ce dernier, en application du paragraphe 216(4) de la Loi sur la défense nationale et sans délai après avoir reçu la demande ou avoir vérifié qu'une demande a été faite, suspend la peine de détention jusqu'à ce que la révision soit terminée (voir l'article 113.34 – Désignation des autorités sursoyantes).

(17.1) If, following the review, there is a punishment of detention that remains to be served, the non-commissioned member shall be taken into custody immediately or at the times specified in any order made under subsection 148(1) of the National Defence Act, to the extent the order remains applicable.

(17.1) Si, une fois la révision terminée, il subsiste une peine de détention à purger, le militaire du rang est mis sous garde immédiatement ou aux moments indiqués, le cas échéant, dans l'ordonnance rendue au titre du paragraphe 148(1) de la Loi sur la défense nationale, dans la mesure où l'ordonnance demeure applicable.

(18) If requested by an officer or non-commissioned member requesting a review, the

(18) Si l'officier ou le militaire du rang qui a présenté une demande de

commanding officer shall appoint an officer or non-commissioned member above the rank of sergeant to assist in the preparation of a request for review and should, where practical, appoint any officer or non-commissioned member requested by the applicant.

révision le requiert, le commandant désigne un officier ou militaire du rang d'un grade supérieur à celui de sergent pour aider le militaire à formuler sa demande et devrait, si cela est raisonnable dans les circonstances, désigner l'officier ou le militaire du rang choisi par le demandeur.

***Special Import Measures Act*, R.S.C., 1985, c. S-15**

77.013(2) Judges of any superior court in Canada and persons who are retired judges of any superior court in Canada are eligible to be appointed to a panel.

***Loi sur les mesures spéciales d'importation* L.R.C. (1985), ch. S-15**

77.013 (2) Les juges ainsi que les anciens juges des juridictions supérieures canadiennes peuvent faire partie d'un groupe spécial.

Public Servants Disclosure Protection Act, S.C. 2005, c. 46

20.7 (1) There is established a tribunal to be known as the Public Servants Disclosure Protection Tribunal consisting of a Chairperson and not less than two and not more than six other members to be appointed by the Governor in Council. All of the members must be judges of the Federal Court or a superior court of a province.

Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles, L.C. 2005, ch. 46

20.7 (1) Est constitué le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles, composé d'un président et de deux à six autres membres nommés par le gouverneur en conseil. Les membres sont des juges de la Cour fédérale ou d'une cour supérieure d'une province.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-606
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LEADING SEAMAN C.D. EDWARDS
AND DOCKET:	CMAC-607
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CAPTAIN C.M.C. CRÉPEAU
AND DOCKET:	CMAC-608
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. GUNNER K. FONTAINE
AND DOCKET:	CMAC-609
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CAPTAIN M.J. IREDALE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 29, 2021
REASONS FOR JUDGMENT OF THE COURT BY:	CHIEF JUSTICE BELL RENNIE J.A. PARDU J.A.
DATED:	JUNE 11 2021

APPEARANCES:

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