

**Court Martial Appeal Court  
of Canada**



**Cour d'appel de la cour martiale  
du Canada**

**Date: 20210617**

**Dockets: CMAC-612  
CMAC-614**

**Citation: 2021 CMAC 3**

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**SERGEANT S.R. PROULX**

**Respondent**

**AND BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**MASTER-CORPORAL J.R.S. CLOUTIER**

**Respondent**

Heard in person at Ottawa, Ontario and by online videoconference  
hosted by the Registry, on March 11, 2021.

Judgment delivered at Ottawa, Ontario, on June 17, 2021.

REASONS FOR JUDGMENT BY THE COURT:

CHIEF JUSTICE BELL  
RENNIE J.A.  
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## REASONS FOR JUDGMENT

### I. Introduction

[1] This is the second of two sets of appeals in which very similar issues are raised. The first concerned Court Martial Appeal Court of Canada (CMACC) files 606, 607, 608, and 609, which was heard on January 29, 2021. The decision on those appeals was rendered on June 11, 2021 and is reported as: *R. v. C.D. Edwards; R. v. Crépeau; R. v. Fontaine; R. v. Iredale*, 2021 CMAC 2 [*Edwards et al.*]. Those appeals focused largely on whether the Code of Service Discipline applies to military judges; whether they can be tried through courts martial and whether the Chief of Defence Staff Order of October 2, 2019 (the impugned order) as well as sections 12, 18, and 60 of the *National Defence Act*, R.S.C., 1985, c. N-5 (NDA), violate an accused's right to be tried by an independent and impartial tribunal as guaranteed by section 11(d) of the *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the Charter).

[2] In the present appeals many of the same issues arise. However, they differ from the four appeals in *Edwards et al.* as they attack the organizational structure of the Canadian Armed Forces (CAF), specifically, whether the position of the Office of the Chief Military Judge (OCMJ), within the military hierarchy, would 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*]). The Respondents

cross-appealed. They ask this Court to declare subsections 12(1) and (2) and sections 17, 18 and 60 of the NDA of no force or effect because they violate section 11(d) of the Charter.

[3] The impugned order states:

“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 MJ on the strength of the Office of the Chief MJ;

...

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] In response to the entering of stays referred to in *Edwards et al.*, the Chief of Defence Staff suspended the order which had been found, by certain military judges, to compromise their adjudicative independence. However, that apparently did not resolve matters. The suspension order stipulated that Canadian Forces Organisation Order 3763 (the CFOO), which establishes the OCMJ as a unit within the CAF, including the section pertaining to the disciplinary regime for military judges, remains in effect. The relevant parts of the suspension order read as follows:

“[...]

And whereas it is anticipated that military judges will continue to order stays of proceedings on the basis that the accused persons’ right under paragraph 11(d) of the Canadian Charter of Rights and Freedoms is violated by the Order titled *Designation of Commanding Officers with respect to Officers and Non-Commissioned Members on the Strength of the Office of the Chief Military Judge Dept ID 3763*, dated 2 October 2019;

And whereas the military justice system is essential to maintain the discipline, efficiency, and morale of the Canadian Armed Forces;

And whereas the Canadian Forces Organization Order 3763 – Office of the Chief Military Judge remains in effect;

Therefore, I suspend the order - *Designation of Commanding Officers with respect to Officers and Non-Commissioned Members on the Strength of the Office of the Chief Military Judge Dept ID 3763*, dated 2 October 2019, pending the final determination of the appeal in *R. v. Edwards*, *R. v. Crépeau*, *R. v. Fontaine*, and *R. v. Iredale*.”

[5] Paragraph 9 of the CFOO states:

Military personnel in the Office of the CMJ are considered to be on strength at NDHQ and will be disciplined IAW [in accordance with] CFSU [Canadian Forces Support Unit] (Ottawa) CFOO [Canadian Forces Organization Order].

[6] On October 14, 2020, Military Judge Sukstorf dismissed an application for a stay of proceedings in *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012. The applicants had alleged a continuing violation of the accused’s section 11(d) Charter rights. At paragraph 97 of her reasons, the military judge concluded that, by reason of the suspension of the impugned order, the concern about adjudicative independence identified in the earlier cases of *R. v. Pett*,

2020 CM 4002 [*Pett*], *R. v. D'Amico*, 2020 CM 2002, *R. v. Bourque*, 2020 CM 2008, and *Edwards et al.* no longer existed.

[7] In *R. v. Christmas*, 2020 CM 3009 [*Christmas*], Military Judge d'Auteuil, in a similar application, arrived at a different conclusion. He concluded that the deficiencies identified in the impugned order persisted in the CFOO and declared CFOO unconstitutional and of no force or effect in that it violated the accused's section 11(*d*) Charter rights. Unlike Military Judge Sukstorf, he ordered a stay of proceedings.

[8] The accused in *R. v. Proulx* 2020 CM 4012 [*Proulx*] was charged with four counts, including, disobeying lawful commands of a superior officer in violation of section 83 of the NDA; behaving with contempt towards the same officer in violation of section 85 of the NDA; and with conduct to the prejudice of good order and discipline in violation of section 129 of the NDA for requesting someone lie for him to a superior officer.

[9] Sergeant Proulx claimed that his rights to a trial by an independent and impartial tribunal were violated. He requested a declaration of same and a stay of proceedings. He argued that the OCMJ was not sufficiently independent from the Executive by virtue of the CFOO and, because military judges may still be prosecuted under the Code of Service Discipline, they lack impartiality. Military Judge Pelletier concluded that the organizational and budgetary regime governing the OCMJ did not give rise to a reasonable apprehension of bias. However, citing his decision in *Pett* he agreed with his colleague, Military Judge d'Auteuil in *Christmas*, that the CFOO is of no force and effect as it pertains to the disciplinary regime for military judges.

[10] As a result of the decision in *Proulx*, the Chief of Defence Staff, on November 18, 2020, deleted paragraph 9 of the CFOO and, with that single amendment, reissued the CFOO.

[11] On February 14, 2020 Master-Corporal Cloutier was charged with dishonourable conduct contrary to section 93 of the NDA; conduct to the prejudice of good order and discipline contrary to section 129 of the NDA; and drunkenness contrary to section 97 of the NDA. He argued, as was the case in *Edwards et al.* that the possibility of military judges being prosecuted for alleged violations of the Code of Service Discipline violates his section 11(d) Charter right. He also contended that sections 12, 17, 18, and 60 of the NDA are inoperable in that they too violate an accused's section 11(d) Charter right.

[12] In his reasons in *R. v. Cloutier*, 2020 CM 4013 [*Cloutier*], Military Judge Pelletier rejected the argument that sections 12, 17, and 18 of the NDA are of no force and effect. Based on the reasoning in *Proulx*, he dismissed the application to have section 60 of the NDA declared of no force and effect. He also rejected the argument that the CFOO, being a financial and administrative order, would lead a reasonable person, fully informed of all the circumstances, to conclude that the Executive Branch was able to influence the OCMJ. However, he found that the CFOO, in its revised form, was unconstitutional in that it still contemplated the prosecution of military judges for alleged violations of the Code of Service Discipline.

## II. Issues

[13] The issues raised in the within appeals are identical to those raised in *Edwards et al.* with the following modifications. These appeals ask this Court to consider three questions: whether



the CFOO violates section 11(d) of the Charter in that it contemplates a commanding officer for purposes of the disciplining of military judges; whether the creation of the OCMJ by the Chief of Defence Staff results in an unconstitutional incursion by the Executive into the independence of the judiciary; and, whether the combined application of sections 12, 17, 18 and 60 of the NDA violate the section 11(d) Charter protections of an accused?

### III. Analysis

[14] For substantially the same reasons set out in *Edwards et al.*, we answer all questions in the negative.

[15] The definition of a CFOO is found in chapter 6 of the document A-DH-200-000/AG-000, *The Heritage Structure of the Canadian Forces*:

**Canadian Forces Organization Order (CFOO).** An order promulgated to formalize the organization of a unit, formation or command of the CAF. It is published by VCDS / C Prog under the authority of the CDS, for each command, formation, unit or other element of the CAF. It normally describes a unit or other element's role, command and control relationships, language designation, support services relationships, and channels of communication. It is an organizational document and not intended for any other purpose. (Ordonnance d'organisation des Forces canadiennes).

[16] CFOOs are orders issued by the Chief of Defence Staff which describe the role, relationships, support service relationships, command and control relationships, as well as channels of communication for all units within the CAF. The authority for the Chief of Defence Staff to issue CFOOs is derived from sections 12 and 17 of the NDA. Much like section 60 of the

NDA, Parliament has granted no exceptions to the Chief's of Defence Staff authority to organize the CAF.

[17] The CFOO pertains to the organization of the Office of the CMJ. It states that:

The officer who holds the appointment of CMJ is the commanding officer of the Office of the CMJ. The commanding officer of the Office of the CMJ is designated as an officer having the power and jurisdiction of an officer commanding a command with respect to personnel on the strength of the office of the CMJ, except in respect of the applications for redress of grievance and any disciplinary matter.

[18] There is nothing objectionable, from a constitutional perspective, about the Chief Military Judge being in command of the Office of the Chief Military Judge. Furthermore, as stated in *Edwards et al.*, there is nothing objectionable, from a constitutional perspective, to having a commanding officer for purposes of participating in the decision whether or not to lay charges against a military judge.

[19] With respect to the constitutional challenge to sections 12, 17, 18 and 60 of the NDA, Military Judge Pelletier noted in paragraphs 31-40 of *Proulx* that the military justice system respects the core requirements of institutional independence set out in *Valente v. The Queen*, [1985] 2 S.C.R. 673. He observed that there exists judicial control over the assignment of judges and the administration of the court. To the extent that military courts rely on their supporting unit, those resources are under the exclusive control of the military judge for the duration of court martial proceedings. He concluded that relationship does not affect the adjudication of matters. We agree with that assessment.

[20] On May 18 and on June 4, 2021, just prior to release of these Reasons, the Respondents filed motions to admit fresh evidence, on the same grounds as similar motions in *Edwards et al.* For the reasons set out in *Edwards et al.*, the motions to admit fresh evidence are dismissed.

#### IV. Conclusion

[21] The Code of Service Discipline appropriately applies to military judges to ensure the maintenance of discipline, efficiency, and morale. Military judges remain officers for the duration of their tenure. They are not above the law.

[22] The impugned order and the CFOO do not create an apprehension of bias. The formation of the unit of the OCMJ does not lead a reasonable observer to conclude a violation of section 11(d) of the Charter. While it is patently obvious, the organization of the superior courts, the creation of judicial positions, the establishment of the offices of Chief Justices and Associate Chief Justices, are, subject to certain constitutional constraints arising from s. 96 and s. 101, of the *Constitution Act, 1867*, entirely in the discretion of provincial legislatures and Parliament.

[23] Largely for the reasons set out in *Edwards et al.*, we are of the view that an informed person, viewing the matter realistically and practically--and having thought the matter through—would conclude neither the impugned order, nor the CFOO, nor the formation of the OCMJ, result in a violation of an accused's section 11(d) Charter rights.

[24] We allow the appeals, dismiss the cross-appeals, dismiss the motions to admit fresh evidence and order the Respondents' trials to proceed.

“B. Richard Bell”

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Chief Justice

“Donald J.A. Rennie”

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J.A.

“Gladys I. Pardu”

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J.A.

**COURT MARTIAL APPEAL COURT OF CANADA**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** CMAC-612

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN v.  
SERGEANT S.R. PROULX

**AND DOCKET:** CMAC-614

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN v.  
MASTER-CORPORAL J.R.S.  
CLOUTIER

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MARCH 11, 2021

**REASONS FOR JUDGMENT BY THE COURT :** CHIEF JUSTICE BELL  
RENNIE J.A.  
PARDU J.A.

**DATED:** JUNE 17, 2021

**APPEARANCES:**

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