Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20110602

Docket: CMAC-539

Citation: 2011 CMAC 2

CORAM: **LÉTOURNEAU J.A.**
DESCHÊNES J.A.
COURNOYER J.A.

BETWEEN:

CORPORAL ALEXIS LEBLANC

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on April 29, 2011.

Judgment delivered at Ottawa, Ontario, on June 2, 2011.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: DESCHÊNES J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] The appellant was tried and convicted, pursuant to section 124 of the *National Defence Act*, RSC 1985, c. N-5 (Act), of having negligently performed a military duty imposed on him.

[2] He was convicted on February 5, 2010, by Judge Perron (judge), who was at that time President of the Standing Court Martial assigned to hear the case. That same day, the appellant was sentenced to pay a $500 fine.

[3] He is appealing the legality of the guilty verdict as well as the judge's decision to dismiss his motion to have the Standing Court Martial declared unconstitutional as constituted under sections 173 and 174 of the Act. The unconstitutionality, it was alleged at the court martial, would arise from the fact that military judges are appointed for five-year, renewable terms and that the appointment process does not provide the institutional guarantees of independence mandated by the *Canadian Charter of Rights and Freedoms* (Charter) in that it breached paragraph 11(*d*) of the Charter, which gives an accused the right to a hearing by an independent and impartial tribunal.

[4] The appellant was seeking from the judge a declaration of constitutional invalidity for subsection 165.21(2) of the Act, and a declaration that subsection 165.21(3) of the Act is of no force or effect. As a corollary to this, he sought, on the ground that they have no statutory basis, to have articles 101.15, 101.16 and 101.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) as amended by Order in Council P.C. 2008-0548 dated March 11, 2008, declared invalid and of no force and effect.

[5] Lastly, he sought, as an individual remedy, a stay of the proceedings against him.

[6] For the reasons that follow, I would agree with his allegation that the appointment process for military judges for five-year, renewable terms breaches the guarantees provided under paragraph 11(*d*) of the Charter. However, I would dismiss his application for a stay of proceedings and his appeal of the guilty verdict. Before doing so, however, it is necessary to briefly review the facts and circumstances surrounding the offence as well as the constitutional facts giving rise to the dispute.

The facts and circumstances surrounding the commission of the offence and the constitutional facts giving rise to the dispute

a) The facts and circumstances surrounding the commission of the offence

[7] The offence imputed to the appellant was committed on October 19, 2008, at about 11 a.m. He, along with other soldiers, was tasked with guarding CF-18 aircraft at Canadian Forces Base Bagotville in Quebec. These aircraft were on standby for the Sommet de la Francophonie, which was being held in Québec City.

[8] Surveillance was carried out as follows. One group controlled access to the base and two teams guarded the aircraft on the tarmac. The appellant was part of one of these two teams.

[9] The appellant and Corporal Tremblay were on lookout in a truck parked near Hangar 7. The appellant was in the passenger seat, and his partner was in the driver's seat. Each of them had a C-7 rifle in their possession and rounds of ammunition. The weapons were on the back seat of the truck.

[10] Corporal Tremblay got out of the truck and went to the washroom, which was inside the hangar. He was away for about five minutes. During that time, Sergeant Campbell, who was alone in his truck, drove up to the appellant's vehicle. He pulled up next to the appellant's side of the truck.

[11] Corporal Tremblay returned to his truck and opened the driver's door. He then told the appellant that Sergeant Campbell, who was beside him, wanted to speak to him.

[12] Sergeants Campbell and Langlois were called as witnesses for the prosecution. The appellant and his companion, Corporal Tremblay, testified for the defence. At the end of the hearing, the judge noted as evidence that the appellant "was reclining and had his eyes closed for at least 10 seconds": see Appeal book, Vol. 1, at page 148. He found that the appellant "was not vigilant from the time when Sergeant Campbell stopped close to his vehicle to when Corporal Tremblay opened his door": *ibidem*. The judge then ruled that the duty that had been assigned to the appellant was assigned in an operational context and, given the fact that he was alone in the vehicle at the time, his lack of vigilance constituted a marked departure from the standard of care expected of him in performing his duty to guard the aircraft: *ibidem*, at page 149. Hence the guilty verdict and sentence.

b) The constitutional facts giving rise to the dispute

[13] Section 165.21 of the Act provides that military judges are appointed for five-year terms, which are renewable on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. It reads as follows:

Military Judges	**Juges militaires**
Appointment	Nomination
165.21 (1) The Governor in Council may appoint officers who are barristers or advocates of at least ten years standing at the bar of a province to be military judges.	**165.21** (1) Le gouverneur en conseil peut nommer juge militaire tout officier qui est avocat inscrit au barreau d'une province depuis au moins dix ans.
Tenure of office and removal	Durée du mandat et révocation
(2) A military judge holds office during good behaviour for a term of five years but may be removed by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.	(2) Un juge militaire est nommé à titre inamovible pour un mandat de cinq ans, sous réserve de révocation motivée par le gouverneur en conseil sur recommandation d'un comité d'enquête établi par règlement du gouverneur en conseil.
Powers of Inquiry Committee	Pouvoirs du comité d'enquête
(2.1) The Inquiry Committee is deemed to have the powers of a court martial.	(2.1) Le comité d'enquête est réputé avoir les pouvoirs d'une cour martiale.
Re-appointment	Nouveau mandat
(3) A military judge is eligible to be re-appointed on the expiry of a first or	(3) Le mandat des juges militaires est renouvelable sur recommandation d'un

subsequent term of office on the recommendation of a Renewal Committee established under regulations made by the Governor in Council.	comité d'examen établi par règlement du gouverneur en conseil.
Retirement age	Âge de la retraite
(4) A military judge ceases to hold office on reaching the retirement age prescribed by the Governor in Council in regulations.	(4) Le juge militaire cesse d'occuper sa charge dès qu'il atteint l'âge fixé par règlement du gouverneur en conseil pour la retraite.

Military judges have security of tenure during their five-year term, but may be removed by the Governor in Council for cause.

[14] According to the appellant, the fact that the terms are for a short period and the fact that they are subject to renewal compromise the level of security of tenure required by the Charter in order for a military judge to be able to constitutionally preside at a standing court martial. The appellant argued that a reasonable person might believe that a military judge could be tempted to deliver decisions that would increase the chances that his or her term would be renewed or that would not compromise those chances, or that might help them curry favour with the executive if his or her term was not renewed.

[15] I reproduce articles 101.15 to 101.17 of the QR&O, which set out the scheme and the reappointment process:

Section 3 – Reappointment of Military Judges

101.15 – ESTABLISHMENT OF RENEWAL COMMITTEE

For the purpose of subsection 165.21(3) of the National Defence Act there is hereby established a committee to be known as the Renewal Committee consisting of one person, being the Chief Justice of the Court Martial Appeal Court. (11 March 2008)

(G) (P.C. 2008-0548 of 11 March 2008)

101.16 – NOTIFICATION BY MILITARY JUDGE

A military judge seeking reappointment shall notify the Renewal Committee and the Minister not earlier than six months, and not later than two months, prior to the expiration of the military judge's appointment. (11 March 2008)

(G) (P.C. 2008-0548 of 11 March 2008)

101.17 – RECOMMENDATION BY RENEWAL COMMITTEE

(1) The Renewal Committee shall, upon receipt of notification under article 101.16 (Notification by Military Judge) and before the expiration of the appointment of the military judge concerned, make a recommendation to the Governor in Council concerning the renewal of the appointment of the military judge. (11 March 2008)

Section 3 – Renouvellement du mandat des juges militaires

101.15 – COMITÉ D'EXAMEN

Est établi, pour l'application du paragraphe 165.21(3) de la Loi sur la défense nationale, un comité d'examen constitué d'un seul membre, soit le juge en chef de la Cour d'appel de la cour martiale. (11 mars 2008)

(G) (P.C. 2008-0548 du 11 mars 2008)

101.16 – AVIS DU JUGE MILITAIRE

Le juge militaire qui souhaite voir son mandat renouvelé en avise le comité d'examen et le ministre au plus tôt six mois et au plus tard deux mois avant la fin du mandat. (11 mars 2008)

(G) (P.C. 2008-0548 du 11 mars 2008)

101.17 – RECOMMANDATION DU COMITÉ D'EXAMEN

(1) Une fois avisé suivant l'article 101.16 (Avis du juge militaire), le comité d'examen présente au gouverneur en conseil, avant la fin du mandat du juge militaire en cause, sa recommandation quant au renouvellement du mandat en question. (11 mars 2008)

(2) In making its recommendation the Renewal Committee shall not consider the record of judicial decisions of the military judge concerned. (11 March 2008)	(2) Le comité d'examen ne tient pas compte dans sa recommandation des décisions rendues par le juge militaire en cause. (11 mars 2008)
(G) (P.C. 2008-0548 of 11 March 2008)	(G) (P.C. 2008-0548 du 11 mars 2008)

History of litigation related to the constitutional validity of renewable terms for military judges

[16] The underlying constitutional issue in this appeal is not new. It has been the subject of conflicting court martial decisions and debate before this Court.

[17] In *R. v. Edwards*, [1995] C.M.A.J. No. 10 and *R. v. Lauzon*, [1998] C.M.A.J. No. 5, 18 C.R. (5th) 288, this Court determined that fixed terms, when protected from interference by the executive for the period of the term, met the requirements of security of tenure, and that the principle that the terms of military judges were renewable did not infringe on the required institutional independence if "the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military trial judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions": *Lauzon*, above, at paragraph 27.

[18] The issue was once again the subject of a thorough analysis by Chief Military Judge Dutil in *R. v. Nguyen*, 2005 CM 57; *R v. Lasalle*, 2005 CM 46; *R. v. Joseph*, 2005 CM 41; *R. v. Hoddinott*, 2006 CM 24; *R. v. Middlemis*, 2008 CM 1025; and *R. v. Semrau*, 2010 CM 1004.

[19] Essentially, the Chief Military Judge asked himself whether the numerous amendments made to the Act since *Edwards* and *Lauzon*, above, and *R. v. Généreux*, [1992] 1 S.C.R. 259, all of which, in his view, have had a significant impact on the function of military judges, had not in fact undermined the security of tenure of military judges to such an extent that it no longer complied with the requirements of the Charter.

[20] After conducting a detailed review of the amendments to the Act and to the organization of military justice, he determined the following at paragraph 65 of *Nguyen*:

> [65] The nature of the duties and the increased role of the military judge, as clearly indicated in the current statutory and regulatory provisions, ensure that a fixed term no longer complies with the minimum requirements of section 11(*d*) of the *Charter*, in the context of military justice and the evolution of the law in matters of judicial independence. This Court is persuaded that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge appointed to hold office during good behaviour for a term of five years, and who is presiding at a standing court martial — or any other court martial — does not enjoy such security of tenure as to be able to try the cases that come before him on the merits without intervention by anyone from outside in the manner in which the judge conducts the case and delivers his decision. The Court concludes, on the basis of all the evidence filed in this Court, that this violation has not been justified within the framework of the section 1 *Charter* review.

[21] Further on, at paragraph 68, he states that the "appointment of a military judge for a fixed renewable term of office does not adequately reflect the increase in the status and powers conferred on military judges under the present legislation and in the context of a modern Canadian society".

[22] In order to maintain the integrity of the military criminal justice system as well as an independent and impartial court martial, the Chief Military Judge used the dissociation method. He kept section 165.21 in force, but removed the words "for a term of five years" from subsection 165.21(2) of the Act. He declared subsection 165.21(3) of the Act, which allows for reappointments, inoperative, and made the necessary amendments to the relevant articles of the QR&O to remedy their constitutional invalidity. These sections, it should be recalled, provide for the scheme governing the said reappointment process.

[23] Judge Lamont, in *R. v. Parsons*, 2005 CM 16 and *R. v. Wilcox*, 2009 CM 2006, invoked the rule of *stare decisis*. He applied the findings and principles set out by our Court in *Lauzon*, which led him to find that five-year, renewable terms are constitutionally valid.

[24] Judge Lamont nonetheless found, in *Parsons*, that the reappointment process for military judges did not provide the important safeguards needed to meet the standard of judicial independence and security of tenure imposed by paragraph 11(*d*) of the Charter. He ruled that articles 101.15 and 101.17 of the QR&O violated paragraph 11(*d*). Consequently, he declared that articles 101.15(2), (3) and 101.17(2) of the QR&O, dealing with the structure of the Renewal Committee and the factors to be considered by the Committee when making a recommendation as

to the reappointment of a military judge, were of no force and effect: see his decision at paragraphs 130 and 131.

[25] *Parsons* and *Dunphy* were appealed by the accused: see *R. v. Dunphy*, 2007 CMAC 1. On cross-appeal, the prosecution challenged the declaration that there had been a breach of paragraph 11(*d*) of the Charter. Our Court concurred with the opinion of Judge Lamont that there had, in fact, been a breach of paragraph 11(*d*): see paragraph 1 of the decision.

[26] As for the declaration of invalidity of articles 101.15(2) and (3) and 101.17(2) of the QR&O, our Court offered a certain number of comments with regard to the question of renewable term appointments and indicated that the time had come to reconsider *Lauzon*, which dated back to 1998. At paragraphs 14 to 23, the Court wrote:

> [14] Assuming that the cross-appeal has not been rendered moot by our disposition of the appeals and is properly before us, we offer the following comments.
>
> [15] In determining whether or not a military judge has security of tenure, the test to be applied is an objective one. Would a reasonable and right-minded person, informed of the relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically - and having thought the matter through- conclude that a military judge presiding at a court martial is at liberty to decide the case that comes before him on its merits without interference by any outsider with the way in which he conducts his case and makes his decision. See *R. v. Valente,* [1985] 2 S.C.R. 673 at paras. 12-13 and 22; *R. v. Lippé,* [1991] 2 S.C.R. 114 at para. 57.
>
> [16] In *R. v. Généreux*, [1992] 1 S.C.R. 259 at para. 86 Lamer C.J. said:
>
> > Officers who serve as military judges are members of the military establishment and will probably not wish to be cut off from

> promotional opportunities within that career system. It would therefore not seem reasonable to require a system in which military judges are appointed until the age of retirement.

[17] Subsequently, in *R. v. Lauzon,* [1998] C.M.A.J. No.5, para. 27 this Court held:

> In our view the fact that the posting of an officer to a military trial judge position is renewable does not necessarily lead to the conclusion that institutional independence is lacking if the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions.

[18] The time has come to reconsider this decision.

[19] The evidence filed before the military judge indicates that the rationale behind *Généreux*, above, and *Lauzon,* above, no longer exists. It is no longer true that a posting to a military judge's position is merely a step in a legal officer's career and that military judges would necessarily want to maintain their connections with the Canadian Forces to preserve their chances of promotion. A military judge doesn't receive a Performance Evaluation Report which is necessary for career advancement. Further the military judge could come back into the chain of command and find him/herself subject to a person he or she had tried. In addition, a return to regular military service would entail a significant financial loss.

[20] With the evolution of time court martial courts have become quite different from the way they were. At General Courts Martial the military judge is no longer an adviser but now performs a role akin to a judge in the civilian courts; that is even more so at Standing Courts Martial such as the ones from which these appeals are brought.

[21] Although the legislation sets out certain factors that the Renewal Committee must and must not consider, it is clear that the Committee's decision is not limited to those factors. Quite apart from the lack of transparency that results, the articles in question cannot act as a sufficient legislative restraint to remove concerns respecting security of tenure. As former Chief Justice Lamer observed in his last report, at p. 1406 of the Appeal book volume VII: "...institutional safeguards are currently not in place to protect a military judge from a reasonable apprehension of bias should it be determined that the military judge's term not be renewed."

> [22] He concluded by recommending that military judges be awarded security of tenure until retirement subject only to removal for cause on the recommendation of an Inquiry Committee.
>
> [23] We agree with his recommendation that military judges be awarded security of tenure until retirement subject to removal for cause. The deficiencies noted by the military judge in the judgments appealed from would cease to have any relevance if those recommendations were followed. We also note that the current provisions will become a dead letter if Bill C-7 is passed.
>
> [Emphasis added]

[27] We can now proceed with an analysis of the judge's decision and the parties' submissions.

Analysis of the judge's decision and the parties' submissions

a) The constitutional issue

[28] In the case at bar, the judge affirmed the Chief Military Judge's position that the words "for a term of five years" had been removed from subsection 165.21. He therefore concluded that, on a constitutional level, he had the necessary institutional independence and security of tenure to preside at the court martial and hear the appellant's case. In so doing, he did not issue the general declarations of constitutional invalidity sought by the appellant.

[29] Counsel for the respondent opposed the issuing of such declarations "tooth and nail", to use his expression. He claimed that while security of tenure for military judges, subject to removal for cause, may be desirable, it is not constitutionally required. At this point it might be timely to briefly

examine the evolution of the status and functions of military judges as well as the concept of judicial independence.

[30] I have already cited the observations and findings made by our Court in *Dunphy*, above. They make reference to the end result of certain administrative and legislative changes in matters of military criminal justice.

[31] I have no intention of re-examining in detail each and every amendment to the Act and to the organization of military criminal justice that have led to an increase in importance of the role of military judges on a constitutional level since *Généreux* and *Lauzon*, above. This was done meticulously and judiciously by the Chief Military Judge in *Nguyen*, *Middlemiss* and *Semrau*, above. I refer to it approvingly. I would like to, if I may, illustrate the extent of these changes by citing just a few examples that are not necessarily those noted by the Chief Military Judge.

[32] The reduction in the number of courts martial from four to two, coupled with the fact that some offences now fall under the exclusive jurisdiction of the General Court Martial and the fact that it is now the accused, and not the prosecution, who can choose the court martial where the trial will take place, mean that military judges are called upon to play an important role in trials before General Courts Martial that include five-member panels. In addition, there is the relatively new rule whereby a decision of the panel in respect of a finding of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder is no longer determined by a simple majority, but by the unanimous vote of its members: see subsection 192(2) of the Act.

[33] The Standing Court Martial, which, prior to the recent reforms, had limited jurisdiction and sentencing powers, has seen these restrictions disappear. Now, its jurisdiction to try persons for service offences (*rationae materiae*), with regard to the place of the commission of the offence (*rationae loci*) and on the person (*rationae personae*) is identical to that of the General Court Martial. Its jurisdiction is no longer limited to military personnel. It extends to any civilian who is liable to be charged, dealt with and tried on a charge of having committed a service offence, which was not the case before: see sections 166, 166.1, 173 and 175 of the Act. At this level of jurisdiction, only the fact that the Standing Court Martial is composed of a single military judge distinguishes it from the General Court Martial, which, as was previously mentioned, is composed of a military judge and a panel of five members: see sections 167 and 174 of the Act.

[34] Like their colleagues at superior courts or provincial courts of criminal jurisdiction, military judges have the power:

a) to issue orders prohibiting a person from possessing a firearm (section 147.1), to order the surrender (section 147.2) or forfeiture of any firearms (section 147.3);

b) notwithstanding any requirement in the *Criminal Code*, to increase the portion of the sentence that must be served before the offender may be released on parole (sections 140.3 and 140.4); and

c) to issue warrants authorizing the taking, for the purpose of forensic DNA analysis, of samples of bodily substances (section 196.12), of additional samples (section 196.24) and to make an order prohibiting access to information relating to these warrants (section 196.25).

He or she may impose a whole array of sentences from imprisonment for life to dismissal with disgrace from Her Majesty's service, with serious consequences for the accused: see section 139 of the Act. Prior to amendments to the Act in 1998, military judges could issue death sentences.

[35] In short, we are at a point where, pursuant to section 130 of the Act, which incorporates into the *Code of Service Discipline* all offences under the *Criminal Code* or any other Act of Parliament, military judges exercise the full powers of superior and provincial courts of criminal jurisdiction, with the exception of the power to try a person charged with the offence of murder, manslaughter and child abduction under sections 280 to 283 of the *Criminal Code* committed in Canada: see section 70 of the Act.

[36] They are called upon to try the most serious offences in our criminal law or to preside at General Courts Martial that include a five-member panel that the military judge must direct in law and that have jurisdiction to try these offences. They include murder and manslaughter committed outside Canada: see for example *R. v. Deneault* (1994), 5 CMAC 182 (murder committed in Germany); *R. v. Brown* (1995) 5 CMAC 280 (manslaughter and torture in Somalia); *R. v. Laflamme* (1993) 5 CMAC 145 (manslaughter in Germany); *R. v. Brocklebank* (1996) 5 CMAC 390 (charged with complicity in an act of torture associated with the death of the victim in Somalia); and *R. v. Semrau*, 2010 CM 4010 (charged with 2nd degree murder and attempted murder in Afghanistan).

[37] I agree with the Chief Military Justice that the numerous amendments to the Act have, on the one hand, caused the roles and functions of military judges to become intrinsically comparable

to those of civilian criminal court judges, and, on the other hand, enhanced fairness in the military justice system for military personnel facing criminal charges: see *Nguyen*, above, at paragraph 43, and *Middlemiss*, above, at paragraph 19.

[38] Judges of superior courts of criminal jurisdiction enjoy a constitutional guarantee of security of tenure. They are appointed and hold office during good behaviour and must vacate their offices at the age of seventy-five (75): see section 99 of the *Constitution Act (1867)*, R.S.C. 1985, Appendix II. Provincial court judges acquire their security of tenure through their governing statutes along with a fixed retirement age: see for example Quebec's *Courts of Justice Act*, L.R.Q., c. T-16 at sections 92.1 and 95, where judges hold office during good behaviour until they reach the age of 70, Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C-43, at section 47, where the retirement age is set at 65, the *Provincial Court Act*, RSBC 1996, c. 379 of British Columbia at section 17, and the *Provincial Court Act*, RSNS 1989, c. 238 of Nova Scotia at section 6, where judges hold office during good behaviour until they reach the age of 75, while in Alberta the security of tenure is the same, except that the retirement age is set at 70, *Provincial Court Act*, RSA 2000, c. P-31, section 9.22.

[39] Security of tenure for judges is, along with administrative independence and financial security, a component of judicial independence: see *Provincial Court Judges' Assn. of New Brunswick v. Nouveau-Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286, at paragraph 7.

[40] As the Supreme Court stated at paragraph 4 of the decision: "[t]he basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution". To which the court added:

> Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard*, at p. 70), and has been said to exist "for the benefit of the judged, not the judges" (*Ell*, at para. 29). Independence is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process; *Beauregard*, at p. 70.
>
> [Emphasis added]

Paragraph 11(*d*) of the Charter "[applies] to courts and tribunals that determine the guilt of those charged with criminal offences: see *Ell v. Alberta*, [2003] 1 S.C.R. 857, at paragraph 18.

[41] The concept of judicial independence has evolved over the last few years. At paragraphs 2 and 3 of *Provincial Court Judges' Assn. of New Brunswick*, above, the Supreme Court wrote:

> 2 The concept of judicial independence has evolved over time. Indeed, "[c]onceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence . . . . Opinions differ on what is necessary or desirable, or feasible": *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 692, *per* Le Dain J.
>
> 3 This evolution is evident in the context of judicial remuneration. In *Valente*, at p. 706, Le Dain J. held that what was essential was not that judges' remuneration be established by an independent committee, but that a provincial court judge's right to a salary be established by law. By 1997 this statement had proved to be incomplete and inadequate. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Reference*"), this Court held that

> independent commissions were required to improve the process designed to ensure judicial independence but that the commissions' recommendations need not be binding. These commissions were intended to remove the amount of judges' remuneration from the political sphere and to avoid confrontation between governments and the judiciary. The *Reference* has not provided the anticipated solution, and more is needed.

[42] Courts martial have not escaped this evolution, and this is due to the crucial and fundamental role assigned to them under the Act in matters of criminal justice and military discipline. Thus, the salaries of military judges are revised and set after a review by the *Military Judges Compensation Committee* whose mandate is to examine the adequacy of military judges' pay, taking into account various factors including the role of financial security in maintaining judicial independence. This committee is similar to the *Judicial Compensation and Benefits Commission* established for civilian judges and shares the same objectives.

[43] The question of security of tenure of military judges was neither forgotten nor abandoned. The *Généreux* and *Lauzon* decisions, above, and *R. c. Bergeron* (1999), 6 CMAC 104, to name only a few, invalidated certain provisions of the Act that might have either undermined judicial independence, or given a reasonable person cause to believe or to fear that such may be the case. Thus, it was found that the institutional and organisational links between the Minister of Defence, the Judge Advocate General and the members of the Office of the Judge Advocate General who represented the Executive and the military judges did not provide a sufficient guarantee of impartiality and institutional independence with regard to, among other things, security of tenure of military judges due to their appointment and removal process.

[44] The question of security of tenure has led to military judges being granted greater constitutional guarantees of institutional independence. I believe we have now reached a new crossroads regarding this question and that the only viable way forward is that which leads to the legislative provisions under review being declared unconstitutional.

[45] I will begin by returning to one of the observations made by our Court in *Dunphy*, above. It is found at paragraph 19 of the decision, which I reproduced above. I completely agree with observations made by our Court to the effect that the function of a military judge has taken on a stature of its own. For a judge it is no longer, as it was at the time of *Généreux* and *Lauzon*, above, a simple transition stage in his or her military career, a springboard to another promotion, or a feather in his or her cap. It has become a career for jurists who seek to apply their knowledge for the benefit of and in the service of the needs of military criminal justice.

[46] The conditions under which military judges exercise their functions are now such that the position is considered to be the crowning achievement of a lawyer or counsel's career. In this respect, their situation is similar to that of judges in civilian courts.

[47] For civil and criminal courts and the judges who sit on them, it was decided that the three components of judicial independence, including, particularly with regard to security of tenure, the requirement of the granting of an office during good behaviour, are constitutionally required in order to comply with the right to a hearing by an independent and impartial tribunal. It seems inconceivable to me, and I say this with all due respect for the contrary view, that military judges,

who exercise the same functions and have essentially the same powers as superior and provincial courts of criminal jurisdiction, should be subject to the whims, the unknowns, the uncertainty and anxiety of having their positions come up for renewal every five years. In fact, they are the only judges with such jurisdiction to be subject to short, renewable terms of employment.

[48] Military judges also preside at General Courts Martial. These function, with some minor differences, like civil trials by jury. The five members of the panel determine the guilt or innocence of an accused for the most serious offences in criminal law and for those offences for which the accused chooses to be tried by the panel.

[49] But there is an important difference in terms of the composition of the jury in a civil trial and that of the members of a panel of a General Court Martial. This difference, in my view, has an impact on the question of the independence of military judges presiding at General Courts Martial in that it highlights the need for better guarantees of independence.

[50] In a civil trial, the jury is made up of 12 people who generally do not know each other and are chosen by the prosecution and the defence from a list of individuals who qualify for jury duty.

[51] There are only five members of a panel of a General Court Martial but they are all part of the chain of command. They are not chosen by the prosecution or by the accused. They are appointed by the Court Martial Administrator using a random methodology: see section 165.19 of the Act and subsection 111.03(1) of the QR&O. The composition of the panel varies according to

the rank of the accused: see section 167 of the Act. However, except for a few rare exceptions, the panel members know each other, especially at the officer level, as they have been in contact with each other or have either been under the command of or in command of a fellow panel member. The military judge presiding at these General Courts Martial is often of lower rank than the members of the panel.

[52] Judicial independence is "for the benefit of the judged: see *Provincial Court Judges' Assn. of New Brunswick*, above, at paragraph 4. It is important for the accused person that the judge not be, and not appear to be, beholden to these five members of the chain of command, that his or her security of tenure is not subject to reappointment and that his or her institutional independence provides the accused with the assurance of a fair and equitable trial. The late Chief Justice Lamer recognized this in his first review of the provisions and application of Bill C-25 amending the *National Defence Act* presented to the Minister of National Defence on September 3, 2003. Having further reflected on the matter since the position he had taken in *Généreux*, above, he recommended that military judges hold office during good behaviour in order to provide them with guarantees of institutional independence against a reasonable apprehension of bias: see page 21.

[53] I would add the following: An accused person who is tried before a military tribunal, even for an offence as serious as murder, does not have the right to a trial by jury. This possibility is denied under paragraph 11(*f*) of the Charter in the case of an offence where the maximum punishment for the offence is imprisonment for five years or more or a more severe punishment.

[54] In such a context, the accused person's right to a hearing by an independent and impartial tribunal, guaranteed under paragraph 11(*d*) of the Charter, takes on its full significance and becomes of paramount importance. Before a General Court Martial composed of a panel of members of the chain of command, the accused, who will be led from the hearing room in handcuffs to serve a life sentence without the possibility of parole for 20 or 25 years, must have the assurance, indeed the firm conviction, that the presiding military judge enjoyed the security of tenure necessary to ensure the fairness of the proceedings he or she has been subject to. The accused person must also be able to be confident that the sentence he or she received was imposed by a military judge who enjoys the constitutional protection required to ensure the legitimacy of the sentence. I do not believe that five-year renewable terms for military judges provide the necessary constitutional protection, especially if you consider the added fact that it was considered necessary to give such protection to civilian judges exercising the same functions.

[55] The government has shown that it is sensitive to the need to provide better guarantees of security of tenure for military judges. Unfortunately, all of the three bills tabled by the government died on the order paper in the House of Commons: see Bill C-7, *An Act to amend the National Defence Act*, April 27, 2006, section 39, Bill C-45, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, March 3, 2008, section 38, and Bill C-60, *An Act to amend the National Defence Act and to make a consequential amendment to another Act*, June 16, 2010.

[56] Like its predecessors, Bill C-60 proposed that military judges be appointed and hold office until they reach retirement age. This proposal, however, raises certain difficulties due to the fact the retirement age for military judges varies according to their rank and their date of enlistment in the Armed Forces: see article 15.17 of the QR&O, *Release of officers – Age and length of service*.

[57] Consequently, military judges currently holding office, who enlisted in the Canadian Forces prior to 2004, will retire at different ages. I agree with the Chief Military Judge that, in the interests of treating judges equally, the age of retirement should be the same for all military judges, regardless of their rank. As he stated at paragraph 14 of *Hoddinott*, above, "[f]or that matter, it should be noted that the rank of a military judge is irrelevant to the appointment, the remuneration and the powers of a judge under the *National Defence Act* or the *Queen's Regulations and Orders for the Canadian Forces*".

[58] But there is more. The retirement age may be extended under sub-articles 15.17(3) and (5) of the QR&O, which read as follows:

15.17	**15.17**
…	[…]
(3) Subject to paragraph (5), an officer of the Regular Force shall be released	(3) Sous réserve de l'alinéa (5), tout officier de la force régulière est libéré :
(*a*) upon reaching the appropriate age prescribed under subparagraph (1)(*a*); or	*a*) lorsqu'il atteint l'âge approprié prévu au sous-alinéa (1)*a*);
(*b*) <u>except in the case of a military judge</u>, after the completion of 30 years	*b*) <u>sauf dans le cas d'un juge militaire</u>, s'il a terminé 30 années de service à

of full-time paid service, including service as a non-commissioned member, in any of Her Majesty's Forces, if the Chief of the Defence Staff so recommends.	plein temps et rémunéré dans l'une des forces de Sa Majesté, y compris en qualité de militaire du rang, et que le chef d'état-major de la défense le recommande.
…	[…]
(5) The retention of an officer of the Regular Force beyond the release age prescribed in subparagraph (1)(*a*) or the retention of an officer of the Reserve Force beyond the release age determined under paragraph (4) may be authorized:	(5) Le maintien en service d'un officier de la force régulière au-delà de l'âge de retraite prévu en vertu du sous-alinéa (1)*a*) ou le maintien en service d'un officier de la force de réserve au-delà de l'âge de retraite déterminé aux termes de l'alinéa (4) peut être autorisé :
(*a*) by the Minister; or	*a*) soit par le ministre;
(*b*) by the Chief of the Defence Staff if: (i) the period is less than 365 days, or (ii) the officer is of or below the rank of colonel.	*b*) soit par le chef d'état-major de la défense, si selon le cas : (i) la période est de moins de 365 jours, (ii) l'officier détient le grade effectif de colonel ou un grade moins élevé.

[Emphasis added]

[59] In the case of a military judge, the extension of the retirement age cannot be recommended by the Chief of the Defence Staff (see paragraph 15.17(3)(*a*)), but may be authorized by the Minister, at his or her discretion (see paragraph 15.17(5)(*a*)). In my view, such ministerial discretion, interfering with the retirement age of judges, needlessly raises an issue which can only be detrimental to the organization and administration of military criminal justice and, above all, to the independence of the military judiciary.

b) The remedy to the constitutional issue

[60] It should be recalled that, as of 2005, the Chief Military Judge removed the five-year limit for terms of appointment for military judges from subsection 165.21(2) of the Act. In so doing, he conferred a security of tenure upon courts martial judges until the age of retirement as a result of subsection 165.21(4) of the Act, which provides for this. As with the proposed measures in the defunct bills, the position taken by the Chief Military Judge has the merit of granting security of tenure, but it does not resolve the problem posed by subsection 165.21(4) of the Act. It is obvious that he could only do so much and that legislative intervention is needed.

[61] Such intervention is required on a constitutional level not only to provide a solid legislative underpinning for the security of tenure of military judges with the safety valve of removal for cause, but also to prevent interference from the Executive with regard to the retirement age, which, through a discretionary extension on the whim of the Executive, would allow a judge to continue to hold office past the age of retirement.

[62] When added together, subsection 165.21(4) of the Act and sub-articles 15.17(3) and (5) of the QR&O have the potential to undermine both the individual and institutional independence of the military judiciary or, almost assuredly, raise a reasonable apprehension in a reasonable and right-minded person that this independence may be undermined by external interference, in this case, that of the Minister. The individual and institutional dimensions of judicial independence include the need to ensure that a "judge is free to decide upon a case without influence from others" and the

need to "maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government": *Ell v. Alberta*, above, at paragraphs 21 and 22.

[63] In addition, the Supreme Court added the following at paragraph 23 of this decision:

> Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it": see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 38, *per* Gonthier J. The principle requires the judiciary to be independent both in fact and perception.
>
> [Emphasis added]

[64] Given the fact that the issue of security of tenure for military judges has been the subject of contradictory decisions that have generated concern and uncertainty since 2005, that the Government has continued to reappoint military judges as if the declarations of unconstitutionality of five-year terms had never existed (see: the reappointment of judges Dutil and Lamont), and that no legislation has been enacted to correct this situation, I have no other choice but to declare invalid and of no force and effect subsections 165.21(2), (2.1), (3) and (4) of the Act as well as articles 101.15, 101.16 and 101.17 of the QR&O as amended by Order in Council P.C. 2008-0548 dated March 11, 2008. However, I would suspend the declaration of invalidity and its coming into force for a period of six months from the date of this judgment.

The legality of the guilty verdict against the appellant

[65] Relying on the security of tenure provided for in *Nguyen* et seq., above, the judge proceeded to hear the witnesses and weigh the evidence. The appellant alleged that the judge erred in law when he determined that the appellant's conduct constituted a marked departure from the standard of care expected of him in performing his duty.

[66] The appellant also submits that the judge did not assign enough weight to the entire security apparatus that was in place for the occasion, and, in particular, that they were not in a situation of apprehended danger on the base, that a second team was guarding the aircraft and that both the main entrance to the base as well as the gate near the tarmac were being guarded.

[67] With respect, I do not believe that the allegation against the judge is founded. The appellant was part of an elaborate and integrated security apparatus that was deemed to be necessary in the circumstances. If I may use a metaphor, I would say that the appellant was a link in the security chain that was put in place. And, as everybody knows, a chain is only as strong as its weakest link.

[68] Each link in the chain had a role to play. The appellant and Corporal Tremblay had been assigned to guard a specific sector, and it was their duty to guard it at all times. The fact that other links in the chain were also on guard duty could not, and did not, absolve him of the guard duty that was imposed on him and which he was expected to perform. I agree with counsel for the respondent

that the absence of his partner [TRANSLATION] "logically required complete vigilance on his part": see paragraph 61 of the respondent's memorandum of fact and law. If Sergeant Campbell was able to openly drive his truck right up to the appellant without him noticing, one can only imagine what could have happened if someone with malicious intentions had surreptitiously approached the appellant.

[69] In light of the circumstances relevant to the appellant's duty to remain vigilant, especially when his partner was absent, the judge determined that there had been a marked departure from the standard of care expected of the appellant. I cannot say that this finding was either erroneous, or unreasonable in the circumstances.

Did the judge err by not ordering a stay of the proceedings against the appellant?

[70] Having satisfied himself that he enjoyed security of tenure until the age of retirement, the judge had no reason to order a stay of proceedings, given the very narrow manner in which this concept is applied and the very limited possibility of associating it with the declaration of invalidity made under subsection 52(1) of the *Constitution Act*,1982 see *R. v. Ferguson*, [2008] 1 S.C.R. 96; *R. v. Demers*, [2004] 2 S.C.R. 489; and *R. v. Regan*, [2002] 1 S.C.R. 297.

Conclusion

[71] For these reasons, I would allow the appeal for the sole purpose of declaring invalid and of no force or effect subsections 165.21(2), (3) and (4) of the Act and articles 101.15, 101.16 and 101.17 of the QR&O, but I would suspend the declaration of invalidity and its coming into force for a period of six months from the date of this judgment in order to allow Parliament to make the necessary legislative corrections.

[72] In all other respects, I would dismiss the appeal.

[73] In conclusion, I would remind the parties that, by Notice dated June 12, 2002, given to the parties and counsel by the Chief Justice, they must identify (by underlining or marking the margins) the passages of decisions from the case law on which they intend to rely. This identification by each party allows the opposing party and members of the panel to better prepare for the hearing. It results in better exchanges during oral argument and saves time and energy for everyone involved.

"Gilles Létourneau"

J.A.

"I agree
Alexandre Deschênes, J.A."

"I agree
Guy Cournoyer, J.A."

Certified true translation
Sebastian Desbarats, Translator

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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CONCURRED IN BY:	DESCHÊNES J.A. COURNOYER J.A.
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APPEARANCES:

Major Eric Charland Major Edmund Thomas	FOR THE APPELLANT
Commander Martin Pelletier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services Gatineau, Quebec	FOR THE APPELLANT
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT