



HEARING BEFORE A MILITARY JUDGE

Citation: *R. v. Christmas*, 2025 CM 7003

Date: 20250429

Docket: 202424

Preliminary Proceedings

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Corporal K.L. Christmas, Applicant

- and -

His Majesty the King, Respondent

Before: Colonel S.S. Strickey, M.J.

REASONS ON AN APPLICATION TO HAVE CERTAIN INDIGENOUS PRACTICES INCORPORATED INTO COURTS MARTIAL

Introduction and background

[1] Corporal (Cpl) Christmas, the applicant, faces three charges: an offence punishable under section 130 of the *National Defence Act (NDA)*, that is to say, sexual assault, contrary to section 271 of the *Criminal Code*; an offence punishable contrary to section 93 of the *NDA*, disgraceful conduct; and, one charge contrary to section 97 of the *NDA*, drunkenness.

[2] A court martial was convened on 2 October 2024 for these charges. As noted in the convening order, a Standing Court Martial is scheduled for 5 May 2025 in Sydney, Nova Scotia.

[3] The applicant filed a notice of application and corresponding book of authorities on 15 April 2025. The applicant is seeking the following relief:

“1. An Order authorizing a smudging ceremony, on a volunteer basis, at the court martial location prior to the opening proceedings, to be coordinated with the hosting Unit;

2. [An order] authorizing the use of an Eagle Feather for the administration of oaths and affirmations to any witness or participant who so chooses; and

3. Any such further relief as this Court deems just.”

[4] The application was heard on 29 April 2025. Following receipt of arguments from both parties, I granted the application with written reasons to follow. Specifically, I ordered the following:

- (a) authorizing the performance of a smudging ceremony, on a volunteer basis, at the court martial location prior to the opening proceedings, to be coordinated with the hosting unit. The unit shall ensure that the smudging ceremony complies with all applicable federal, provincial and municipal laws, regulations and policies; and
- (b) authorizing the use of a Sacred Eagle Feather for the administration of oaths and affirmations to any witness or participant who so chooses.

Issue

[5] I granted the relief sought by the applicant. My reasons for granting the order are set out below.

Matters taken on judicial notice

[6] Along with the matters taken into judicial notice pursuant to Military Rule of Evidence (MRE) 15, counsel for the applicant requested that I take judicial notice of the following documents pursuant to MRE 17:

- (a) Office of the Commissioner for Federal Judicial Affairs Canada, Action Committee on Modernizing Court Operations: Indigenous Practices in the Courts;
- (b) Canadian Judicial Council, Eagle Feather Initiative – Supreme Court of Prince Edward Island; and
- (c) Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015).

[7] This request was not opposed by counsel for the respondent. The Court took judicial notice of the above-noted documents.

Evidence

[8] Counsel for the applicant entered as exhibits the notice of application, Exhibit PP1-1, and the certificate of service that accompanies the notice of application, Exhibit PP1-2. Counsel for the respondent did not enter any evidence into the record.

[9] One witness testified on behalf of the applicant, Major (Maj) Doyle. Counsel for the respondent did not call any witnesses.

[10] Maj Doyle is the Deputy Commanding Officer (DCO) and Plans Officer with The Cape Breton Highlanders (CB Highrs), the unit hosting the court martial of the accused. Maj Doyle testified that he has the approval of the commanding officer to support the accused's request to hold a smudging ceremony and have witnesses (on a volunteer basis) take the oath or affirmation using the Sacred Eagle Feather.

[11] Maj Doyle stated that the unit is familiar with the smudging ceremony and has conducted it in the past. Maj Doyle is also familiar with the use of the Sacred Eagle Feather; it has been used as part of previous cultural awareness training.

[12] In terms of the smudging ceremony, Maj Doyle testified there is a master warrant officer in the unit who is familiar with the tradition and has conducted a smudging ceremony at certain events, such as prior to an exercise or a parade. The ceremony has been conducted indoors in the past, in the drill hall. Maj Doyle testified that the drill hall has a high ceiling and fans that dissipate any smoke. The ceremony is generally short, depending on the number of people participating, approximately fifteen to twenty minutes. Following the ceremony, Maj Doyle estimates that it takes fifteen to twenty minutes for the smoke to dissipate.

[13] Regarding the Sacred Eagle Feather, Maj Doyle has been in contact with the Court Martial Administrator (CMA). Maj Doyle further stated that he has contacted the Sydney Provincial Court and is able to obtain a Sacred Eagle Feather on loan for the duration of the court martial. There are certain measures in place to ensure the Officer of the Court takes possession of it and it is properly respected. In addition, a member of the court staff from CB Highrs, Sergeant Stevens, is familiar with the traditions of smudging and the handling of the Sacred Eagle Feather. The Sacred Eagle Feather will then be returned to the Sydney Provincial Court where it can be secured.

[14] The respondent did not cross-examine Maj Doyle.

Application and submissions

[15] The notice of application states that the applicant/accused identifies as a member of the Mi'kmaq First Nation and resides within the Eskasoni Mi'kmaw Nation (a band government of the Mi'kmaq First Nations). Upon her enrollment in the Canadian Armed Forces, she swore her oath of allegiance with a Sacred Eagle Feather. She also regularly engages in smudging (the burning of sacred medicinal herbs such as tobacco, sage, cedar, and sweetgrass) as a foundational spiritual and cultural practice. From the applicant's perspective, it represents a way of preparing spiritually and mentally for solemn proceedings and is "essential to her meaningful participation in this court martial proceeding" (see notice of application, paragraphs 10 to 12).

[16] The application submits that Sacred Eagle Feathers are recognized in Canadian civilian courts as a valid sacred object for purposes of swearing an oath or giving an affirmation. The

Sacred Eagle Feather is used as a solemn alternative to the Bible or a secular affirmation. In addition, several provincial jurisdictions have taken steps to incorporate the Sacred Eagle Feather as a valid ceremonial object for the purposes of an oath or affirmation (see notice of application, paragraph 13). From the applicant's perspective, courts martial offer witnesses to swear an oath on the Bible or affirm; however, "the absence of Indigenous ceremonial options may undermine the perceived neutrality of these choices, inadvertently favouring Christian practices and marginalizing Indigenous spirituality." (see notice of application, paragraph 16).

[17] In oral submission, counsel for the applicant stated that the current structure of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) allows a witness to either swear an oath or affirm prior to giving their evidence. The applicant is not seeking an order to amend the QR&O but if an individual wishes to affirm, they can use the Sacred Eagle Feather with the same language set forth in the QR&O. In general, the application seeks for the court martial to allow a witness the opportunity to give an oath or affirm using the Sacred Eagle Feather. This would permit the court to employ oaths and affirmations in a more inclusive manner.

[18] From a practical perspective, the applicant stated that a Sacred Eagle Feather has been secured for the court martial, and its use would not delay the proceedings. In addition, granting the relief sought would recognize the efforts of the federal government and other civilian courts to incorporate the Sacred Eagle Feather into this court martial and set forth precedent for the future.

[19] Regarding the smudging ceremony, during oral argument the applicant outlined some practical issues related to the timing of the smudging with the beginning of the court martial.

[20] From the respondent's perspective, they take no issue with the substance of the applicant's argument as it relates to this court martial; however, they submit that no evidence has been put before the Court that an accommodation should be made in relation to an individual before the court martial. The respondent cautioned the Court that should any relief be granted, it should be limited to this specific court martial.

Analysis

[21] Having reviewed the notice of application and book of authorities, I agree with the applicant that civilian courts throughout Canada have adopted incorporating Indigenous practices aligned with national reconciliation efforts. At subparagraph 6(a), I took judicial notice of a document entitled "Office of the Commissioner for Federal Judicial Affairs Canada, Action Committee on Modernizing Court Operations: Indigenous Practices in the Courts" (Action Committee paper"). The Action Committee on Modernizing Court Operations is co-chaired by the Chief Justice of Canada and the Minister of Justice and Attorney General of Canada. The Action Committee is supported by an Indigenous Advisory Group ("to enrich the Action Committee's work by ensuring that Indigenous perspectives are accurately reflected", and [by] a Technical Working Group ("to ensure that national perspectives are reflected")).

[22] The Action Committee paper sets out several guiding principles. Two of these principles are “Adopting an Orientation of Humility, Respect and Receptivity” and “Incorporating Indigenous Practices”. More specifically, some excerpts from these guiding principles set out the following:

2.2 Adopting an Orientation of Humility, Respect and Receptivity

Most justice actors do not have lived experience with, or expertise in, Indigenous practices. There is much that non-Indigenous judges, court administrators and counsel do not know, to the extent that people often “don’t know they don’t know.” As such, it is important to work to incorporate Indigenous practices in the courts with humility, respect and receptivity to new Indigenous led ideas.

4.1 Pathways to Incorporating Indigenous Practices in Specific Cases

Although court leadership will be at the forefront of creating relationships, individual judges and court administrators have important supporting roles at the institutional level. Significantly, they will encounter opportunities to incorporate Indigenous practices on a more everyday basis within specific proceedings and court operations. Creating a welcoming and accessible environment at the individual case level is equally important as the work happening at the more institutional level.

[23] As it relates to smudging ceremonies within the civilian courts, the Action Committee paper cites two examples: one from the Provincial Court of Saskatchewan and the other from the Manitoba Court of King’s Bench. In Saskatchewan, the Provincial Court has adopted a protocol for an Indigenous Smudging Ceremony. Some of the key provisions are set out as follows:

Purpose for Granting a Request for Smudging Ceremonies

The Provincial Court recognizes that supporting and incorporating Indigenous customs and practices within the Court will foster understanding and respect.

The Provincial Court supports smudging in courtrooms in appropriate circumstances and places to confirm the establishment and maintenance of mutually respectful relationship between Court and Indigenous people, thereby achieving a measure of reconciliation in the criminal justice system over which the Provincial Court has authority.

Request and Authorization Procedure

The Provincial Court supports the use of smudging ceremonies and recognizes that there will be times when smudging may be appropriate as part of a court proceeding such as a sentencing hearing, or in order that testimony from an accused, complainant, or witness may be effectively provided.

[. . .]

In consideration of the approval of a smudging ceremony, the presiding judge/Chief Judge will consider where applicable:

- the circumstances in which the request is being made;
- who will hold the smudging ceremony;
- whether there is a location for the smudging ceremony identified or an alternative location identified in if the initial location is not appropriate or viable;
- if there is sufficient time to facilitate the smudging ceremony without impediment or hindering other court matters;
- if a smudging ceremony is customarily practiced by the person making the request.

[24] At section 5.2, the Action Committee paper also cites the work of the Manitoba Court of King’s Bench – Trust, Reconciliation and Access to Justice Committee. That Committee, formed in 2017, was centered on “address[ing] the unique obligations, opportunities and challenges that currently surround the court’s relationship with Indigenous Manitobans in an era of reconciliation.” More specifically, the Action Committee paper noted that smudging requests are more frequently made before the Manitoba Court of King’s Bench:

Increasingly, requests are being made for smudging ceremonies in King’s Bench courtrooms on matters touching the Indigenous community. Currently requests are being addressed by the Court as they arise, with planned work on the development of guidelines and protocols in the coming year.

[25] In terms of the use of the Sacred Eagle Feather, the Action Committee paper refers to this practice at 4.2.2 “Sacred Objects and Other Meaningful Symbols in the Courtroom”:

Sacred Objects and other meaningful symbols in the courtroom, although perhaps more subtle than Indigenous ceremonies, can be equally powerful for those who resonate with these symbols. Some examples in Canadian courts of court proceedings include:

- Administering the Oath with an Eagle Feather.

[. . .]

Sacred objects have also been incorporated into many courts across the country for the specific use of affirmations. To date, the most common sacred object incorporated for affirmation by First Nations and Métis has been the eagle feather (see for example the Eagle Feather Initiative from the Supreme Court of Prince Edward Island . . .)

[26] The above-noted initiative in the Supreme Court of Prince Edward Island is outlined on the website of the Canadian Judicial Council (CJC). That initiative took place in 2020 and is explained as follows:

The Eagle Feather Initiative provides an opportunity for the Eagle Feather to be used in the same way as a Bible to swear an oath or an affirmation. Preparation and training for handling and caring for the Eagle Feathers was provided to the courts.

Those testifying may hold the Eagle Feather or have it placed in front of them while affirming to tell the truth, or when providing an affidavit, sworn statement or statutory declaration. Each courthouse now has an Eagle Feather available for courtroom use.

[27] Finally, the notice of application cites a news article¹ outlining that the use of an Eagle Feather for affirmations or oath swearing has been available in Nova Scotia Courts since 2018. Indeed, Maj Doyle testified that for the purposes of the upcoming court martial, the unit was able to obtain a Sacred Eagle Feather from the Nova Scotia Provincial Court in Sydney. In Ontario, the *Ontario Superior Court of Justice: Modernizing The Justice System 2019-2023 Report*, notes at page 51 the incorporation of the use of Eagle Feathers into the Northeast Region of the province:

A significant Indigenous population inspires our judges to strengthen their understanding of Indigenous culture and to foster their relationship with them. Over the past five years, the judiciary developed and implemented learning opportunities to increase cultural competence regarding Indigenous people. This included meetings with Elders on the National Day for Truth and Reconciliation to discuss the Court's role regarding the Calls to Action and receiving teachings on Indigenous peoples' experiences within the court system. Further, the region's judiciary also participated in Indigenous ceremonies, including teachings involving eagle feathers and the transfer of responsibility for an eagle feather in one of our districts. Responsibility for this eagle feather was granted by an Elder for use in our courts

[28] All that to say, it has been established by the applicant that civilian courts in Canada have adopted the Indigenous practices of smudging and the use of the Sacred Eagle Feather for affirmation or oath swearing. The next issue to determine is how these practices can be incorporated into the upcoming court martial.

Law

Oaths and affirmations – military justice system

[29] The law surrounding oaths and affirmations in the military justice system are outlined in the *NDA* at section 251 and section 251.1 respectively:

Oaths

¹ See CBC News: *Eagle Feathers introduced to Nova Scotia Court System for Legal Affirmations* (8 Nov 2018), available at: <https://www.cbc.ca/news/indigenous/eagle-feathers-affirmations-nova-scotia-court-1.4897541>

251 At summary hearings and courts martial, and at proceedings before a military judge, board of inquiry or commissioner taking evidence under this Act, an oath must be taken by or administered to the following persons in the manner and in the forms prescribed in regulations made by the Governor in Council:

- (a) the officer conducting the summary hearing;
- (b) the judge presiding at the court martial;
- (c) each member of the panel of the court martial;
- (d) each member of the board of inquiry;
- (e) the commissioner;
- (f) court reporters;
- (g) interpreters; and
- (h) subject to section 16 of the *Canada Evidence Act*, witnesses.

Solemn affirmation instead of oath

251.1 (1) A person who is required to take an oath under this Act may, instead of taking an oath, make a solemn affirmation.

Effect

(2) A solemn affirmation has the same force and effect as an oath.

[30] In terms of the QR&O, oaths and affirmations are set out at articles 112.20 and 112.21.

112.20 – OATH TO BE TAKEN BY WITNESSES

The oath to be taken by a witness shall be administered by the judge and shall be in the following form:

“I swear that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth. So help me God.”

NOTE

For making a solemn affirmation in lieu of an oath, see article 112.21 (Affirmation in Lieu of Oath).

112.21 – AFFIRMATION IN LIEU OF OATH

(1) Section 251.1 of the *National Defence Act* provides:

“251.1 (1) A person who is required to take an oath under this Act may, instead of taking an oath, make a solemn affirmation.

(2) A solemn affirmation has the same force and effect as an oath.

(3) An oath or a solemn affirmation under this Act has, in respect of any prosecution under the *Criminal Code*, the same force and effect as an oath taken before a civil court.”

(2) The form of a solemn affirmation shall be as prescribed for the appropriate oath and adapted as follows:

(a) in the case of an oath taken in accordance with article 112.16, the words “and affirm” are to be substituted for the words “and swear” and the words “So help me God” are to be omitted; and

(b) in all other cases, the words “I solemnly affirm” are to be substituted for the words “I swear” and the words “So help me God” are to be omitted.

[31] In their application, the applicant cites subsection 179(1) of the *NDA*. In their view, this section provides the necessary legal authority to grant the order(s) sought. The applicable paragraphs of section 179 are as follows:

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:

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

[. . .]

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

[32] The applicant cited several cases where my judicial colleagues applied section 179 to the circumstances of a particular case (see *R. v. Barrieault*, 2019 CM 2013 at paragraphs 19 to 21; *R. v. Gobin*, 2018 CM 2006 at paragraph 3; *R. v. Levesque*, 2022 CM 2012 at paragraph 14; *R. v. Machtmes*, 2021 CM 2002 at paragraphs 14 to 19, 27, and 47; *R. v. Sutherland*, 2022 CM 5022 at paragraph 10). I have also considered *R. v. Lavoie*, 2023 CM 4007 and *R. v. Maslin*, 2025 CM 7001.

[33] I concur with the now-Chief Military Judge Deschênes, at paragraph 10 of *Sutherland* that the powers outlined at section 179 are limited:

[10] The matters for which the power may be exercised are expressly listed in this section, which constitutes a clear indication of Parliaments’ intent to restrict the exercise of the authority to these matters, consistent with the legal nature of statutory courts. The addition of “all other matters necessary or proper for the due exercise of its jurisdiction” was meant to allow the exercise of these powers only when it is deemed imperative for the court to exercise its jurisdiction. In other words, paragraph (d), or section 179 of the *NDA* cannot be used if doing so would contravene another legislative provision.

[34] My colleague Pelletier M.J., succinctly outlined the limitations of section 179 in *Lavoie* at paragraph 45:

Section 179 of the *NDA* simply confers upon the court martial some powers of the superior courts in the enumerated areas (the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders) and all other matters necessary or proper for the due exercise of its jurisdiction. Section 179 is a provision that allows a court martial to operate as a court of law through respect, that is, by compelling those summoned to appear, to be sworn, to answer questions, and to bring documents and produce them; enforcing its orders; and punishing for contempt if necessary.

[35] As noted by Sukstorf M.J. in *Barrieault* at paragraph 21, a military judge should only consider section 179 in the “clearest of cases”:

[21] The exercise of inherent jurisdiction is a special and extraordinary power to be exercised only sparingly and in the clearest of cases and where it is required to maintain the authority and integrity of the court process. To put it simply, a military judge must exercise its power set out in section 179 that it does not contravene a statutory provision and the court cannot use section 179 as an end run around existing legislation.

[36] Finally, in *Maslin* the applicant (accused) requested to attend his court martial remotely. As there were no provisions in the *NDA* or QR&O directly on point, I applied QR&O article 101.04 when denying the application:

101.04 – CASES NOT PROVIDED FOR IN QR&O

When in any proceedings under the Code of Service Discipline a situation arises that is not provided for in QR&O or in orders or instructions issued to the Canadian Forces by the Chief of the Defence Staff, the course that seems best calculated to do justice shall be followed.

Smudging ceremony prior to the commencement of the court martial

[37] There are no provisions in the *NDA* or QR&O that refer to a smudging ceremony. Gleaning the rationale from *Maslin*, this situation seems appropriate to apply QR&O article 101.04. From a court operations perspective and utilizing the guidance from the Provincial Court of Saskatchewan noted above, the unit has conducted a ceremony in the past and are familiar with this tradition. The applicant identifies as a member of the Mi’kmaq First Nation and resides within the Eskasoni Mi’kmaq Nation. She regularly engages in smudging as a foundational spiritual and cultural practice. Taking all these factors into account, the smudging ceremony is authorized pursuant to QR&O article 101.04.

Authorizing the use of the Sacred Eagle Feather at the court martial

[38] In this situation, the *NDA* provides that at courts martial or before proceedings by a military judge, an oath or affirmation “must be taken” (*NDA* section 251 and section 251.1). Similarly, QR&O articles 112.20 (oath) and 112.21 (affirmation) use the word “shall” when outlining the specific wording to be used.

[39] As referenced above, numerous civilian courts across Canada have allowed the use of a Sacred Eagle Feather as an alternative to swearing an oath on the Bible or an affirmation in legal proceedings (see generally, *R. v. King*, 2022 ONCA 665 at paragraph 156; *R. v. KF*, 2024 ABCJ 14; *R. v. Arcand*, 2014 SKPC 214). However, as it relates to the *Canada Evidence Act*, there is only mention of oaths and affirmations before the Courts (see sections 13 to 16(1)).

[40] In the circumstances of this case, it is appropriate for the military judge to use its “inherent power to control its procedure in respect of residual matters that are not dealt with in the *NDA* or regulations” (see *Gobin* at paragraph 3) at section 179 of the *NDA* to allow witnesses

in this court martial who wish to use the Sacred Eagle Feather to swear an oath or affirm before giving their testimony.

[41] In my view, the utilization of section 179 in this case respects the jurisprudence of my fellow military judges in the *Lavoie*, *Sutherland* and *Barrieault* cases respectively. This is a very particular request where it appears to be the “clearest of cases” required to “maintain the authority and integrity of the court process” (see *Barrieault*, paragraph 21). In this case, the applicant demonstrated that the practice of administering an oath or affirmation with the use of a Sacred Eagle Feather is used within Canadian civilian courts. In addition, the relief sought would appear to fall directly within the purview of paragraph 179(a) that specifically contemplates, among other things, “the swearing of witnesses”. Finally, this remedy would also respect the ongoing efforts at reconciliation as noted in the Report on Truth and Reconciliation (cited in the appellant’s book of authorities) while also recognizing and adopting the current practice in civilian criminal courts to the military justice system.

[42] I agree with the respondent that while this decision could be used as guidance for my fellow military judges in future courts martial (see *R. v. Caicedo*, 2015 CM 4018), each case will be decided on its facts.

[43] That said, the incorporation of Indigenous practices into courts martial may be a topic to consider during the next independent review of the military justice system (see *R. v. Edwards*, 2024 SCC 15 at paragraph 80) :

I note that the task of reviewing policy for the military justice system is confided by statute to the Minister of National Defence who has a duty to “cause an independent review” of the operation of aspects of the *NDA*, including specifically the CSD [Code of Service Discipline] and report to Parliament (see s.273.601 noted in *Stillman*, at para 53).

[44] From a practical perspective, the unit has exhibited due diligence in incorporating Indigenous practices into these court martial proceedings. As it relates to a smudging ceremony, Maj Doyle testified it has been conducted by the unit in the past with no issues. For incorporating the Sacred Eagle Feather, the DCO has consulted with the CMA and secured the use of the Sacred Eagle Feather for the duration of the court martial. All that to say, incorporating these Indigenous practices would not impact court martial proceedings.

[45] While the applicant cites the *Canadian Charter of Rights and Freedoms* concerns, there is no requirement to address them in this decision. It is clear that Indigenous practices such as smudging and the use of the Sacred Eagle Feather have been incorporated into the civilian justice system. Using the guidance and policies of various jurisdictions within that system, these practices will be incorporated into the upcoming court martial using the Court’s authority under *NDA* section 179 and QR&O article 101.04 respectively.

FOR THESE REASONS, THE COURT:

[46] **GRANTS** the application made by Cpl Christmas.

[47] **ORDERS** the following:

- (a) authorizing the performance of a smudging ceremony, on a volunteer basis, at the court martial location prior to the opening proceedings, to be coordinated with the hosting unit. The unit shall ensure that the smudging ceremony complies with all applicable federal, provincial and municipal laws, regulations and policies; and
 - (b) authorizing the use of a Sacred Eagle Feather for the administration of oaths and affirmations to any witness or participant who so chooses.
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Counsel:

Major C.M. Da Cruz and Lieutenant-Colonel A.H. Bolik, Defence Counsel Services, Counsel for Corporal K.L. Christmas, Applicant

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner, Major M.D. Ferron and Lieutenant(N) E. Carley, Counsel for the Respondent