Citation: *R. v. Master Seaman R.J. Middlemiss*, 2008 CM 1025

Docket: 200857

GENERAL COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE, GATINEAU

Date: 15 December 2008

PRESIDING: COLONEL M. DUTIL, C.M.J.

MASTER SEAMAN R.J. MIDDLEMISS
(Applicant)
v.
HER MAJESTY THE QUEEN
(Respondent)

DECISION RESPECTING AN APPLICATION THAT THE GENERAL COURT MARTIAL IS NOT AN INDEPENDENT AND IMPARTIAL TRIBUNAL MADE UNDER S. 7 AND S. 11(*D*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.
(Rendered orally)

INTRODUCTION

[1] In a notice of application delivered on 23 October 2008, the applicant informed the court of his intent to make an application on the question of law that General Courts Martial created under ss. 166-168 of the *National Defence Act* are not independent and impartial tribunals as guaranteed by ss. 7 and 11(*d*) of the *Canadian Charters of Rights and Freedoms* (the *Charter*) . The applicant requested that the court enter a stay of proceedings and such other relief as this court would find just and appropriate. The applicant stated that this matter would be raised as a plea in bar of trial pursuant to subparagraph 112.05(5)(*b*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os). The court heard the application on 10 and 12 November, 2008. During the hearing of the application, the court refused to hear the matter as a plea in bar of trial under subparagraph 112.05(5)(*b*) and article 112.24 of the QR&Os and accepted to proceed under subparagraph 112.05(5)(*e*) and article 112.07 of the said regulations as being a proper matter to be disposed of by way of an application on a

question of law or mixed law and fact. The applicant brings this application alleging that the issue of judicial independence and impartiality of military judges presiding at courts martial and other judicial proceedings, which was dealt with almost three years ago in a series of decisions made at courts martial in *R. v. Nguyen*, *R. v. Ex-Leading Seaman Lasalle,* and *R. v. Corporal Joseph*[1]. With regard to the said decisions that the problem, or the issue, according to the applicant, has been activated by recent developments, including the Court Martial Appeal Court decision in *R. v. Dunphy* and *R. v. Parsons*[2]. The applicant further argues that the new regulatory scheme adopted by the Governor in Council on 11 March 2008 for the renewal process of military judges is still insufficient to meet the requirements of judicial independence.

POSITION OF THE PARTIES

The Applicant

[2] I will now deal with the positions of the parties. In both written and oral submissions, the applicant submitted that General Courts Martial, as presently constituted pursuant to ss. 166-168 of the *National Defence Act*, are not independent and impartial tribunals as guaranteed by ss. 7 and 11(*d*) of the *Charter* because military judges presiding at these courts martial have insufficient guarantees of judicial independence. Such a violation cannot, according to the applicant, be justified in a free and democratic society under s. 1 of the *Charter*. Consequently, the applicant asked this court to declare the affected legislation null and void pursuant to s. 52 of the *Constitution Act*.

[3] The applicant submits that the issue of judicial independence and impartiality of military judges presiding at courts martial and other judicial proceedings, which was dealt with almost three years ago in the series of decisions, has been activated by recent developments, including the CMAC decision in *R. v. Dunphy* and *R. v. Parsons*. The applicant further argues that the new regulatory scheme adopted by the Governor in Counsel on 11 March 2008 for the renewal process of military judges is insufficient to meet the requirements of judicial independence. This new renewal process would be deficient because the Renewal Committee makes only recommendations that are not binding on the Executive. The applicant further submits that the process is not open and transparent and the public has no way of reviewing the reasons of the Renewal Committee or the Executive in regard to reappointment. Finally, it is submitted that the list of factors is inadequate because it is not exhaustive and could be changed at the whim of the Executive, whereas the factors listed in QR&O 101.17(2)(*b*) of "any

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[1] 2005 CM 57, 19 December 2005; 2005 CM 46, 21 December 2005; 2005 CM 41, 10 January 2006.

[2] 2007 CMAC 1, 29 January 2007

compelling military requirement," is so open-ended, broad, and vague that is could be used to deny reappointments of military judges based on ulterior and improper motives.

[4] The applicant concluded its submissions in stating that the line of reasoning in the cases *Ngyuen, Lasalle*, and *Joseph* is compelling, cogent, and correct. The applicant advances that the decision of the Court Martial Appeal Court in *Dunphy* and *Parsons* supports the reasoning of the trilogy cases, although it could be said that this support comes in the form of *obiter dicta*. The only area where the applicant departs from the reasoning of the courts in the cases of *Ngyuen, Lasalle*, and *Joseph*, is with regard to the appropriate remedy. Although the applicant agreed that it is appropriate and likely that Parliament will choose to appoint military judges until retirement, this intent cannot simply be presumed, as it would not be the only legislative option. Therefore, the remedy sought is a declaration of invalidity under s. 52(1) of the *Constitution Act*.

The Respondent

[5] The respondent submits that appointing military judges for terms of five years does not violate s. 11(*d*) of the *Charter*. The respondent further submits that QR&O articles concerning the reappointment of military judges, as amended on 11 March 2008, in response to the Court Martial Appeal Court decision of *Dunphy* and *Parsons,* met the standard for security of tenure required by s. 11(*d*). It is further submitted that one should assume that the Chief Justice of the Court Martial Appeal Court, who constitutes the Renewal Committee, will act lawfully in performing his task and no further checks and balances are required for the renewal process. The respondent concedes that the broader issue of whether the appointment of a military judge for a fixed term of five years under s. 165.21(2) of the *National Defence Act* violates s. 11(*d*) of the *Charter* was not addressed nor argued before the CMAC, but limited to the narrower issue of the constitutionality of the renewal process, in particular, the adequacy of the regulations made under s. 165.21(3) of the *Act* that were applicable at the time of the rulings made by Lamont, M.J. Questioned by the court concerning the line of cases of *Ngyuen, Lasalle*, and *Joseph*, as well their legal effect, the respondent stated that the declaration of invalidity pronounced by the courts martial concerning ss. 165.21(2) and 165.21(3) could not have been appealed by the prosecution to the Court Martial Appeal Court because all cases resulted in findings of guilty.

[6] The respondent further submits that the constitutionality of the General Court Martial is not an issue unless the military judge does not possess substantial and sufficient guarantees of judicial independence. As such, should this court martial find that s. 165.21(2), of the *Act* violates s. 11(*d*) of the *Charter*, which states that military judges are appointed for five-year terms, the respondent submits that the approach taken in *Ngyuen, Lasalle*, and *Joseph* and *Hoddinott* is the correct one. The respondent submits that the words, "for a term of five years," should be severed from ss. 165.21(2) and 165.21(3) should be struck down and declared to be of no force and effect. Despite

the fact that Bill C-7 and Bill C-45, which would have provided military judges security of tenure until the age of retirement died on the Order Paper, the respondent submitted that it is likely that Parliament would still agree with such an approach.

BACKGROUND

[7] In order to deal with this application in a clear and concise manner, it is important to provide a sufficient background and legal context at the outset. In the decisions of *Ngyuen, Lasalle*, and *Joseph*, presided by this military judge, the courts martial declared that a Standing Court Martial presided by a military judge appointed under s. 165.21(2) did not constitute an independent and impartial tribunal under s. 11(*d*) of the *Charter*. After a thorough review of the evidence before the court and the evolution of the office of military judge, this military judge concluded that the appointment of a military judge for a term of five years, renewable, did not constitute a minimal impairment of the right guaranteed by the *Charter* to be tried by an independent and impartial tribunal in the context of military justice as set out in the *National Defence Act*. Although it was found to be perfectly acceptable that officers may be appointed as military judges to strictly perform judicial functions or functions that are not incompatible with these functions, the justification of a system of service tribunals that consist of summary trials for minor offences held by an officer within the chain of command, and of courts martial presided by military judges only, who play an important constitutional role, did require that the courts martial meet the highest possible standards of judicial independence. It was determined that the appointment of military judges for a fixed term renewable did not take sufficiently into account the evolution of the office of military judge or the extended role and functions of a military judge under the statutory framework in the context of a modern Canadian society.

[8] The fact that a fixed-term and renewable appointment for military judges had not been ruled unconstitutional under previous legislation was not determinative of the issue. The current legislative framework and recent evolution of the concept of judicial independence required, in the opinion of this military judge, that a military judge must be appointed until reaching the age of retirement for his or her rank, as opposed to the age of retirement applicable to other federally appointed judges, to meet the minimal constitutional requirements. Therefore, s. 165.21(2) of the *National Defence Act* could not be justified under s. 1 of the *Charter*. In these decisions, the courts martial considered that the appropriate remedies could be found in the application of s. 52 of the *Constitution Act*, although specific personal remedies under s. 24(1) of the *Charter* were not found adequate in the circumstances. The presiding judge reminded himself of the importance to act with judicial restraint to determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration. In *Ngyuen, Lasalle*, and *Joseph*, the courts used the alternative remedy of severance by removing the words, "for a term of five years," in s. 165.21(2) of the

National Defence Act. As a result, s. 165.21(3) was struck down since the renewal process was no longer required.

[9] In the Standing Courts Martial of *Master Corporal Dunphy*[3] and *Corporal Parsons*[4], my colleague, Military Judge Lamont, faced identical applications. Based on mostly similar evidence, he concluded that the fact that the term of a military judge could be renewed did not, of itself, infringe the guarantee of independence of military judges. Rather than embarking on a thorough review of the evolution of the roles and functions of the office of military judge through the jurisprudence and the relevant legislative and regulatory provisions, as well as the evolution of the notion of judicial independence over the recent years, my colleague, Lamont, adopted a different and narrower approach. He chose to embark on the analysis of the renewal process for military judges, including the structure of the Renewal Committee and the factors that it could consider pursuant to QR&O articles 101.15 to 101.17. He concluded that the regulatory provisions failed to respect the independence of the military judiciary required by s. 11(*d*) of the *Charter* and declared that paragraphs 101.15(2), 101.15(3), and 101.17(2) were inconsistent with s. 11(*d*) and therefore of no force or effect pursuant to s. 52 of the *Constitution Act*. He then moved on to review the renewal process to determine whether it met the constitutional standard for judicial independence. I fully agree with his statement that the fact that the term of a military judge could be renewed did not, of itself, infringe the guarantee of independence of military judges. In the Standing Court Martial of *Corporal Joseph*, the court stated:

> [56] As stated by Chief Justice Lamer in 1992 in *Généreux*, it is true that the *Charter* does not require that military judges be accorded tenure until retirement during good behaviour equivalent to that enjoyed by judges of the regular criminal courts. It is also true that the appointment of military judges for a fixed term, renewable, is not *per se* unconstitutional as it was clearly indicated by the Court Martial Appeal Court. This complex issue may exist elsewhere in other contexts. For example, the issue of fixed and renewable appointments of part-time judges from retired judges has been examined in other courts and that situation, although different, is not also *per se* unconstitutional.
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> [57] These questions must be examined in taking into account the specific statutory and regulatory provisions which govern the court or tribunal's constitution and proceedings at the time of the trial. The analysis shall also take into account the context of judicial independence, which continues to evolve over time.
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> [58] The nature of the functions and the increased role of the military judge in the Military Justice System since *Lauzon* is, according to this court, the cornerstone of the modernization or evolution of that system as it stands out from *National Defence Act* further to the adoption of Bill C-25. The court believes that this element is not strictly related to the modern context and history of military tribunals in Canada. The court believed that it represents a clear intent from Parliament to more closely align the military justice system

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[3] 2005 CM 33, 14 February 2006.

[4] 2005 CM 16, 31 January 2006.

> not only with civil courts but with the current Canadian core values and criteria of justice but in trying to preserve the characteristics that were believed to be necessary in the unique military context.

[10] The decisions of the Standing Courts Martial in *Ngyuen, Lasalle*, and *Joseph* were not the subject of any appeal to the Court Martial Appeal Court. However, both Corporal Parsons and Master Corporal Dunphy appealed their convictions. The Court Martial Appeal Court delivered its decision on both appeals on 29 January 2007[5]. In its reasons, the Court Martial Appeal Court made the following introductory comments:

> [1] These appeals are not factually related but they raise a common issue under paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B, to the *Canada Act* 1982 (U.K.), 1982 c. 11 (the Charter): the independence of the tribunal that tried them. The same military judge decided both cases and incorporated his reasons on the paragraph 11(d) motion from the *Parsons* case in his *Dunphy* decision. Although the military judge declared that the appointment renewal provisions of military judges violated paragraph 11(d) of the Charter he declined to grant an individual remedy pursuant to subsection 24(1) of the Charter. Both *Parsons* and *Dunphy* were found guilty of one count of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*, R.S., c. N-4. They are appealing their convictions. By way of cross-appeal the Crown appeals the declaration that paragraph 11(d) was violated and the declaration of invalidity pursuant to section 52 of the Charter. For the reasons that follow we are in substantial agreement with the military judge's conclusion that the articles in question violate the Charter and his conclusion that no individual remedy should be afforded.

[11] The Court Martial Appeal Court disposed of the *Parsons* appeal on another ground before turning to the *Dunphy* appeal. The court considered that the only issue was whether the military judge erred by not granting *Dunphy* a *Charter* remedy pursuant of s. 24(1) of the *Charter*. During argument at the appeal hearing, counsel for the applicant conceded that he was not entitled to an indiviudal remedy and that the appropriate remedy was a declaration of invalidity pursuant to s. 52(1). The Court Martial Appeal Court dismissed the appeal accordingly. The court dealt further with the cross-appeals by the Crown at paragraphs 13 to 24:

> 13. We now propose to deal with the cross-appeals by the Crown. The military judge declared that certain sections pertaining to the reappointment of military judges pursuant to the QR&O were of no force and effect. He held that articles 101.15(2), 101.15(3) and 101.17(2) of the QR&O, which provide for the composition of the Renewal Committee and the factors that it must and must not consider in making its recommendation as to whether or not a military judge should be reappointed, gave rise to a reasonable apprehension that the military judge would be unable to decide the case before him without interference from external actors....
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> 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.

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[5] *Supra* note 2.

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.
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> 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.
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> 24. Accordingly, we are in substantial agreement with the conclusion of the military judge and would order that the cross-appeal be dismissed.

So that provides for the background and legal context of the application we have today.

DECISION

[12] In *Ngyuen, Lasalle*, and *Joseph*, the courts martial held that s. 165.21(2) of the *Act* violated s. 11(*d*) of the *Charter* and the violation could not be justified under s. 1. The remedy granted by the courts martial in these decisions came in the form of a declaration of invalidity under s. 52 of the *Constitution Act* in severing the words, "for a term of five years," in s. 165.21(2) as well as the striking down of s. 165.21(3) of the *Act* and various regulatory provisions. These rulings are still in effect. As stated by Gauthier J., for the Supreme Court of Canada in *Nova Scotia v. Martin*[6], at p. 528:

> The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state.

[13] Neither this case nor previous courts martial in recent years have raised the competence for courts martial to grant remedies under the *Charter* and s. 52 of the *Constitution Act*. In *Ngyuen, Lasalle*, and *Joseph*, the courts martial granted identical remedies pursuant to s. 52 of the *Constitution Act* and the declaration of invalidity were not suspended by the courts martial. The fact that a court martial is an *ad hoc* court does not affect the legality and effect of its decision. A decision of a court martial carries the same legal effect as any decision of a court of competent jurisdiction, including declarations of invalidity. In *Constitutional Law in Canada*[7], Professor Peter

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[6] [2003] 2 S.C.R. 504.

[7] 5th ed. Supplemented (Looseleaf Edition), Volume 2 (Toronto: Thomson Carswell, 2007).

W. Hogg speaks clearly about the effect of unconstitutional law at pp. 58-4.2 and 58-4.3:

> Is there a duty to obey unconstitutional law? If the law has been the subject of a suspended declaration of invalidity, there is a duty to obey the unconstitutional law for the period of suspension or until corrective legislation has replaced the unconstitutional law. Setting aside that unusual case, once the Supreme Court of Canada has held that a law is unconstitutional, there can be no doubt about the status of the law; it is invalid, and need not be obeyed. The same result follows from a holding of invalidity by a lower court. Moreover, it is unlikely that the government would succeed in obtaining a stay of judgement, or an injunction compelling obedience to the law, pending an appeal. Of course, the holding of unconstitutionality might be reversed on appeal, in which case the theory would be that the law had always been constitutional. Anyone disobeying a law, in reliance on the judgement of the lower court that the law is unconstitutional, does take the risk that the law will ultimately be held to be constitutional. However, it is unlikely that such a person would be exposed to criminal liability by the retroactive effect of the appellate court's reversal of the holding of unconstitutionality.

[14] As it now stands, s. 165.21(2) reads as follows:

> 165.21(2) A military judge holds office during good behaviour 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.

[15] With regard to the status of s. 165.21(3), the declaration of invalidity pronounced in *Ngyuen, Lasalle*, and *Joseph* was not suspended because its existence was no longer required as a result of the courts martial rulings and remedy chosen to make s. 165.21(3) *Charter* compliant.

[16] The Court Martial Appeal Court in *R. v. Dunphy* and R. v. Parsons[8], did not address the constitutionality of ss. 165.21(2) and (3) of the *National Defence Act*, nor did it have to. However, they offered the following comments at paragraphs 18 to 23:

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

And I have already quoted paragraph 19 to 23, and I refer counsel to those paragraphs.

[17] Whether the CMAC adopted the reasoning of the courts martial in *Ngyuen, Lasalle*, and *Joseph,* or simply expressed its concurrence with the views expressed by former Chief Justice Lamer and the contents of Bill C-7 in making the said remarks, it remains that the court refrained from making any declaration of invalidity as it was neither required nor necessary to deal with the narrower issue raised in *Dunphy* and *Parsons*. However, there is no doubt that the court's remarks shall be taken very

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[8] Supra note 2.

seriously, if not considered authoritative. In *R. v. Henry*[9], at paragraph 57, Justice Binnie for the Supreme Court of Canada, delivering the judgement, offered the following remarks on the weight of *obiter dicta*:

> 57. The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it.

[18] The contents of Bill C-7 and Bill C-45, which received first reading in March 2008, were admitted by the parties during this application. These bills contained amendments to the *National Defence Act* that would remove the fixed-term appointment for military judges and provide that a judge ceases to hold office on release from the Canadian Forces at his or her request or on reaching retirement age. These bills died on the Order Paper. It is unknown if Parliament will attempt to introduce similar legislation in the near future, but it is fair to say that such amendments reflected the intent of recent governments to pass legislation that would effectively appoint military judges until the age of retirement. Whether Bill C-45 contained provisions dealing with the security of tenure of military judges in response, wholly or partially, to the court martial decisions in *Ngyuen, Lasalle*, and *Joseph*, the court martial court decisions in *Dunphy* and *Parsons,* and the Lamer Report, is unknown. However, it does not affect the legality and the effect of the declarations of invalidity pronounced in *Ngyuen, Lasalle*, and *Joseph*. In other words, it does not set them aside or reverse them. Judicial decisions are not legal opinions and they should be treated accordingly. However, the making by the Governor in Council in March 2008 of the new regulatory framework for the renewal process for military judges is based on the impugned legislation; namely, s. 165.21(3) of the *National Defence Act* that was declared null and void under s. 52 of the *Constitution Act*.

[19] It is of interest to note that despite the missed opportunities for Parliament to adopt Bill C-7 and C-45, the *National Defence Act* received significant amendments in 2008. First, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act,* 2008 c. 29, received Royal Assent on 18 June 2008. Significant changes to the *National Defence Act* included the reduction of the types of courts martial from four to two and the right to an accused person, in certain circumstances, to choose the type of court martial that will be convened. It also provided that certain decisions of the panel of a General Court Martial must be

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[9](2005) 202 C.C.C. (3d) 449.

unanimous. Viewed objectively, these measures would enhance fairness in the military justice system in ensuring that members of the Canadian Forces enjoy a right to choose how they will be tried that parallels the rights that are currently found in the Canadian civilian criminal justice system. Second, the *National Defence Act* was also amended by the coming into force on 12 September 2008 of *An Act to Amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act,* 2005, c. 5 [Assented to March 29th, 2007] as well as supporting regulations. The new Division 8.1 - Sex Offender Information - creates a scheme that parallels the one in the *Criminal Code* which requires offenders who have committed service offences of a sexual nature to provide information for registration in a national database under the *Sex Offender Information Registration Act*. These most recent enhancements to the military justice system establish clearly that courts martial continue to evolve over time and the constant legislative and jurisprudential progress confirm that the role, status, jurisdiction, and functions of military judges increasingly resemble those of their civilian counterparts. Unlike justices of the peace, who perform limited judicial functions in support of provincial and superior court judges, military judges preside at *sui generis* courts with a very wide jurisdiction in criminal and penal matters, and they have the exclusive jurisdiction in the system of military justice to impose the most serious punishments available in Canadian law.

[20] Both parties submitted that the court should act with restraint and refrain from usurping the role of Parliament in crafting an appropriate remedy beyond a mere declaration of invalidity pursuant to s. 52 of the *Constitution Act*. While it is true that the *Charter* does not require that military judges be accorded tenure during good behaviour equivalent to that enjoyed by judges of the regular criminal courts, it remains that the nature of the functions and the increased role of the military judge in the military justice system since *Lauzon* is the cornerstone of the modernization or evolution of that system as it stands out from the *National Defence Act*. The most recent amendments to the *Act* are more examples that Parliament is committed to align the military justice system with the current Canadian core values and criteria of justice. As stated in *Ngyuen, Lasalle*, and *Joseph*, there is no compelling legal requirement that a military judge appointed to hold office during good behaviour should have an age of retirement similar to other federally appointed judges or provincial court judges. But the evolution of the role and function of the office of military judge ensures that courts martial presided by modern military judges can play the essential and exclusive role of upholding the rule of law and protecting the constitutional rights of persons subject to the Code of Service Discipline within the Canadian military justice system. I am more than convinced that the minimal constitutional requirement of judicial independence in the context of the Canadian military justice system implies that a military judge shall be appointed to hold office during good behaviour until reaching the age of retirement for the benefit of every person subject to the Code of Service Discipline. This is the minimal constitutional requirement in the circumstances. This is why the courts martial in *Ngyuen, Lasalle*, and *Joseph* chose the alternative remedy of severance by removing

the words, "for a term of five years," in s. 165.21(2) of the *National Defence Act*, and as a result, s. 165.21(3) was struck down since the renewal process was no longer required.

CONCLUSION

[21] The issue is not to determine whether this court should arrive at the same conclusion and grant identical remedies as those previously chosen in the cases of *Ngyuen, Lasalle*, and *Joseph*. Should this court ask the following question: Would a similar approach be appropriate in the case at bar, or should the court limit its intervention to a declaration that ss. 165.21(2) and (3) and the regulations made in support of this legislation are of no force and effect pursuant to s. 52 of the *Constitution Act*? The answer is no. I stated earlier that s. 165.21(2) now reads:

> 165.21(2) A military judge holds office during good behaviour 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.

[22] This subsection, as it reads now, does not violate s. 11(*d*) of the *Charter*. Based on the evidence before the court, the applicant has not established that the legislative framework that provides security of tenure to military judges during good behaviour, subject to removal for cause on the recommendation of an Inquiry Committee and when they cease to hold office on reaching the retirement age prescribed in regulations made by the Governor in Council[10], violates his rights to be tried by an independent and impartial tribunal.

[23] Although it is not required to dispose of this application, as I have just stated, I would offer the following remarks. In the recent decision of the Supreme Court of Canada, in *R. v. Ferguson*[11], Chief Justice McLachlin made the following remarks concerning remedies available under s. 52 of the *Constitution Act* and the intrusion on the role of Parliament at pp. 119-120:

> [49] Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the *Constitution*. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. Constable Ferguson is proposing a constitutional exemption under s. 24(1) as an additional tool for minimizing interference with Parliament's legislative role when a court must grant a remedy for a constitutionally defective provision.
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> [50] On the other hand, it has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. An alternative to striking down that initially appears to be less

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[10]See s. 165.21(4) of the *National Defence Act*.

[11][2008] 1 S.C.R. 96.

> intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role. This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter: Schachter; Vriend v. Alberta*, 1998 ... 1 S.C.R. 493; *R. v. Sharpe*, 2001...1 S.C.R. 45, 2001 SCC 2. These principles apply with equal force to the proposed alternative remedy of the constitutional exemption. In this case, the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended. It follows that a constitutional exemption should not be granted.
>
> [51] When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter*, the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the *Constitution* rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would not have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

[24] Based on the evidence before it, including the contents of Bill C-7 and C-45, the court believes that Parliament would more than likely follow the approach of the courts martial in *Ngyuen, Lasalle*, and *Joseph* with the alternations made by means of severance in s. 165.21(2) in order to provide in new legislation that military judges have security of tenure until the age of retirement.

[25] For the reasons expressed, the motion of the applicant is dismissed.

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