Citation: *R. v. Corporal R.D. Parsons*, 2006cm3001

Docket: 200516

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE GREENWOOD

Date:31 January 2006

PRESIDING:COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL R.D. PARSONS
(Accused-Petitioner)

DECISION RESPECTING AN APPLICATION IN REGARDS OF SECTION 174 OF THE *NATIONAL DEFENCE ACT* AND 11(d) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

INTRODUCTION

[1] A system of justice that fails to command the respect of the community it serves is not worth the name. By a Notice of Application dated 17 Oct 2005 the Applicant, Corporal Rodney Dwayne Parsons, seeks a declaration that his trial by Standing Court Martial on charges of stealing and improper possession of public property is unconstitutional on the ground that the Standing Court Martial created by section 174[1] of the *National Defence Act* is not an independent tribunal guaranteed by section 11*(d)* of the *Canadian Charter of Rights and Freedoms*.[2] In particular, the Applicant submits that many of the statutory and regulatory provisions dealing with military judges who preside at standing courts martial fail to respect the principle of judicial independence, and are therefore inconsistent with the *Charter* guarantee of a trial before an independent and impartial tribunal, and those provisions should be

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[1] *NDA* sec.174 "Every military judge is authorized to preside at a Standing Court Martial and a military judge who does so constitutes the Standing Court Martial."
[2] *Charter* sec.11*(d)* "Any person charged with an offence has the right. . .(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;…"

declared to be of no force or effect under section 52(1) of the *Charter*.

[2] In addition the Applicant seeks a stay of proceedings, or other relief, under section 24(1) of the *Charter*.

[3] The prosecution, whom I shall refer to as the Respondent, argues that the impugned provisions are constitutionally valid, but in the event the court disagrees, the prosecution has not sought to justify any of the provisions in issue on the basis of section 1 of the *Charter*.

LEGISLATIVE CONTEXT

[4] The statutory and regulatory provisions in question in this application are part of a package of substantial amendments made to the *National Defence Act* by Bill C-25 which came into force in 1999[3]. The amendments were extensive and far-reaching and dealt with many aspects of the military justice system including the establishment of an independent prosecution service and a Director of Defence Counsel Services. As well, the amendments clarified the roles of the Minister of National Defence and the Judge Advocate General.

[5] The amendments also created the position of military judge. These office-holders are to be appointed by the Governor in Council from the ranks of legally trained and qualified officers of the Canadian Forces for a term of five years, and are to hold office during good behaviour[4]. A military judge may be reappointed for a subsequent term or terms of unspecified length,[5] but ceases to hold office upon reaching the age of retirement specified in regulations made by the Governor in Council.[6]

[6] At a General[7] Court Martial or a Disciplinary[8] Court Martial a military judge sits as a member of the Court and presides over the proceedings[9]. At such panel Courts the military judge sits with a panel of five or three members of the Canadian Forces whose role is to determine the facts of the case based upon the evidence heard during the trial and on the instructions of the military judge, and to make a finding as to whether the accused is guilty or not guilty. The military judge determines all questions of law or mixed law and fact that may arise before these Courts.[10] In these Courts therefore, the role of a military judge is akin to that of a judge of a superior court of

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[3] S.C. 1998, c.35
[4] *NDA* sec.165.21
[5] *NDA* sec.165.21(3)
[6] *NDA* sec.165.21(4)
[7] *NDA* sec.167(1)
[8] *NDA* sec.170(1)
[9] *NDA* sec.165.23(1)
[10] *NDA* sec.191

criminal jurisdiction conducting a jury trial under Part XX of the *Criminal Code*.[11]

[7] A military judge may also sit as a judge alone, either at a Standing Court Martial[12] for the trial of any member of the Canadian Forces, or at a Special General Court Martial[13] for the trial of civilians who may be subject to military law. In either case the military judge fulfils the functions of both judge of the law and judge of the facts, in much the same way as a court of criminal jurisdiction, whether a provincial or a superior court, anywhere in Canada.

[8] Thus, a modern Canadian court martial under the Code of Service Discipline[14] is the very face of criminal justice for the members of the community it serves. In addition to this, it remains part of a vital process designed to enhance and maintain discipline in the Canadian Forces. This duality of roles is not recent and has always been a feature of the Canadian and British[15] systems of military justice. As Lamer C.J. noted in *R. v. Généreux*:[16]:

> ... Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare...(*page 282*)…Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline....

[9] In this case the Applicant claims that the system of military justice established by the *National Defence Act* as amended in 1999 is unconstitutional because the Standing Court Martial is not an independent tribunal. This claim calls for an examination of the law relating to judicial independence.

JUDICIAL INDEPENDENCE

[10] The Supreme Court of Canada, speaking through Major J delivering the

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[11] *R. v. Nystrom* CMAC-477, December 20, 2005 *per* Létourneau J at para 70
[12] *NDA* sec.174
[13] *NDA* sec.177
[14] Part III of the *National Defence Act*
[15] Tytler, A.F., *Essay on Military Law*,1814, page 206 "As the King is the prosecutor of all crimes which are offences against the public peace, of which he is the conservator; so is he in a more particular manner the prosecutor in military offences, which are violations of his own authority as head of the army. In all trials, therefore, before a general Court-Martial, the Judge-Advocate sustains the prosecution in the name of the King; and that, either solely, for the cognizance of a breach of the public Military law, as in the trial of mutiny, desertion, &c. or in concurrence with a private prosecutor, who is *generally* a party who has individually suffered an injury by the aggression and crime of the prisoner to be tried…".
[16] [1992] 1 S.C.R. 259, at p. 281

judgment of the Court in *British Columbia v. Imperial Tobacco Limited* [17] stated as follows: (para 44 *et seq*):

> 44 Judicial independence is a "foundational principle" of the Constitution reflected in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, and in both ss. 96-100 and the preamble to the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 109. It serves "to safeguard our constitutional order and to maintain public confidence in the administration of justice": *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at para. 29. See also *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, at paras. 80-81.
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> 45 Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice": *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper "interference from any other entity" (*Ell*, at para. 18) — i.e. that the executive and legislative branches of government not "impinge on the essential 'authority and function' ... of the court" (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 827-28). See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 686-87, *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 73 and 75, *R. v. Lippé*, [1991] 2 S.C.R. 114, at pp. 152-54, *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 57, and *Application under s. 83.28 of the Criminal Code (Re)*, at para. 87.
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> 46 Security of tenure, financial security and administrative independence are the three "core characteristics" or "essential conditions" of judicial independence: *Valente*, at pp. 694, 704 and 708, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 115. It is a precondition to judicial independence that they be maintained, and be seen by "a reasonable person who is fully informed of all the circumstances" to be maintained: *Mackin*, at paras. 38 and 40, and *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, at para. 6.
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> 47 However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 82-92.

[11] A former Chief Justice of the Court Martial Appeal Court stated in the case of *Gratton v. Judicial Council*[18]:

> "…independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without

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[17] 2005 SCC 49

[18] (1994) 115 D.L.R. (4th) 81, [1994] 2 F.C. 769 *per* Strayer J.

> concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to judicial independence. But it is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged"."

[12] Counsel before me are agreed that the test to be applied to determine whether the guarantee of judicial independence is secured to military judges is an objective test that focuses upon the legal structures supporting the characteristics of the independence of military judges. That is, does the *National Defence Act* and the regulations made pursuant to it provide a person who is to be tried by a Standing Court Martial with sufficient guarantees that the military judge presiding at the court martial is able to hear and decide the case before him or her without interference from external actors? Or put another way, 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 such a court martial is a tribunal which could make an independent adjudication?[19]

[13] The perception of the reasonable person is key. The unduly cynical person lacks confidence in the proper exercise of any kind of public power without regard for the statutes or regulations that both authorize and constrain its exercise. Naïve or overly trusting persons on the other hand would require no legislated standard, but their confidence is jejune and misplaced. Only objective guarantees appeal to the reasonable person and justify his or her confidence in the proper exercise of the judicial function.

[14] The three "core characteristics" or "essential conditions" of judicial independence, to which Major J adverted in *British Columbia v. Imperial Tobacco*, were first enunciated by LeDain J. speaking for the Supreme Court of Canada in *Valente v. The Queen.*[20] They are the touchstone by which the constitutional guarantee is to be measured. In applying this standard the court must have regard for the context in which the tribunal operates.[21] Having regard for that context, it is sufficient if the essence of each of the core characteristics is respected.[22] Legislatures are not required to legislate the ideal method of securing judicial independence as a minimum, but merely to ensure the minimum level of independence that the Constitution requires.[23]

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[19] *Valente v. The Queen* [1985] 2 S.C.R. 673, para.13, 22, *Reference re Remuneration of Judges of the Provincial Court of PEI* [1997] 3 S.C.R. 3 para. 113, *Ell v. Alberta* [2003] 1 S.C.R. 857, para.32
[20] *ibid.*
[21] *ibid*., para 25, *Ell v. Alberta*, supra, footnote 19, para.30, *R. v. Généreux*, supra, footnote 16, 259 *per* Lamer C.J. at page 284-285, *per* Stevenson J at page 316.
[22] *Valente*, para.26
[23] *R. v. Lippe* [1991] 2 S.C.R. 114 *per* Lamer C.J.at p.142.

SECURITY OF TENURE

[15] In *Valente v. The Queen,*[24] LeDain J. identified the security of tenure of judges as a core characteristic of judicial independence as guaranteed by section 11*(d)* of the *Charter*.[25] It comprises two requirements: first, judges can only be removed from their position for cause "related to the capacity to perform judicial functions", and then only after a "judicial inquiry at which the judge affected is given a full opportunity to be heard".[26]

[16] Removal from office of a military judge is provided for in section 165.21(2) of the *National Defence Act*:

> (2) A military judge holds office during good behaviour for a term of five years but may removed by the Governor in Council on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.

[17] Queen's Regulations & Orders (QR&O) article 101.13 and 101.14 establish the Inquiry Committee, provide for the processes it is to follow, and set out a clear standard to be applied by the Inquiry Committee in deciding whether or not to recommend the removal of a military judge from office. The Committee consists of two or more judges of the Court Martial Appeal Court appointed by the Chief Justice. The standard to be applied by the Committee is clearly related to the capacity of the military judge to continue to perform judicial functions.

[18] The Applicant does not suggest that the scheme for the removal of military judges established by these regulations fails to respect the security of tenure of military judges. Rather, the Applicant submits that because the scheme is set out in regulations rather than in the *National Defence Act* the scheme can be easily changed at the whim of the executive branch of government by simply making new regulations. Regulations do not enjoy the same degree of scrutiny by Parliament that is given to a bill before it becomes a statute, and regulations made pursuant to section 12 of the *National Defence Act* are exempted from the requirement to be registered by the Clerk of the Privy Council.[27]

[19] In my view the arguments of the Applicant on this point misconceive the nature of a regulation. Under the authority of a statute, Parliament can delegate its authority to the executive branch of government to make regulations, within the scope

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[24] supra, footnote 19

[25] *Valente,* para.27 "Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of section 11*(d)* of the *Charter.*"

[26] *Valente*, para.30. And see *Re Therrien* [2001] 2 S.C.R. 3

[27] *Statutory Instruments Regulations* C.R.C. c.1509, s.7(a)

of the grant of regulation-making power. Properly made regulations are as much an expression of the intention of Parliament as the statute that authorizes their making.

[20] In *R. v. J.P.*[28] the Ontario Court of Appeal discussed the *Medical Marijuana Access Regulations* made pursuant to the *Controlled Drugs and Substances Act* in order to provide a medical exemption to the prohibition in section 4 of the *CDSA* against the possession of marijuana. The Court observed[29]:

> ... As explained by Duff J., in *Re Gray*, subordinate legislation in the form of regulations is as much an expression of Parliament's will as is a provision in a statute....

[21] The accused *J.P.* argued that the regulations permitting the use of marijuana for medical purposes in some circumstances should be set out in the governing statute. The Court disagreed holding that, on the assumption that the regulations are made within the authority granted by the statute:

> ... Like any other Government action, those regulations were subject to *Charter* challenge. The outcome of that challenge, however, depended on whether the substance of the regulations were consistent with *Charter* demands and not on the fact that the substance appears in regulations rather than in the statute.[30]

[22] Many of the bedrock requirements of the financial security of judges, some of which will be discussed below, are to be found in subordinate legislation. For example, the *Salaries and Benefits of Provincial Judges Regulations* [31] deal with the salaries, pensions, vacation and leave entitlements, etc., of judges of the Ontario Court of Justice. It is true that under the *Framework Agreement* contained in the Schedule to the *Courts of Justice Act* the recommendations of the independent Commission that considers financial matters in relation to Ontario's provincially appointed judges are binding upon the government, except in respect of pensions. Nevertheless, it cannot be realistically suggested that housing these provisions in regulation form rather than in the statute compromises judicial independence.

[23] In particular, I am not persuaded that the lower level of scrutiny afforded to regulations as opposed to bills, or the exemption from the registration requirement for regulations made under the *National Defence Act* can reasonably be seen to affect the independence of military judges. The constitutional validity of such regulations as apply to military judges must be assessed from the point of view of the content of those regulations, not whether the rules are embodied in the form of a regulation or a statute.

[24] As I stated, the Applicant takes no issue with the content of the

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[28] (2003) 177 C.C.C. (3d) 522 (Ont. C.A.)
[29] *ibid.* para 26
[30] *ibid.* para 24
[31] O.Reg. 67/92

regulations dealing with the removal of military judges. I therefore conclude that the scheme for removal of military judges from office is not inconsistent with the judicial independence of military judges guaranteed by section 11*(d)* of the *Charter.*

[25] The Lamer Report[32] was produced before me in evidence on this application. In his review of the operation of the *National Defence Act* in the five years since the amendments made by Bill C-25, the former Chief Justice of Canada recommended to the government that certain provisions in the QR&O dealing with military judges should be put into the statute itself. These provisions concerned the composition of the Renewal Committee that recommends the reappointment of military judges and the factors the Renewal Committee should consider (page 21), the yearly salary of military judges, and the composition of the Compensation Committee and the factors it should consider (page 23).

[26] I do not consider that the recommendations of the former Chief Justice were intended to be anything other than a thoughtful attempt to improve public policy. Certainly these recommendations do not purport to reflect a minimum standard required by the constitutional guarantee of judicial independence.[33] As such, I do not consider that the recommendations of the former Chief Justice affect the conclusion I have reached that the scheme for the removal of military judges from the performance of judicial duties contained in QR&O article 101.13 *et seq.* is constitutionally sufficient.

RETIREMENT

[27] The retirement age of military judges is set by regulation made pursuant to the *National Defence Act.*[34] QR&O article 101.175 deals with the retirement age of military judges and provides that retirement age varies with the military rank of the judge in the same way as retirement age is determined for other officers. As members of the regular force military judges are subject to the retirement age specified by regulations that apply to all officers of the Canadian Forces.

[28] The Applicant submits that retirement age can be varied simply by regulation and therefore allows the executive branch to manipulate the retirement age of military judges. Counsel points to a recent policy statement under which members of the Canadian Forces may postpone their retirement date to age 60. An Instruction number 14/04 of the Assistant Deputy Minister (Human Resources – Military) was exhibited before me as VD1-12. This instrument states that for members enrolling in

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[32] *The First Independent Review of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts,* dated September 3, 2003.

[33] The former Chief Justice drew the attention of his readers to this distinction himself in the Report at page 21.

[34] *NDA* ss.165.21(4) "A military judge ceases to hold office on reaching the retirement age prescribed by the Governor in Council in regulations."

the regular force on or after 1 July 2004 the age of retirement is 60. Members serving on 30 June 2004 may elect to retire at age 60 if election is made at least one year before the retirement age that would otherwise apply.

[29] The Applicant argues that the retirement age for military judges should be set out in the statute. For the reasons I have already given dealing with the removal of military judges from office, I am not persuaded that a retirement age for judges set by regulation is for that reason unconstitutional as infringing judicial independence. Again it is the content of the regulation that matters.

[30] Nevertheless, the constitutional requirements of judicial independence delimit the authority of both the executive and legislative branches to change the retirement ages of judges. For example, if a regulation were made to lower the age of retirement of sitting military judges in a disguised attempt to remove them from office, then a serious issue as to judicial independence would certainly arise. That is not the case here.

[31] The Applicant submits that the extension of the retirement age to 60 is a matter within the discretion of Canadian Forces authorities, and therefore military judges who wish to continue to serve as judges may reasonably be perceived to be seeking a benefit from the executive that compromises their independence. In my view the terms of the Instruction 14/04, make it clear that all members of the regular force who were serving on 30 June 2004 may elect to retire at age 60, and the approval of the chain of command is not required. It is not reasonable to suppose that the independence of military judges is compromised by the possibility that a military judge may elect to serve until age 60.

RENEWAL

[32] The Applicant argues that the fact that a military judge is appointed for a term of five years, rather than until retirement, yet may seek to be re-appointed by the executive to continue as a military judge, objectively speaking imperils the perception of judicial independence. This is because it raises the reasonable perception that the military judge may decide cases in such a way as to favourably influence the prospect of re-appointment, or to obtain some other advantage from the executive branch of government upon ceasing to hold judicial office.

[33] Secondly, the Applicant points to the decision of the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia*[35] and argues that while term appointments may be appropriate for government tribunals whose role is to implement government policy in the process of making quasi-judicial adjudications, term

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[35] [2001] 2 S.C.R. 781

appointments are not appropriate for judges who have, of course, no role with respect to the implementation of government policy.

[34] Thirdly, the Applicant attacks the scheme for the renewal of the appointments of military judges set out in QR&O articles 101.15 to 101.17, in respect of the composition of the Renewal Committee and the factors the Committee is to consider in making a recommendation to the Governor in Council to reappoint a military judge.

[35] The Respondent replies that in the context of the military justice system a fixed term appointment during which a military judge can only be removed for cause is sufficient to meet the requirements of judicial independence. The process of reappointment is in fact carried out in a manner that ensures the military judge is free from pressures that could influence the outcome of judicial decisions because the Renewal Committee itself is independent, the Committee is presumed to act in accordance with the law, the factors it must consider are precise and objective, and the Committee cannot consider the record of judicial decisions made by the military judge seeking renewal.

[36] It must be observed, I think, that term appointments for judges, while not unheard of, are very rare in Canada. Appointments of High Court judges used to be for life until by an amendment to the Constitution in 1960 a retirement age of 75 years was imposed. Today all federally-appointed judges, including judges of the Superior Courts in each province, judges of the Federal Court, and judges of the Tax Court of Canada, are appointed until retirement[36]. The same can be said for all judges of the provincial courts across Canada, although the age of retirement varies among the provincial jurisdictions. In some provincial jurisdictions even sitting justices of the peace are appointed until retirement.

[37] The question of term appointments of military judges came before the Court Martial Appeal Court in the case of *R. v. Lauzon*[37] discussed below. Apart from the military context, term appointments are made of deputy judges of the Territorial Courts of the Northwest Territories[38] and Yukon[39], as well as deputy judges of the Small Claims Court branch of the Ontario Superior Court of Justice.[40] In many provincial jurisdictions a retired judge of the provincial court may be appointed as a judge for a fixed term.[41]

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[36] Friedland, M.L. *A Place Apart: Judicial Independence and Accountability in Canada*, 1995, p. 41

[37] [1998] C.M.A.J. No.5

[38] Following *Reference re: Territorial Courts Act (N.W.T.)S.6(2)* (1997) 152 D.L.R. (4th) 132, the statute was amended to provide for the tenure of deputy territorial judges until retirement. See the *Territorial Court Act*, R.S.N.W.T. 1988, c.T-2, s.11, as amended.

[39] *Territorial Court Act*, R.S.Y. 2002, c.217, ss.6(2)

[40] *Courts of Justice Act*, R.S.O. 1990, c.C.43, s.32

[41] see for example the Saskatchewan *Provincial Court Act*, 1998, S.S.1998, c.P-30.11, ss.13(3)

[38] I have already noted that the role of a military judge appointed under the 1999 amendments to the NDA is very similar to that of a civilian judge presiding in a court of criminal jurisdiction anywhere in Canada. A military judge now makes rulings on all legal matters, including the imposition of a fit sentence, subject of course to the right of appeal, but without the authority that formerly rested with the President of a General or Disciplinary Court Martial or the chain of command in the Canadian Forces to confirm or vary the decisions of a military judge. Like his civilian counterpart, a military judge can make an order for the provision of DNA samples as part of a sentence, and can also make orders with respect to weapons prohibitions. Like a civilian justice of the peace, a military judge can issue a search warrant, and can deal with the subject of judicial interim release on bail pending a trial, and like a provincial court judge a military judge can issue a warrant for the taking of DNA samples as part of an investigation. Finally, a military judge has authority to deal with issues concerning the mental health of an accused person, that is, fitness to stand trial and the defence of "not criminally responsible on account of mental disorder", in the same manner as his civilian counterpart.

[39] The Applicant points to these parallels between civilian and military judges, and forcefully argues that there is no military reason justifying the difference in tenure. But it must be recalled that the question before this court is not whether the tenure of military judges should be the same as their civilian counterparts as a matter of public policy. Rather, the court must determine whether the Constitution prohibits term appointments for military judges. While the nature of the judicial functions exercised by the judge in question may well be a relevant factor for the legislature in deciding what kind of tenure a judge should enjoy, in my view it is an uncertain guide to the limits upon the choices the legislature may make consistently with the requirements of the Constitution.

[40] A judicial appointment for a fixed term is not *per se* unconstitutional. As LeDain J. stated in *Valente*:[42]:

> ...The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, *for a fixed term*, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. (emphasis added)

[41] The Respondent submits that the constitutional validity of term appointments for military judges is settled by the decisions of the Supreme Court of Canada in *R. v. Généreux* and by the Court Martial Appeal Court in *R. v. Lauzon*.

[42] In *Généreux* the Supreme Court of Canada considered the issue of

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[42] *Valente*, para 31

whether a General Court Martial was an independent and impartial tribunal for the purposes of section 11*(d)* of the *Charter*. The trial was held in late May of 1989. Under the provisions of the *National Defence Act* and QR&O in force at that time, a General Court Martial consisted of a President and at least four other officers who were appointed to the court by a Convening Authority. The court was assisted by a Judge Advocate, a legal officer belonging to the Office of the Judge Advocate General who was specially trained as a military judge and was assigned to the case by the Judge Advocate General. As Lamer C.J. noted:[43]

> The judge advocate officiates at a General Court Martial much as a judge presides over a hearing in an ordinary court of law. He is not, however, the trier of fact. The judge advocate is called upon to determine questions of law or mixed law and fact whether they arise before or after the commencement of the trial (s.192(4) of the Act). If the permission of the president is obtained, he may address the members of the court martial on such matters as he deems necessary or desirable (art.112.05(4)(a) Q.R.&O.). In certain circumstances, the president may direct the judge advocate to rule on a question of law or mixed law and fact (art.112.06 Q.R.&O.). The court may only disregard the opinion of the judge advocate on questions of law and procedure "for very weighty reasons" (art.112.54 Q.R.&O.).

[43] Lamer C.J. observed that following a court martial under the rules that applied in 1989, the judge advocate returned to legal duties within the Office of the Judge Advocate General. He concluded that this arrangement was insufficient in respect of security of tenure because the regulations "fail to protect a judge advocate against the discretionary and arbitrary interference of the executive" since he is appointed to the case by the Judge Advocate General, who represents the executive, and "there was no objective guarantee that his or her career as military judge would not be affected by decisions tending in favour of an accused rather than the prosecution".[44]

[44] Lamer C.J. held[45]:

> …a reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. Any system of military tribunals which does not banish such apprehensions will be defective in terms of s.11*(d)*. At the very least, therefore, the essential condition of security of tenure, in this context, requires security from interference by the executive for a fixed period of time. An officer's position as military judge should not, during a certain period of time, depend on the discretion of the executive.

[45] Finally, Lamer C.J. noted that amendments to the QR&O made subsequent to the trial of *Généreux* "appear to correct the primary deficiencies of the

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[43] *Généreux*, page 300
[44] *ibid*, page 302-303
[45] *ibid*, page 303

judge advocate's security of tenure"[46] and "have largely remedied this defect [of insufficient institutional independence] to the extent required in the context of military tribunals".[47] The changes resulted in the appointment of military lawyers to the position of military trial judge for a period of two to four years (QR&O article 4.09), and the authority to appoint a military judge to be a judge advocate at a General or Disciplinary Court Martial was taken from the Judge Advocate General and given to the Chief Military Trial Judge (QR&O article 111.22).

[46] Following *Généreux* those new provisions of QR&O came before the Court Martial Appeal Court in the case of *R. v. Edwards.*[48] On appeal from findings of guilty by a Disciplinary Court Martial, Strayer C.J. followed the *obiter* statements of Lamer C.J. in *Généreux* and held that the Judge Advocate, posted to the position of military trial judge within the Office of the Judge Advocate General under QR&O article 4.09 for a fixed term of normally four but not less than two years, had such security as in the context of a court martial meets the standard of section 11*(d)* of the *Charter.*

[47] The judge advocate, whose role was considered by the Supreme Court of Canada in *Généreux* and by the Court Martial Appeal Court in *Edwards* bears but little resemblance to a military judge appointed under the amendments to the *National Defence Act* made in 1999. The former position was to all intents and purposes indistinguishable from its counterpart under the military law of England. As to that role Clode, writing in 1874 and quoting earlier writers, described the function of the Judge Advocate at a General Court Martial as follows:[49]

> He cannot interfere with anything of his own authority in the privileges of a Court-martial – for which the president and members are alone responsible. He has no *judicial power* nor any determinative voice either in the sentences or interlocutory opinions of the Court; he is not, therefore, entitled to regulate or dictate those sentences or opinions.

[48] In *Lauzon*[50] the Court Martial Appeal Court dealt with a similar attack based on section 11*(d)* of the *Charter* but this time in the context of the Standing Court Martial, and held at paragraph 26:

> As this Court of Appeal decided in *R. v. Edwards* ... the posting of members to military judge positions for a fixed term, even if this term is not for life, guarantees institutional independence....

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[46] *ibid*, page 305
[47] *ibid,,* page 309
[48] [1995] C.M.A.J. No.10
[49] Clode, Charles M., *Military and Martial Law*, 1874, page 125
[50] supra, footnote 37. And see *R. v. Bergeron* (1999) CMAC-417

[49] At a Standing Court Martial the judicial role of the military judge is much more prominent than that of a judge advocate at a General Court Martial. Nevertheless, the Court Martial Appeal Court does not seem to have drawn this distinction in addressing the question of judicial independence of military judges at a Standing Court Martial.

[50] Because the case dealt specifically with the independence of a judge advocate at a General Court Martial, I do not consider that *Généreux* is controlling in the present case. But I do consider the question before me as to the constitutional validity of term appointments for military judges presiding at a Standing Court Martial to be settled by the authority of *Lauzon.* A term appointment of five years for military judges is not *per se* unconstitutional.

[51] Relying on *Ocean Port Hotels Ltd*[51] the Applicant submits that a term appointment may be appropriate for administrative tribunals but not for a court exercising the judicial functions of a military judge. In my view this case does not stand for the proposition that a fixed term appointment of a tribunal exercising judicial functions is inconsistent with section 11*(d)* of the *Charter.*[52] No such issue arose in *Ocean Port Hotels* because the case dealt only with the interpretation of legislation creating administrative tribunals.

[52] What about a scheme that contemplates the renewal of a term appointment of a judge?

[53] In *Lauzon* the accused submitted that the possibility of reappointment interferes with the principle of the security of tenure of military trial judges. The court held, however[53]:

> [27] 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 trial judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions....

[54] The few examples elsewhere in Canadian law of term-appointed judges include provisions for the renewal of such appointments. I conclude that the fact that the term of a military judge can be renewed does not, of itself, infringe the guarantee of independence of military judges.

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[51] supra, footnote 35

[52] *Ocean Port Hotels* at para 24 "While [administrative] tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not."

[53] *Lauzon*, para 27

[55] But as this passage from the judgment in *Lauzon* reminds us, the *terms* of the renewal of a judicial appointment may be contrary to the principle of judicial independence protected by section 11*(d)*. For example, the re-appointment by the executive of provincial judges following their retirement to hold office "at pleasure" was held to be incompatible with section 11 *(d)* in *Valente.*[54]

[56] The difficulty was isolated by Stevenson J. in *Généreux* where he noted that[55]:

> … as tenured terms draw to a close the military judge may wish to secure a re-appointment or to advance their careers in some other respect. It would thus be in the interest of these judges to please the "executive"....

[57] In his written submissions dealing with the financial security of military judges the Applicant has referred to the substantial drop in remuneration if a military judge returns to a career as a lawyer in the Legal Branch of the Canadian Forces following service as a military judge. It cannot be doubted that in this context the financial rewards are an incentive to a military judge to continue in office, although there are undoubtedly other factors the relative importance of which will, of course, vary with the individual concerned.

[58] It is clear, therefore, that any scheme for the renewal of the term appointment of a military judge must be carefully drawn in order to banish any reasonable perception that the decisions of the military judge might be influenced by the prospect of reappointment. With this principle in mind I proceed to an examination of the terms of renewal of the appointment of a military judge under QR&O.

(i) Structure of the Renewal Committee

[59] The renewal of the appointment of a military judge is made by the Governor in Council on the recommendation of a Renewal Committee established by regulation. QR&O article 101.15 establishes the Renewal Committee to consist of three members appointed by the Governor in Council for a period of not more than four years, as follows: a judge of the Court Martial Appeal Court nominated by the Chief Justice of that Court who is to act as the Chairperson, a civilian lawyer nominated by the Minister of Justice, and a person nominated by the Minister of National Defence who is neither a legal officer in the Canadian Forces nor a military policeman.

[60] I do not accept the submission of counsel on behalf of the Respondent that the Renewal Committee as it is presently structured under these regulations is

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[54] *Valente*,para 37-39. By the time the case reached the Supreme Court of Canada this objectionable feature of the statute had been changed.

[55] *Généreux*, page 317

independent. It is apparent that the Committee, while including representation from the judicial branch of government in the person of a judge of the Court Martial Appeal Court, consists predominantly of persons nominated by, and who therefore may reasonably be seen to represent the interests of, the executive branch. Certainly there is nothing in the regulation to prevent a nominating authority from nominating a person who the nominator believes will advance the interests of the nominating authority.

[61] But the reappointment of judges should not be a matter of brokering the interests of one branch of government against another. Nowadays the power of reappointment for term judges is either in the hands of a judicial office-holder, or is made by a Judicial Council[56], a body in which sitting judges predominate. For example, the reappointment of retired provincial judges for successive terms is normally made by the chief provincial judge.[57] The reappointment of a retired chief judge is made by a judicial council.[58]

[62] In some cases, the reappointment may be made by the executive, but upon the request or recommendation of someone holding judicial office[59] or by a Judicial Council.[60]

[63] In either case it is clear that the judicial role must predominate when dealing with issues of judicial tenure.

[64] I am not persuaded that there are any circumstances peculiar to the military judiciary that would justify an enhanced role for the executive branch, and a corresponding diminution in the role of the judicial branch, in the reappointment process. I therefore conclude that with respect to the military judiciary, a reasonable perception of independence in the reappointment process requires that the Governor in Council act upon advice from a body that consists predominantly of individuals from the judicial branch. The Renewal Committee established by QR&O article 101.15 does not meet this standard.

(ii) Factors the Renewal Committee is to consider

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[56] A Judicial Council consists predominantly of judges with representation from the executive branch and perhaps from independent persons (*R. v. Temela* (1992) 71 C.C.C. (3d) 276 (NWTCA). In *Ell v. Alberta* [2003] 1 S.C.R. Major J delivering the judgment of the Court observed that in *Valente* "this Court determined that the involvement of a provincial Judicial Council in tenure issues went a considerable distance to secure judicial independence. . ."

[57] *Valente*, para 39. For Saskatchewan, see the *Provincial Court Act, 1998* ss.13(3), Nova Scotia, see *Provincial Court Act* ss.6A(1), Ontario see *Courts of Justice Act* ss.47(3).

[58] Ontario *Courts of Justice Act* ss.47(5)

[59] see for example *Pellerin v. Therien* (1997) 148 D.L.R. (4th) 255 (Que. C.A.) at page 266-269

[60] *Reference re: Territorial Court Act S.6(2)* (1997) 152 D.L.R. (4th) 132 at para 88-95, *Craig v. British Columbia* [1997] B.C.J. No 1417 at para 98

[65] QR&O article 101.17 deals with the process to be followed by the Renewal Committee, and sets out in paragraph 101.17(2) the factors the Committee shall consider in arriving at its recommendation. The matters to be considered by the Committee include the requirements of the Office of the Chief Military Judge, including "any planned change which will increase or reduce the establishment within the unit of the Chief Military Judge". This must refer to changes that are planned by the executive. In my view where the executive branch contemplates a reduction in the number of judges, it must be accomplished at the time of initial appointment by simply forbearing to make a further appointment. It is incompatible with the independence of sitting judges that the executive branch should be able to get rid of sitting judges by simply reducing the authorized complement and then waiting for an existing appointment to expire. This could only lend colour to the suggestion that sitting judges have an important interest in pleasing the executive in order to avoid being let go at the end of their term in office.

[66] The Committee is also directed to consider the official language requirements within the unit of the Chief Military Judge. Again, this is an important consideration at the time of initial appointment in order that the military judiciary properly reflect Canada's linguistic heritage, and in order to be able to honour the choice of language of trial made by the accused person. While this factor is a relevant consideration for the executive in the making of an initial judicial appointment, in my view this factor is irrelevant to the matters that a properly constituted Renewal Committee should consider.

[67] The Committee is directed by article 101.17(2)(b) to consider "any compelling military requirement to employ the military judge after the completion of the current term of appointment in a non-judicial capacity elsewhere in the Canadian Forces". This factor gives far too much weight to the interests of the executive branch of government in the development of a recommendation to renew a judicial appointment. Again, a reasonable person could reasonably perceive that a sitting judge might wish to make decisions that please the executive in order that the executive would not decide that the judge should be employed in some other non-judicial role elsewhere in the Canadian Forces.

[68] By article 101.17(2)(c) the Committee is to consider "the military judge's physical and medical fitness to perform military duties as an officer of the legal classification". I am unable to understand the possible relevance of this factor to the matter the Committee would have under consideration. If a judge is unable to perform military judicial duties by reason of physical or medical unfitness, the question ought to go before an Inquiry Committee for a consideration of removal from office. Short of that, I fail to understand the relevance of these factors to a determination of the suitability of a judge to continue in a judicial capacity. If at the end of a term

appointment a judge falls short of the prescribed standards of physical and medical fitness, is the Renewal Committee to recommend that the judge not be renewed but rather be returned to the Legal Branch of the Canadian Forces, from whence the judge was recruited, despite the physical or medical shortcoming? Or, is the fact that the judge would not meet the standard of physical fitness a reason to recommend the renewal of the appointment as a judge because the individual fails to meet the standard of physical or medical health required of a Legal Officer? I am simply unable to make sense of this factor.

(iii) Standard to be applied

[69] Importantly, the regulation contains no standard to be applied by the Renewal Committee in the development of its recommendation to the Governor in Council.

[70] The lack of an articulated standard was a feature of the scheme for the renewal of military judge appointments considered by Létourneau J in *Lauzon* when he observed that the process of reposting by the Minister was "entirely within the discretion of the Minister, without any protective standard or guideline which, for all practical purposes, is equivalent to removal from the performance of judicial duties without cause" and "…the lack of standards for reappointment does not offer sufficient objective guarantees of independence".[61] (emphasis added)

[71] While the regulation clearly sets out certain non-exhaustive factors for the Committee to consider, some of which I have discussed above, these factors are not referable to a standard or guideline which is to inform and focus the Committee's deliberations. Were the reappointment process to be in the hands of the judicial branch, one might infer that the standard to be applied is the best interests of the administration of military justice. But no such standard can be read into the plain words of QR&O article 101.17 as it presently stands.

[72] I conclude that as a result of these deficiencies, considered collectively, the scheme for the renewal of appointments of military judges does not provide the "substantial and sufficient guarantees" of which Létourneau J spoke in *Lauzon*, and therefore does not meet the standard for security of tenure required by section 11*(d)* of the *Charter.*

[73] The Respondent submits that the renewal scheme is not unconstitutional as the Renewal Committee must act in accordance with the principles of natural justice, and therefore must act reasonably and must not consider irrelevant matters. As well, under QR&O article 101.17(3) the Renewal Committee is prohibited from considering

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[61] *Lauzon*, para 27

the judge's record of judicial decisions.

[74] It is always possible, of course, for a statutory decision-maker to act in a proper manner. The question is, is that sufficient to meet the constitutional requirement of objective guarantees of judicial independence? In my view the position taken by the Respondent is definitively answered by Lamer C.J. in *Canadian Pacific Limited v. Matsqui Indian Band*[62]*:*

> ... The function of institutional independence is to ensure that a tribunal is legally structured such that its members are reasonably independent of those who appoint them. My colleague Sopinka J appears to be of the view that it is possible for the appellant bands to exercise their discretion under the by-laws with respect to financial and tenure matters in such a way that the fundamental inadequacies of the by-laws will be cured. With respect, it is always possible for discretion to be exercised consistent with natural justice. The problem is the discretion itself, since the point of the institutional independence doctrine is to ensure that tribunal independence is not left to the discretion of those who appoint the tribunals. It is, in my opinion, inconsistent to concede that institutional independence applies in this case, yet go on to conclude that the lack of institutional independence in the by-laws may be addressed through the exercise of the discretionary powers granted to the Band Chiefs and Councils under the by-laws. Institutional independence and the discretion to provide for institutional independence (or not to so provide) are very different things. Independence premised on discretion is illusory. (emphasis in original)

[75] The Renewal Committee as it is structured in QR&O fails to respect the characteristic of security of tenure required by judicial independence.

RELIEF FROM PERFORMANCE OF DUTIES

[76] QR&O article 19.75 deals with relief from the performance of a military duty. The operative provision is paragraph (4) which provides:

> (4) An authority may relieve an officer or non-commissioned member from the performance of military duty if, in a situation other than one provided for under paragraph 101.08(3), the authority considers that it is necessary to relieve the member from the performance of military duty to separate the member from their unit.

[77] Under paragraph (2) the authority to relieve from the performance of military duty rests with the Chief of the Defence Staff or an officer commanding a command. A separate article deals with relief from performance of military duty where the member concerned is either under investigation for or is charged with or convicted of a federal or provincial offence.[63]

[78] The Applicant submits that article 19.75 gives the CDS and an officer

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[62] [1995] 1 S.C.R. 3, p.60-61
[63] QR&O art.101.08

commanding a command the power to temporarily suspend a military judge from the performance of judicial duties, and that such authority is inconsistent with the required institutional independence of military judges.

[79] The duties of military judges are set out in the *National Defence Act* in section 165.23:

> (1) Military judges shall preside at courts martial and shall perform other judicial duties under this Act that are required to be performed by military judges.
>
> (2) In addition to their judicial duties, military judges shall perform any other duties that the Chief Military Judge may direct, but those other duties may not be incompatible with their judicial duties.
>
> (3) Military judges may, with the concurrence of the Chief Military Judge, be appointed as a board of inquiry.

[80] In my view the judicial duties of military judges are military duties as understood by article 19.75. Military judges performing judicial duties are therefore within the reach and scope of this Article.

[81] In the face of the power granted by this article it would be reasonable for a person to conclude that a military judge might be relieved of his or her duties as a judge if the judge's decisions disappointed the expectations of the executive branch of government as represented by the CDS or a commander of a command. Conversely, it would be reasonable to suppose that those military judges who continue to perform judicial duties are those judges whose decisions have not seriously disappointed the expectations of the chain of command in the past. Both perceptions, though reasonable, are incompatible with a judiciary that is independent of the executive. On its face, therefore, this article grants a power in respect of military judges that is incompatible with the independence required of judicial office.

[82] The Respondent replies that the power of temporary suspension from duty in relation to military judges should be interpreted as subject to the statutory requirement of an Inquiry Committee recommendation for removal from office under section 165.21(2) of the *National Defence Act.*

[83] In my view the power of temporary suspension from duty by the chain of command under article 19.75 is something quite different from the power of permanent removal from office by the Governor in Council contemplated by section 165.21(2), and the former cannot be read as subject to the latter. These powers are alike, however, in their effect upon the security of tenure of military judges. It follows that the possible application of the power contained in article 19.75 to military judges violates the *Charter* guarantee of an independent tribunal.

FINANCIAL SECURITY

[84] Financial security is the second of the core characteristics to which Major J adverted in *British Columbia v. Imperial Tobacco.* In *Valente* LeDain J. wrote that financial security[64]

> … means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.

[85] It is the political branches of government, the legislative and the executive, that provide for the payment of salaries and other benefits, including pensions, to judges, and the law clearly permits those branches to change the amounts involved by increasing or decreasing the sums paid to judges. But as the Supreme Court of Canada held in *Reference re Remuneration of Judges of the Provincial Court of P.E.I*[65] the Constitution requires that governments make changes to judicial salaries and benefits only upon a consideration of the recommendations of a committee or commission that operates independently of government, whose recommendations are effective, and who considers objective criteria in arriving at its recommendations.[66] The government may disregard the recommendations of such a committee only by justification upon a standard of simple rationality.

[86] The process of an independent commission applies to the determination of judicial salaries and benefits because judges, unlike employees, cannot bargain, either individually or collectively, over their remuneration. The process of negotiation itself involves mutual expectations between the parties to the negotiation that are simply incompatible with the judicial function.[67] The independent commission process is intended to replace those mechanisms and achieve fairness both to judges and to the public purse from which they are paid, while at the same time maintaining the integrity of judicial decision-making.

[87] Finally, judicial remuneration cannot fall below a "basic level of remuneration", that is, a minimum level of financial security for the office of judge that is necessary to maintain public confidence in the independence of the judiciary.[68]

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[64] *Valente*, para.40
[65] [1997] 3 S.C.R. 3
[66] *ibid.* para 133
[67] *ibid.* para 134
[68] *ibid.* para 135

PAY OF MILITARY JUDGES

[88] Since the substantial amendments to the *National Defence Act* effected in 1999, the pay of military judges has been determined by the executive branch of government[69] following the recommendation of the Military Judges Compensation Committee established by QR&O article 204.23.

[89] The Applicant does not suggest that the Military Judges Compensation Committee process does not meet the standards of independence, effectiveness and objectivity required by the Supreme Court of Canada in the *PEI Reference case*. But it is argued that because the provisions guaranteeing military judicial salaries are as prescribed by regulation and not contained in the statute itself, the provisions are at risk of manipulation and change by the executive without Parliamentary scrutiny. For this reason it is argued that the statute is unconstitutional, as are the QR&O that establish the Compensation Committee and provide for its processes.

[90] I have already dealt with a similar argument in the context of security of tenure. In my view the fact that these provisions, although required by the Constitution to ensure judicial independence, are contained in regulations as opposed to the authorizing statute, does not affect judicial independence.

[91] A similar point to that taken by the Applicant here was taken in the case of *Valente* as the salaries of Ontario provincial judges at the time were fixed by regulation. LeDain J. wrote:[70]

> The principal objections to the manner in which the salaries of provincial court judges are provided for is that they are not fixed by the legislature and they are not made a charge on the Consolidated Revenue Fund. These two requirements have traditionally been regarded as affording the highest degree of security in respect of judicial salaries….
>
> Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s.11*(d)* of the *Charter*....

[92] I conclude that the judicial independence of military judges does not require that their salaries be set out in statutory form, and the attack on the statutory and regulatory provisions dealing with the pay of military judges fails.

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[69] *NDA* s.12(3) "The Treasury Board may make regulations (a) prescribing the rates and conditions of issue of pay of military judges;"
[70] *Valente*, para. 42-43

[93] Finally, at paragraphs 37 to 41 of his written submissions, the Applicant observes that the pay of military judges is substantially higher than that of Legal Officers in the Judge Advocate General's Branch, and if upon the completion of a term of judicial office the judge were to return to the Legal Branch, the salary the former judge would earn as a Legal Officer would be below the minimum necessary to maintain public confidence in the judiciary.

[94] I have dealt with this submission in my discussion of security of tenure where, I believe, this point is most germane. In my view there is simply no evidence before the court as to the minimum salary that military judges are to be paid in order to ensure the level of financial security required by judicial independence. Apart from that, it must be recalled that the requirement of financial security for judges exists because of the effect that a lack of financial security may have, in the eyes of a reasonable person, upon judicial decision-making. That concern no longer exists once the judge has left judicial office.

PENSIONS OF MILITARY JUDGES

[95] There is no separate pension plan for military judges, but as members of the regular force they are contributors, and become entitled to pension benefits, under the *Canadian Forces Superannuation Act.*[71] The Applicant does not challenge the fact that military judges are treated as members of the Canadian Forces generally for pension purposes. In light of the holding of the Supreme Court of Canada in *Valente* it is unlikely that such a general attack would succeed.[72]

[96] The Applicant does however challenge two provisions of the *CFSA* on the ground of inconsistency with the principles of judicial independence.

[97] The first such provision is subparagraph 18(2)(c)(iii) of the *CFSA* which permits a contributor who is compulsorily retired from the regular force after ten but less than twenty years of service to receive an immediate reduced annuity, in lieu of a return of contributions or a deferred annuity, providing that the Minister of National Defence consents. The Applicant argues that ministerial consent contemplates the negotiation of pension benefits between the executive and the retired judge, and negotiation between the executive and judicial branches in financial matters is incompatible with the holding of the Court in the *PEI Reference* case.[73]

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[71] R.S.C. 1985, c.C-17, as amended.
[72] At the time the *Valente* case arose provincial judges in Ontario were treated for pension purposes in the same way as provincial public servants. See *Valente* para 45-46.
[73] *PEI Ref* para 134

[98] In my view, the mere existence of executive authority to administer the pension benefits of a judge following retirement from judicial office does not violate the principles of the financial security characteristics of judicial independence. Such authority is a necessary feature of the administration of all pension plans in the public sector that are paid out of public funds. Post-retirement negotiation over pension entitlements is not the kind of negotiation that was proscribed in the *PEI Reference* case as incompatible with judicial independence, and the prospect of having to engage in such a negotiation in the future cannot reasonably be seen to affect the process of judicial decision-making while the judge is in office.

[99] The second provision of the *CFSA* that is attacked here is subsection 49(4). Section 49 creates the Service Pension Board whose duty is to determine and to certify the "reason for the retirement" of any contributor who is retired from the regular force. The amount of a pension benefit payable under the *CFSA* may vary according to the reason for retirement. By subsection (4) the Treasury Board may exempt any case or classes of cases from the jurisdiction of the Service Pension Board.

[100] The Applicant argues that a retired military judge may make representations to the Service Pension Board as to the appropriate reason for retirement on which the judge's pension benefit is to be determined, and this entails an unacceptable negotiation for a pension benefit. The Applicant seeks an order that the provisions of section 49 be read down so as not to apply to military judges.

[101] Again, I consider that this is not the kind of negotiation of which Lamer C.J. spoke in the *PEI Reference* case. In the course of oral argument counsel on behalf of the Applicant agreed that it would be unreasonable for the Service Pension Board to consider a judge’s record of judicial decision-making in determining the proper reason for the retirement of the judge. It would not be reasonable for anyone to suppose that judicial decision-making might be influenced by concerns on the part of a judge as to how the judge might be dealt with by the Service Pension Board after retirement.

ADMINISTRATIVE INDEPENDENCE

[102] The third of the three core characteristics of judicial independence is administrative independence. This refers to matters of administration that bear directly on the exercise of the judicial function, such as the assignment of judges, the sittings of the court including allocation of court rooms and maintenance of court lists, as well as the direction of the administrative staff engaged in carrying out these functions.

OFFICE OF THE CHIEF MILITARY JUDGE

[103] The Applicant submits that two provisions of QR&O dealing with the organization of the Canadian Forces generally are unconstitutional insofar as they refer

to the Office of the Chief Military Judge because they are inconsistent with the administrative independence characteristic of judicial independence. QR&O article 2.07(2) gives the Chief of the Defence Staff the authority to determine the establishment for officers and non-commissioned members for each unit in the Canadian Forces. QR&O article 3.21(1) declares that an officer commanding a command shall exercise command over all units, etc. that are allocated to the command "unless the Chief of Defence Staff otherwise directs".

[104] The parties have agreed to certain facts in relation to this issue that are reduced to writing and exhibited on the application as Exhibit VD1-8, from which I quote:

> ". . .By Ministerial Organization Order (MOO) 2000007, the Minister of National Defence (MND) authorized the organization of the Office of the Chief Military Judge (CMJ) as a unit of the CF, embodied in the Regular Force, with Dept ID 3763. Canadian Forces Organizational Order (CFOO) 3763 dated 20 February 2002 superseded CFOO 3763 dated 26 February 1998, and set out at paragraph 4 the role of the CMJ as Commanding Officer of the Office of the CMJ. This officer is also designated as an officer having the power and jurisdiction of an officer commanding a command with respect to personnel on the strength of the Office of the CMJ, except in respect of applications for redress [of] grievance and any disciplinary matter."

[105] The Applicant argues that under QR&O article 3.21(1) the Chief of Defence Staff retains the authority to direct the manner in which the Chief Military Judge, as a commander of a command, is to exercise authority over that command, and that this authority is incompatible with judicial independence. It is argued that the Office of the Chief Military Judge should be created by the statute itself rather than pursuant to a mere administrative direction that could be rescinded at "the stroke of a pen".

[106] In my view the concerns raised by the Applicant in this portion of his submissions do not reach the areas identified by LeDain J. as constituting "the essential or minimum requirement for institutional or "collective" independence" of military judges.[74]

[107] CFOO 3763 dated 20 February 2002 is before me as exhibit VD1-2.[75] It recites such matters as the role of the Chief Military Judge in appointing military judges

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[74] *Valente* para 49

[75] Oddly, this instrument refers to "Presidents" and "Judge Advocates" at General and Disciplinary Courts Martial despite the changes effected by the 1999 amendments to the *NDA*.

and members to preside at military courts, providing for court reporter services, and the chain of command for such matters as grievances and disciplinary matters within the Office of the Chief Military Judge. It states that the document is an organizational document "and is not intended for use as an authority for other than organizational purposes". More importantly, none of its provisions purport to direct the Chief Military Judge in the exercise of any of the judicial functions of which LeDain J. spoke.

[108] In my view the administrative arrangements of which the Applicant complains are somewhat analogous to the relationship between a provincial Attorney General whose department of government employs court staff on the one hand, and the judges who are assisted in the discharge of their judicial role by those staff members on the other. The authority that the executive branch may exercise as an employer over persons who are employed as court staff does not extend to matters that trench upon the essential conditions of administrative independence of the judiciary. The administrative arrangements governing the office of the Chief Military Judge as set out in QR&O, or otherwise established in evidence before me, do not cross that line.

GRIEVANCES

[109] Since as long ago as the *Articles of War* of 1672 the soldier has enjoyed a right to petition his superiors for the redress of any complaint of a wrong suffered at the hands of a superior officer.[76] This right is now contained in section 29(1) of the *National Defence Act* which reads:

> **29.**(1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.

[110] Under the statute the Chief of Defence Staff is the final authority in the resolution of a grievance[77], but that officer may, and in prescribed cases shall, refer a grievance to the Grievance Board for a non-binding recommendation.

[111] The Applicant points out that there is no special arrangement for dealing with a grievance that might be made by a military judge, and submits that a grievance by a military judge should be resolved by an organization that is independent of the Chief of Defence Staff. In this respect I was referred to a passage in the Report of former Chief Justice Lamer, at page 24:

> ... It would be contrary to the principles of judicial independence to allow a military judge to apply to the executive for redress of a grievance, as this would open the door to

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[76] Clode, Charles M., *Military and Martial Law*, 1874, p.17, 78
[77] *NDA* sec.29.11

> executive interference with the judiciary....

[112] The former Chief Justice goes on to recommend that grievances by military judges should be sent directly to the Grievance Board for a final decision.

[113] With the greatest of respect, I confess to having some difficulty with the breadth of the statement of the former Chief Justice. Seen from the vantage point of the reasonable person it is quite true that an individual judge who seeks a specific advantage from the executive branch of government might imperil the perception of equal justice. But in many relatively minor matters of complaint it would be unreasonable to suppose that the course of judicial decision-making could be influenced by the possibility that the resolution of a grievance might be in the judge's favour.

[114] It may be that a counsel of prudence would be for military judges to forswear engaging the grievance process. After all, judges have a responsibility to do their part as individuals to ensure that judicial independence is maintained. In any case in which a personal grievance must be brought, the judge might be well-advised to bring the matter to the attention of the Chief Military Judge instead of launching a formal process that might give the appearance of compromising judicial independence.

[115] If a military judge were to submit a grievance on a matter of substantial importance that related in some way to a case before the judge, that judge might be thought to have lost the impartiality that is necessary to maintain the confidence of the parties. QR&O specifically provides in articles 112.05(3)(b) and 112.14 for a process to determine an objection that a party might have to the judge assigned to the case.

[116] Impartiality is related to but is not the same as independence.[78] Independence is a necessary, but not a sufficient, condition of impartiality. I cannot say that the absence of a separate process for the adjudication of grievances by military judges itself affects judicial independence.

[117] Finally, the Applicant seeks a declaration that sections 173 and 174 of the *National Defence Act* are of no force and effect. As I have already pointed out,[79] these provisions of the statute establish the institution of a Standing Court Martial to consist of a military judge sitting alone with jurisdiction over any officer or non-commissioned member charged with having committed a service offence.

[118] In his written submissions to this court the Applicant did not develop any argument attacking these provisions. In his oral argument counsel for the Applicant clarified that he is not attacking the institution of the Standing Court Martial as such.

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[78] *Ruffo v. Conseil de la Magistrature* [1995] 4 S.C.R. 267 *per* Gonthier J for the Court at para 38 et seq.
[79] See the text accompanying footnote 12, *supra*

His attack upon these provisions rests solely on the grounds that the presiding military judge is not an independent and impartial tribunal.

[119] I have found that the QR&O dealing with the Renewal Committee and its processes and also the regulation dealing with relief from the performance of military duties do not meet the standards of judicial independence required by section 11*(d)* of the *Charter*. In my view these findings do not affect the Standing Court Martial itself, and therefore these provisions of the statute are not unconstitutional.

REMEDIES

[120] In summary, I have concluded that the provisions of QR&O dealing with the renewal of the appointments of military judges under articles 101.15 to 101.17, and the relief of military judges from the performance of military duties under article 19.75 fail to respect the independence of the military judiciary required by section 11*(d)* of the *Charter*.

[121] The *Charter* is Part I of the *Constitution Act*, *1982*,[80] and is therefore part of the "Constitution of Canada" as defined in section 52(2)(a).

[122] Section 52(1) of the *Charter* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[123] Relying upon this provision the Applicant seeks the remedy of a declaration from this court that various provisions of the *National Defence Act* and the relevant provisions of QR&O are of no force and effect. With respect to article 19.75, and in the alternative, the Applicant seeks an order of this court reading down article 19.75 so that it would not apply to military judges.

[124] In *Schachter v. Canada*[81] the Supreme Court of Canada summarized the law dealing with the remedies that are available under the *Charter* where a statute has been found to be inconsistent with the *Charter*. Lamer C.J. for the majority of the Court stated:[82]

> A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with

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[80] The *Canada Act 1982* (U.K.) c.11
[81] [1992] 2 S.C.R. 679
[82] *ibid*. p. 695

> the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a [page 696] court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

[125] The court must consider the extent of the inconsistency. Can the inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the statute or regulation inextricably linked to the part that is inconsistent with the *Charter*?[83]

[126] With respect first of all to QR&O article 19.75, if the court were to simply strike down the offending provision there would be no capability to temporarily suspend members of the Canadian Forces from duty in circumstances where such temporary suspension is clearly appropriate. The Applicant recognizes that this capability is necessary. His complaint, with which I agree, is that such a power in the executive should not apply to military judges.

[127] In my view, QR&O article 19.75 must be read so as not to apply to military judges. This is conveniently accomplished by reading paragraph (1) of this article as if it read "This article does not apply to a military judge, or to an officer or non-commissioned member to whom article 101.08 (*Relief from Performance of Military Duty – Pre and Post Trial*) applies."

[128] It may be that the Chief Military Judge should be thought to have the authority to relieve a military judge from the performance of duties, especially in circumstances where an Inquiry Committee is dealing with the question of whether a military judge should be removed from office. The authority to suspend a sitting judge is found in some provincial statutes[84] and rests with a Chief Judge, acting, in the case of Ontario for example, on the interim recommendation of the Judicial Council. Whether there should exist such a power in the military context is a question to be addressed by policy-makers rather than by this court.

[129] There will therefore be a declaration that QR&O artcle 19.75 does not apply in respect of a military judge.

[130] With respect to the renewal of the appointments of military judges, I

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[83] *ibid.*, page 717

[84] see, for example, the Ontario Courts of Justice Act, R.S.O. 1990, c.43, s.51.4(10) and 51.4(12), and the Nova Scotia Provincial Court Act, R.S.N.S. 1989, c.238, s.15(2).

have already concluded that aspects of the scheme set out in QR&O articles 101.15 and 101.17 violate section 11*(d)* of the *Charter.* In my view the inconsistency with the *Charter* is limited to the specific provisions contained in QR&O article 101.15(2) dealing with the structure of the Renewal Committee, and 101.17(2) dealing with factors the Committee is directed to consider. As well, article 101.15(3) is inextricably linked to article 101.15(2).

[131] There will therefore be a declaration that QR&O 101.15(2), 101.15(3) and 101.17(2) are inconsistent with section 11*(d)* and therefore of no force or effect.

[132] As stated above, in addition to the declaratory relief, the Applicant seeks what I will refer to as personal remedies under section 24(1) of the *Charter.* That section provides:

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[133] In his written submissions the Applicant sought a stay or termination of proceedings, or such other relief as the court deems just. In oral argument the Applicant as well sought a constitutional exemption.

[134] In *Schachter* Lamer C.J. wrote[85]:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.

[135] In my view, the present case is not one of the rare cases in which declaratory relief under section 52(1) of the *Charter* should be accompanied by a personal remedy. The Applicant has not demonstrated any effect peculiar to him of the declaration of invalidity of the QR&O articles dealing with renewal of military judges, nor any effect upon him of the provision for relief from performance of military duties. No authority has acted pursuant to these unconstitutional provisions to the detriment of the Applicant. In these circumstances I do not consider that the personal remedies sought by the Applicant are either appropriate or just.

[136] It is argued that a simple declaration of invalidity does not reward the Applicant who has brought the issue before the court for determination. In this sense the Applicant's success on the application is but a Pyrrhic victory. It is true of course that there is an important public interest that is served by the bringing of an application of

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[85] *Schachter,* p. 720

this nature. But the granting of the personal remedies that are sought in this case would have the effect of stopping the prosecution altogether. This would appear to me to be rather a windfall to the Applicant to which he has not demonstrated an entitlement.

[137] The application for a stay of proceedings or a constitutional exemption is refused.

NECESSITY

[138] The Respondent on this application asks the court to suspend any declaration of invalidity it may make if as a result of such declaration military judges lose jurisdiction to preside at courts martial.[86]

[139] In *Schachter* Lamer C.J.wrote[87]:

> A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain*, *supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth....

[140] The effect of the application of the doctrine would be to suspend the declaration for such reasonable length of time as would enable the executive or Parliament to remedy the constitutional shortcomings as found by the court by the passing of remedial legislation or the making of a regulation.

[141] In my view the suspension of the declarations I have made in this case is not justified. The declarations do not affect the jurisdiction of military judges to continue to preside at courts martial until the earlier of the expiry of the appointed term in office or the judge's retirement date.

[142] Even if I am wrong in this, the test for a suspension of the declarations is not met in this case. There is no public danger, or threat to the rule of law, or denial of a benefit under unconstitutional legislation. The executive may change the regulations that I have found to run afoul of the constitutional requirement for an independent judiciary without extensive delay, or even inconvenience. The statutory authority to make the required changes is clear. There is no reason to doubt that the necessary changes will be made.

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[86] *Written Submissions of the Respondent* para.54
[87] *Schachter*, p. 715

[143] As Lamer C.J. stated in the *P.E.I Reference case*[88]:

> ... In a system of responsible government, once legislatures have made political decisions and embodied those decisions in law, it is the constitutional duty of the executive to implement those choices.

DISPOSITION

[144] This application therefore succeeds in respect of the request for declarations concerning the renewal of the appointments of military judges, and concerning relief from performance of military duties. The application is otherwise dismissed.

COMMANDER P.J. LAMONT, M.J.

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[88] *supra*, footnote 19, para 139