Citation: *R. v. Corporal R.P. Joseph*, 2005 CM 41

Docket:C200541

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE NORTH BAY

Date:10 January 2006

PRESIDING:LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL R.P. JOSEPH
(Accused-petitioner)

DECISION RESPECTING AN APPLICATION MADE UNDER SUBPARAGRAPH 112.05(5)(e) OF THE QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES RESPECTING SECTION 11(d) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.
(Rendered orally)

INTRODUCTION

[1] This is an application made under paragraph 112.05 (5)(e) of the Queen's Regulations and Orders for the Canadian Forces that the Standing Court Martial is not an independent tribunal within the meaning of section 11*(d)* of the *Canadian Charter of Rights and Freedoms*, the *Charter*, because military judges presiding at these courts martial have insufficient guarantees of judicial independence. This application is one of three similar applications argued before standing courts martial presided by this military judge. The other cases are the Standing Court Martial concerning Corporal H.P. Nguyen that commenced on 12 October 2005 in Sherbrooke, Québec, and the Standing Court Martial concerning Ex-Leading Seaman LaSalle that commenced in Gatineau, Québec, on 1 November 2005.

[2] These applications raise for the first time since the cases in *R. v. Lauzon* [1998] C.M.A.J. No. 5 and *R. v. Bergeron* [1999] C.M.A.J. No. 3, the issue of judicial independence as it relates to courts martial under section 11*(d)* of the *Charter*

since the enactment of the amendments to the *National Defence Act* and its regulations in 1998. In the recent case *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)*, 2005 SCC 44, the Supreme Court reaffirmed at paragraph 4:

> The basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution; see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at paras. 18-23. Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard*, at p. 70), and has been said to exist "for the benefit of the judged, not the judges" (*Ell*, at para. 29)....

This court strongly believes that these principles apply to courts martial in Canada. Despite their important duties, military judges presiding at courts martial have a more limited jurisdiction that of superior or provincial court judges. Military judges preside over penal and disciplinary matters dealing with persons subject to the Code of Service Discipline, military or civilian, in Canada or abroad. The court accepts that their role in upholding the Constitution is more limited than that their counterparts of superior and provincial courts. Therefore, it is likely that less stringent conditions are necessary to satisfy their judicial independence. However, the review of the court martial structure shall take into account not only its historical and statutory context, but it shall also acknowledge its overall relationship with other courts and tribunals in this country.

[3] The issue of judicial independence has been addressed in several case law since *Valente v. The Queen* [1985] 2 S.C.R., 673 where Le Dain J. stated at page 692:

> Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence .... Opinions differ on what is necessary or desirable, or feasible....

[4] Nobody should take issue with the fact that judicial independence has evolved over time both in terms of its essential components i.e., security of tenure, financial security and administrative independence and with regard to its application to the broad spectrum of existing tribunals. Judicial independence has two dimensions. One individual as it relates to the independence of a particular judge and the other institutional as it relates to the independence of the court the judge sits on. These dimensions depend upon objective standards that protect the judiciary's role; *Valente*, at page 687; *Beauregard*, at page 70; and *Ell*, at paragraph 28. The Supreme Court has reiterated the content and the conditions of judicial independence in *Ell v. Alberta* [2003] 1 S.C.R., 857, at paragraphs 28 to 31 where Major J. stated, for the court:

> 28 As stated, judicial independence encompasses both an individual and institutional dimension. The former relates to the independence of a particular judge,

and the latter to the independence of the court to which the judge is a member. Each of these dimensions depends on objective conditions or guarantees that ensure the judiciary's freedom from influence or any interference by others: see *Valente, supra*, at p. 685. The requisite guarantees are security of tenure, financial security and administrative independence: see *Provincial Court Judges Reference*, *supra*, at para. 115.

29 The principal question in this case is whether the Legislature's removal of the respondents from office contravened their security of tenure. In assessing this issue, it must be considered that the conditions of independence are intended to protect the interests of the public. Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice: see *Provincial Court Judges Reference*, *supra*, at para. 9. The principle exists for the benefit of the judged, not the judges. If the conditions of independence are not "interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts": see *Mackin*, *supra*, at para. 116, *per* Binnie J., in his dissent.

30 The manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal and the interests at stake. See *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 83, *per* Lamer C.J., and *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 65, where the Court advocated a contextual approach to judicial independence:

> ... although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements, since s. 11*(d)* of the *Canadian Charter* may have to be applied to a variety of tribunals. These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected ....

31 The level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal. Superior court judges are removable only by a joint address of the House of Commons and the Senate, as stipulated by s. 99 of the *Constitution Act*, *1867*. This level of tenure reflects the historical and modern position of superior courts as the core of Canada's judicial structure and as the central guardians of the rule of law. Less rigorous conditions apply in the context of provincial courts, which are creatures of statute, but which nonetheless perform significant constitutional tasks. See *Mackin*, *supra*, at para. 52:

> ... the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act*, *1982*; provide relief for violations of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act*, *1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act*, *1982*.

> While the respondents have important duties, their jurisdiction is considerably more limited than that of provincial court judges. Their role in upholding the Constitution is narrower in scope. As a result, less stringent conditions are necessary in order to satisfy their security of tenure.

[5] The concept of judicial independence is a pre-requisite to the judge's impartiality and it must be assessed objectively. This court has to determine whether a reasonable person, who is informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that this Standing Court Martial is independent. Moreover, the law requires that the emphasis be placed on the existence of the independent status of the court or tribunal and that this Standing Court Martial be reasonably seen to be independent. Therefore, perception does matter. In *Mackin v. Nouveau-Brunswick (Minister of Finance)*; *Rice v. Nouveau-Brunswick*, [2002]1 S.C.R., 405, Gonthier J., for the majority, added the following, at paragraphs 38 to 40:

> 38 ... Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.
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> 39 As was explained in *Valente*, *supra*, at p. 687, and in the *Provincial Court Judges Reference*, *supra*, at paras. 118 *et seq*., the independence of a particular court includes an individual dimension and an institutional dimension. The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive and legislative branches of the government. The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges -- the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable -- whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.
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> 40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente*, *supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general *perception* of the court's independence. Moreover, these three characteristics must also be *seen* to be

> protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

As previously stated, the analysis must be made in accordance with the nature of the Standing Court Martial and the interests at stake.

THE EVIDENCE

[6] The evidence before this court consists of the following:

(1) the facts and matters that the court has taken judicial notice under section 15 of the Military Rules of Evidence;

(2) the facts and matters that the court has taken judicial notice under section 16 of the Military Rules of Evidence;

(3) the exhibits filed before the court by consent of the parties and for the limited purposes stated by the parties; and

(4) the agreed statement of acts filed before the court.

POSITION OF THE PARTIES

The Applicant

[7] The applicant suggests that the provisions of the *National Defence Act* and of the Queen's Regulations and Orders for the Canadian Forces (QR&Os) do not provide sufficient and necessary guarantees to ensure that this Standing Court Martial is an independent and impartial tribunal under section 11*(d)* of the *Charter*. In a nutshell, the applicant suggests that a military judge, appointed under the current legislation, does not enjoy substantial and sufficient guarantees of judicial independence in the areas of security of tenure, financial security and institutional independence. The applicant submits that this court should distinguish this case with appellate decisions such as *R. v. Généreux* [1992] 1 S.C.R., 259; *R. v. Ingebritson* [1990] 5 C.M.A.C. 87; *R. v. Edwards* [1995] C.M.A.C. no 10; and *R .v. Lauzon* [1998] C.M.A.C. no 5, that all dealt with the issue of judicial independence and impartiality, but before the amendments to the *National Defence Act* by an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, enacted on 10 December 1998 and came into force on 1 September 1999, because these decisions do not reflect the current state of the law in Canada as it relates to judicial independence. The applicant suggests that military justice does not stand still; it continues to evolve. The applicant submits that there is no reason to presume that the essential objective conditions and guarantees for judicial independence should

not continue to evolve along with other areas of military justice. The applicant suggests that conducting a trial in this context would violate the right of an accused to be tried by an independent and impartial tribunal. This violation could not be saved under section 1 of the *Charter*.

[8] The applicant seeks a series of remedies pursuant to section 52 of the *Constitution Act*, *1982* with regard to the various provisions of the *National Defence Act* and QR&Os dealing with the appointment, removal and renewal process of military judges as well as their remuneration process. He also seeks similar remedies with regard to sections of the *Canadian Forces Superannuation Act*, and with provisions dealing with organizational matters, grievances and suspension from military duties. In particular, the applicant seeks that this court grants several orders that would declare the following provisions to be of no force and effect, mainly:

(1) subsection 165.21(2) of the *National Defence Act* and articles 101.13 and 101.14 of the QR&Os;

(2) subsection 165.21(3) of the *National Defence Act* and articles 101.15, 101.16, and 101.17 of the QR&Os;

(3) subsection 165.21(4) of the *National Defence Act* and article 101.175 of the QR&Os;

(4) sections 173 and 174 of the *National Defence Act*;

(5) paragraph 12(3)(*a*) of the *National Defence Act* and articles 204.22, 204.23, 204.24, 204.25, 204.26 and 204.27 of the QR&Os;

(6) section 29.11 and subsection 29.13(1) of the *National Defence Act* and articles 7.08 and 7.14(2) of the QR&Os;

(7) articles 2.07(2) and 3.21(1) of the QR&Os;

(8) paragraphs (2) and (3) of article 19.75 of the QR&Os; and

(9) subparagraph (2)(*c*)(iii) to section 18 of the *Canadian Forces Superannuation Act* as well as an order reading down subsection 49(4) of that *Act*.

The applicant asks also that the court terminate the proceedings against the applicant. Finally, the applicant requests that, should the court order a temporary suspension of the non-validity of the various provisions, the court should issue an order granting a stay of proceedings pursuant to section 24(1) of the *Charter*.

Security of Tenure

Five-Year Term

[9] The applicant submits that military judges presiding at courts martial do not enjoy substantial and sufficient guarantees with regard to both dimensions of their security of tenure. According to the applicant, a fixed term is not unconstitutional *per se* as stated in *Généreux*. However, he suggests that the role and functions of military judges must be examined in their proper context. The applicant submits that military judges can deal with the most serious matters in criminal law, as do judges of the superior courts and provincial courts. They preside at courts martial and have jurisdiction to hear and try all offences under the Code of Service Discipline, including by incorporation, any act or omission punishable under the *Criminal Code* or any other Act of Parliament. This can include, in certain circumstances, murder. Moreover, the military judge can impose the punishment of imprisonment for life.

[10] Despite these similarities, only the military judge must seek reappointment for a subsequent term of office, since superior court judges and provincial court judges are appointed either for life or to a fixed retirement age set out by statute or regulations. According to the applicant, the fact that the military judge must seek reappointment objectively imperils the perception of judicial independence since security of tenure is lacking. It raises the reasonable perception that the military judge may decide cases in such a manner that might favourably influence his or her reappointment for a further term or to obtain a more favourable position of employment or advancement upon ceasing to hold office. The applicant submits that the tenure of military judges should be similar to that of provincial or superior court judges because their judicial tasks and the decisions they are required to make reveals that military judges have many judicial responsibilities that parallel superior court judges as well as judges of the provincial courts. For example, according to the applicant, military judges have judicial powers that include: presiding at General and Disciplinary Courts Martial which include panels similar to jury trials (subsections 167(1) and 170(1) of the *National Defence Act* respectively); presiding at Special General Courts Martial which deals with trials of civilians who are liable to be dealt with under the *National Defence Act* (section 176 of the *National Defence Act)*; order the taking of samples of bodily substances for the purpose of forensic DNA analysis (section 196.14 of the *National Defence Act*); and, order an accused person to undergo an assessment to determine if he or she is unfit to stand trial.

[11] The applicant suggests also that courts martial are not administrative tribunals. According to the applicant, they are courts of criminal law as that term is normally understood, with military judges empowered to make full judicial decisions. Moreover, military judges are called upon, on a routine basis, to adjudicate *Charter* violations and remedies, which by definition, is an examination and assessment of the government's intrusions into an individual's constitutional rights and liberties. This

inherent tension between the government's (or their actors') actions and the individual's *Charter* rights, necessarily requires that military judges have, and be seen to have, complete autonomy to decide a case, free from even the slightest perception of executive influence or interference. According to the applicant, the remuneration process provided for military judges as well as the outcome of the Military Judges Compensation Committee previous work can be used by analogy to confirm that level of tenure required for military judges should not, at the very least, be inferior to that of provincial court judges.

Removal

[12] The applicant suggests also that the removal process prescribed in article 101.14 of the QR&Os should be set out in the statute and not in regulations as they are more susceptible to the whim of the executive without the scrutiny of Parliament.

Relief from Military Duties

[13] The security of tenure of military judges is also undermined, according to the applicant, because the Chief of the Defence Staff could, under article 19.75 of the QR&Os, relieve a military judge from military duties. This would be incompatible with the removal process.

Retirement Age

[14] The applicant further suggests that the security of tenure and the financial security of military judges are affected because military judges are left in a precarious situation under the current regulations. He argues that as it currently stands, there is considerable manoeuverability for the executive to manipulate the compulsory retirement age (CRA) for military judges. According to the applicant, a CF policy cannot be considered an objective guarantee, as it is too vulnerable to manipulation and change. The applicant submits that military judges should be given adequate protection to CRA by way of statute, not regulations, particularly when discretion is permitted to not even make an offer under QR&O article 15.17 to have table H to the said article applied to military judges.

Renewal

[15] The applicant suggests that the renewal process is unconstitutional. He contends that a close scrutiny of the composition of the Renewal Committee and the renewal process reveals insufficient objective safeguards, conditions and guarantees and is therefore, fatally flawed with respect to judicial independence. The first issue is the fact that the criteria are found in regulations and not in a statute. This leaves the whole scheme vulnerable to the whims of the executive, for changes can be made readily

without the scrutiny of Parliament. The second issue is that the third member of the Renewal Committee, pursuant to QR&O article 101.15(2)(*c*), could be any member of the CF except for a JAG officer or a member of the military police. This would mean, according to the applicant, that, the third member could potentially be the CDS, a commanding officer, or even a member who was found guilty and sentenced in a court martial by the very judge who is seeking reappointment. This would raise all sorts of potential conflicts of interest according to the applicant. He further questions the validity of the regulation dealing with the composition of the Renewal Committee because it does not prescribe what constitutes a quorum. The applicant suggests that the objective opportunity for the executive to take advantage of this alleged oversight, particularly when considering whom the third member of this Committee potentially could be, is perilous to judicial independence. On that specific issue, the court would only refer the parties to section 22 of the *Interpretation Act*, which specifically addresses what constitutes a quorum.

[16] The applicant argues that the renewal process is flawed because the decision to reappoint does not rest with a judicial council, as it should, but rather with the executive. The recommendation is also not binding on the executive. Finally, he submits that the recommendation to nor the decision of the Governor in Council do not have to be made public.

[17] The applicant further suggests that the factors listed in article 101.17 of the QR&Os that shall be considered by the Renewal Committee do not provide substantial and sufficient guarantees of independence. First, the list of factors to be considered is not exhaustive. According to him, it would leave open the opportunity for external, subjective, and non-relevant factors to be considered. Second, the individual factors are either vague, over broad, irrelevant or simply do not contain sufficient objective safeguards in order to protect military judges from what could be perceived as oblique motives from the executive. Finally, the applicant suggests that these factors are all subject to change at the whim of the executive since they are set out in regulations and not in the enabling statute.

Financial Security

[18] The applicant also raises the lack of financial security. The applicant's first concern lies with the fact that the remuneration provisions set out in QR&O articles 204.22, 204.23, 204.24, 204.25, 204.26 and 204.27 and prescribed by Treasury Board pursuant to subsection 12(3) of the *National Defence Act* should all be in legislation. He further argues that in the context of a judge facing the possibility of not being re-appointed for a subsequent term of office, he or she would face a considerable amount of remuneration being reduced when returning to legal officer status. According to the applicant, this lack of financial security would create the perception that a military judge may, particularly as his or her term approaches to an end, be susceptible to external pressures because he or she is concerned, or would be

concerned, with gaining favour with various authorities either to achieve reappointment or to gain a preferred new appointment elsewhere in the military or in another government position. The applicant argues also that the *Canadian Forces Superannuation Act* does not provide sufficient guarantees in the context of financial security because it creates a potential for judges to enter into negotiation over financial benefits, in particular pension benefits. First, he refers to the discretion of the minister, although at the option of the annuitant, to consent to an immediate annuity for those persons of the regular force who have served for ten or more years and who have compulsory retired from the regular force not having reached retirement age under subsection 18(2) of the *Act*. Second, he raises the scenario that because that the Service Pension Board created under section 49 of the *Canadian Forces Superannuation Act* determines the reason for retirement in the case of any contributor who is retired from the regular force, the retired military judge may find himself or herself, according to the applicant, making representations before the Service Pension Board to determine the most appropriate and just benefit. The applicant suggests that this would be another form of negotiating with the Minister or his representative for the most appropriate pension benefit.

Institutional Independence

[19] According to the applicant, the institutional independence or administrative independence of military judges is also insufficient to comply with the requirements of judicial independence. The applicant's argument is based on the organizational structure of the Office of the Chief Military Judge. He refers to the organizational documents such as the MOO 2000007 issued by the Minister of National Defence and CFOO 3763 issued under the authority of the Chief of the Defence Staff, which authorize the establishment of the Office of the Chief Military Judge. He refers also to QR&O article 4.091, which provides that the Chief Military Judge has the powers and jurisdiction of an officer commanding a command. The applicant suggests that the Chief of the Defence Staff still retains discretion over the Chief Military Judge by virtue of QR&O article 3.21. Another example of the lack of institutional independence, according to the applicant, is the fact that the Chief of the Defence Staff could use his powers under QR&O article 19.75 and relieve a military judge from the performance of military duties. The applicant further suggests that the grievance process provided to military judges undermines both dimensions of institutional independence as well as financial security because the Chief of the Defence Staff acts as the final authority. Therefore, the applicant suggests that 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 would conclude that a military judge presiding at a court martial does not enjoy substantial and sufficient guarantees for each of the three components of judicial independence, or the three characteristics of judicial independence; that is security of tenure, financial security and institutional independence.

Remedies

[20] The applicant is therefore seeking a series of orders under section 52 of the *Constitution Act*, *1982* as well as an order to terminate the proceedings. He further requests that, should the court orders a temporary suspension of the non-validity of the various provisions, the court should issue an order granting a stay of proceedings pursuant to section 24(1) of the *Charter*.

The Respondent

[21] The respondent argues that the Standing Court Martial is an independent tribunal because:

(1) a military judge presiding at a court martial has security of tenure;

(2) a military judge presiding at a court martial has financial security and;

(3) a military judge presiding at a court martial has individual and institutional administrative independence.

She further submits that if this court concludes that a Standing Court Martial is not an independent tribunal, any remedies ordered should take the form of a suspended declaration of invalidity or the reading in of additional protections such that military judges and Standing Courts Martial can continue to exercise their jurisdiction while Parliament decides upon the appropriate means of ensuring that the applicant's rights and freedoms are respected.

Security of Tenure

Fixed term for five years

[22] The respondent submits that the applicant has not met his burden of proof and that he has not established that a reasonable and right-minded person, informed of all relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically, and having thought the matter through, would conclude that a military judge presiding at a court martial possesses such security of tenure as to be capable of deciding the cases that come before him on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decisions.

[23] According to the respondent, section 11*(d)* of the *Charter* does not guarantee an ideal level of independence. Rather, the test to determine whether a particular tribunal possesses the characteristics of independence must be applied in a flexible and contextual manner that recognizes the particular circumstances surrounding

the tribunal. The test to be applied is an objective one, focusing upon the legal structures supporting the characteristics of the independence of military judges: 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, would conclude that a military judge presiding at a court martial is a tribunal which could make an independent adjudication. Relying on the decision rendered by the Supreme Court of Canada in *R. v. Généreux* as well as the decision of the Court Martial Appeal Court in *R. v. Lauzon*, the respondent suggests that in the context of the military justice system, security of tenure does not require that a military judge be accorded tenure to a fixed retirement age. Rather, appointment for a fixed term during which the military judge is removable only for cause is sufficient. She further submits that the legislative provisions providing a military judge with a fixed five-year term of appointment during which he is removable only for cause related to his capacity to perform his judicial duties following a judicial inquiry provide objective guarantees that a military judge has security of tenure during his term of appointment. She further submits that the concern raised by the applicant with regard to military judges going back to practice law within the Canadian Forces is not founded. According to the respondent, this is not an issue that could have an impact in the independence of a serving military judge in the mind of a reasonable and well-informed person, although the respondent agrees that this is certainly an ethical issue, which is governed by the rules of ethics and the codes of practice of the legal profession. In addition, a potential return of a former military judge to the practise of law within the Canadian Forces would not affect a serving military judge's financial security while he or she is a serving military judge.

Removal

[24] In response to the applicant's submission that the removal process prescribed in article 101.14 of the QR&Os should be set out in the statute and not in regulations, the respondent submits that while it might be desirable or even ideal to provide for the protection of the core characteristics of the independence of military judges in primary legislation, such a scheme is not constitutionally required.

Age of Retirement

[25] On the issue of the age of retirement for military judges, the respondent submits that, given the physical demands that may be placed upon a military judge in the performance of his functions are similar to those that may be placed upon any officer of the Canadian Forces, the retirement age provided for by the legislative scheme is objectively appropriate. According to the respondent, it would not be reasonable to apprehend that military judges might be influenced in their decision-making by the possibility that the Governor in Council might change the retirement age for all officers of the Canadian forces who hold the same rank. However, the respondent recognizes that it would not be proper for the executive to use

its discretion, under QR&O article 15.17, in order to have table H of that article apply to a military judge, but she argues that this is an equality issue, not one related to judicial independence.

Renewal

[26] The respondent addresses the question of renewal by stating that the existence of a possibility that a military judge may be reappointed on the expiry of a first or subsequent fixed term may be consistent with security of tenure if the reappointment process is carried out in a manner that ensures that the military judge is free from pressure that could influence the outcome of future decisions. While the ultimate decision to reappoint may rest with the executive, that decision must only be made following the receipt of a recommendation by an independent body. According to the respondent, the Renewal Committee is prohibited from considering the record of judicial decisions of the military judge. This prohibition, along with the presumption that Committee members will act in accordance with the law, would ensure that the military judge is free from pressure that could influence the outcome of his decisions. However, the respondent recognized that the regulations allowed the executive, i.e., the Minister of National Defence and the Minister of Justice, to nominate the majority of the members to the Renewal Committee.

[27] The respondent answered to several questions from the court with regard to the criteria or factors to be considered by the Renewal Committee prior to making its recommendation to the Governor in Council. She submits that each factor is relevant, sufficiently precise, and objective. She adds also that the list of factors does not have to be exhaustive, although the law would preclude the Renewal Committee to consider any irrelevant factor or material. The respondent submits that the process leading to the decision of the Governor in Council to appoint a military judge to a subsequent term of office provides sufficient objective safeguards to prevent any reasonable apprehension that a serving military judge might decide a case before him based upon anything but its merits. While the Governor in Council is not required to accept the recommendation of the Renewal Committee, the existence of the recommendation combined with the independence of the Committee acts as a restraint upon her. According to the respondent, if the Governor in Council departs from the Committee's recommendation, then she must do so for legitimate and rational reasons. Finally, the respondent submits that, viewed as a whole, the legislative provisions providing for the possibility of appointment of a serving military judge to a subsequent term of office provide objective guarantees that a military judge has security of tenure during his term of appointment.

Financial Security

[28] Concerning the characteristic of judicial independence referred to as financial security, the respondent submits that 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, would conclude that a military judge presiding at a court martial possesses such financial security as to be capable of deciding the cases that come before him on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decision. The respondent further submits that the essence of financial security is that the right to salary and pension be established by either statute or regulation and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence. Judicial salaries and benefits are not to be negotiated but are to be set following receipt of a recommendation by an independent commission. She adds that the principle of financial security is one that applies to military judges during the period in which they are making judicial decisions. The fact that a former military judge may be paid less than he was while holding office is irrelevant to whether or not he had financial security as a military judge.

[29] With regard to pension benefits, the respondent submits that the fact that the pension benefits applicable to military judges are identical to those applicable to all other members of the Canadian Forces does not touch upon an essential condition of financial security. Finally, the respondent concludes her submission by stating that the applicant has failed to establish that 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, would conclude that a military judge presiding at a court martial lacks such financial security as to be capable of deciding the cases that come before him or her on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decision.

Institutional Independence

[30] The respondent provided also her comments on the issue of institutional independence for military judges. She submits that a reasonable and right-minded person, again, 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, would conclude that both the Chief Military Judge and a military judge presiding at a court martial possess such administrative independence as to be capable of deciding cases that come before him or her on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decision. Relying on *Valente*, the respondent submits that the essence of administrative independence is judicial control over the administrative decisions that bear directly and immediately on the exercise of a tribunal's judicial function. These matters include the assignment of judges and the setting of court sittings and lists. They do not include such matters as budgetary authority or the appointment and supervision of staff. The respondent

submits that the organizational documents creating the Office of the Chief Military Judge issued by the Minister of National Defence and under the authority of the Chief of the Defence Staff are simply intended for organizational purposes. As such, nothing in these documents should be viewed to interfere with the Chief Military Judge or a military judge institutional independence. The respondent submits that these orders allow for the provision by the Canadian Forces and supervision by the Chief Military Judge of support staff and logistical infrastructure to allow military judges to perform their judicial functions. The Chief Military Judge, along with the Court Martial Administrator who works under her general supervision, derives her administrative authority not from a Canadian Forces Organizational Order or a Ministerial Organizational Order but from the *National Defence Act* and the Queen's Regulations and Orders. According to the respondent, the exercise of this authority is assisted by the existence of the orders. However, even if it were to be repealed, there would be no reasonable basis to apprehend that a military judge will be influenced in the performance of his judicial functions.

[31] The respondent submits also that QR&O article 19.75 which provides the mechanism and authority to relieve an officer or non-commissioned member from the performance of military duties could not be used by the Chief of the Defence Staff or the Chief Military Judge to relieve a serving military judge. She submits that this regulation must be interpreted in a manner that is consistent with the provisions of the *National Defence Act* and those regulations made by the Governor in Council. That legislation provides that a military judge may only be removed from office for cause following a judicial inquiry.

[32] With regard to the applicant's submission that the grievance process does not protect the military judges institutional independence, the respondent suggests that in his capacity as a final grievance authority, the Chief of the Defence Staff constitutes a federal board, commission or other tribunal and is, as such, subject to judicial review of his decisions by the Federal Court of Canada. The respondent submits that, in all of the circumstances, there is no reasonable basis to apprehend that a military judge, even one who has grieved a particular decision, so there is no reason to apprehend that that judge might be influenced in his decision-making by the fact that the CDS has decision-making authority over his or her grievance.

Remedies

[33] The respondent submits that the applicant has failed to establish that 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, would conclude that a Standing Court Martial presided by a military judge under the current legislative framework is not an independent and impartial tribunal within the meaning of section 11*(d)* of the *Charter*. Therefore, according to the respondent, no remedies

are required. However, the respondent also submits that in the event that this court finds any of the provisions impugned by this application to be inconsistent with section 11*(d)* of the *Charter*, the court must proceed carefully in formulating a remedy that is as faithful as possible, within the requirements of the Constitution, to the scheme enacted by, and under the authority of Parliament. Therefore, should the court make declarations of invalidity that would cause military judges to lose jurisdiction to preside at courts martial, the respondent submits that such declarations should be suspended for such a period as will allow Parliament to devise a legislative response that will ensure that the rights and freedoms of accused persons appearing before courts martial are respected. She further submits that a suspension would be necessary in order to ensure the rule of law within the Canadian Forces and to protect the public. In the absence of an operating system of courts martial, the entire scheme by which the Canadian Forces are disciplined is vulnerable, according to the respondent, to legal chaos that would have a detrimental impact on the ability of the Government of Canada to effect its foreign, defence and security policies for the benefit of all Canadians. Finally, the respondent submits that a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* is not appropriate in the present case. If this court finds that the impugned provisions are inconsistent with the Constitution, the applicant has failed to establish any individual limitation of his rights that would warrant such a remedy. If this court finds that a remedy under section 52(1) is necessary, then, according to the respondent, the further individual remedy sought by the applicant is superfluous. In a nutshell, that is the position of the parties.

DECISION

[34] Now, turning to the decision of this court. I would start by reading section 2 of the *National Defence Act*, which reads:

> "court martial" includes a General Court Martial, a Special General Court Martial, a Disciplinary Court Martial and a Standing Court Martial.

The amendments to the *National Defence Act* by *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, assented to 10th December 1998, brought changes to the military justice system, modernized the Code of Service Discipline and enhanced the integrity and impartiality of the system. It is important to note that every important court decision where the issue of judicial independence of courts martial has been judicially considered under the *Charter*, i.e., *R. v. Généreux*, [1992] 1 S.C.R. 259 (General Court Martial); *R. v. Ingebritson*, [1990] 5 C.M.A.C. 87 (Standing Court Martial); *R. v. Edwards*, [1995] C.M.A.J. no 10 (Disciplinary Court Martial); *R. v. Lauzon*, [1998] C.M.A.J. no 5 (Standing Court Martial); and *R. v. Bergeron*, [1999] C.M.A.J. no 3 (Standing Court Martial), was rendered based on the applicable legislation which existed prior to the coming into force of the changes to the *National Defence Act* in 1998. The court will conduct an overview of these important decisions.

[35] In *R. v. Généreux*, the Supreme Court had already indicated that the requirements for judicial independence could be adjusted in particular circumstances such as military justice. However, the court reviewed the General Court Martial, as it existed at the time. Lamer C.J., as he then was, stated at paragraphs 62 to 66:

> 62 This, in itself, is not sufficient to constitute a violation of s. 11*(d)* of the *Charter*. In my opinion the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11*(d)* of the *Charter*, must be interpreted in this context.
>
> 63 In this regard, I agree with the conclusion reached by James B. Fay in Part IV of his considered study of Canadian military law ("Canadian Military Criminal Law: An Examination of Military Justice" (1975), 23 Chitty's L.J. 228, at p. 248):
>
> > In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.
>
> 64 In my view, any interpretation of s. 11*(d)* must take place in the context of other *Charter* provisions. In this connection, I regard it as relevant that s. 11(f) of the *Charter* points to a different content to certain legal rights in different institutional settings:
>
> > **11.** Any person charged with an offence has the right
> >
> > ...
> >
> > (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.
>
> 65 Section 11(f) reveals, in my opinion, that the *Charter* does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law. The s. 11*(d)* guarantees must therefore be construed with this in mind. The content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. However, any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of s. 11*(d)* it cannot survive unless the infringements can be justified under s. 1.

> 66 The first step in our inquiry, therefore, must be to consider whether the proceedings of the General Court Martial infringed the appellant's rights under s. 11*(d)* of the *Charter*. The status of a General Court Martial, in an objective sense, as revealed by the statutory and regulatory provisions which governed its constitution and proceedings at the time of the appellant's trial, must be examined to determine whether the institution has the essential characteristics of an independent and impartial tribunal. In the course of this examination the appropriate test to be applied under s. 11*(d)* should be borne in mind: would a reasonable person, familiar with the constitution and structure of the General Court Martial, conclude that the tribunal enjoys the protections necessary for judicial independence?

And Chief Justice Lamer added, at paragraph 86:

> 86 I do not, however, consider that s. 11*(d)* requires that military judges be accorded tenure until retirement during good behaviour equivalent to that enjoyed by judges of the regular criminal courts. 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 not therefore be reasonable to require a system in which military judges are appointed until the age of retirement. (See, in this regard, the judgment of the Court Martial Appeal Court in *R. v. Ingebrigtson* (1990), 61 C.C.C. (3d) 541, at p. 555.) The requirements of s. 11*(d)* are sensitive to the context in which an adjudicative task is performed. The *Charter* does not require, nor would it be appropriate to impose, uniform institutional standards on all tribunals subject to s. 11*(d)*.

It seems that the majority reasoning in *Généreux*, based on the statutory and regulatory provisions which governed the General Court Martial's constitution and proceedings at the time, implied that promotion opportunities for the judge advocates, ought to be protected as the court seemed to believe that the said judge advocates wished to pursue a career within the Office of the Judge Advocate General. If one considers the concept of judicial independence as it stands in 2005, it is fair to ask whether the mere possibility that a sitting military judge should even be thinking of career advancement within the Canadian Forces, after the completion of judicial duties, would, in and of itself, be contrary to minimal standards of judicial ethics and irremediably affect minimal requirements of independence and impartiality.

[36] In *Edwards*, the Court Martial Appeal Court did review the composition of the Disciplinary Court Martial under section 11*(d)* of the *Charter*. At the outset, the court stated that the QR&Os had been modified on 20 December 1990 to include provisions dealing with the selection and the tenure of judge advocates. These amendments had been examined by the Supreme Court of Canada in *R. v. Généreux* who indicated that the amendments appeared to correct the primary deficiencies of the judge advocates' security of tenure. The Court Martial Appeal Court concluded that while this finding appeared to be, strictly speaking, *obiter dicta*, it should not depart from it. Accordingly, the Judge Advocate in this case, having enjoyed the security of tenure prescribed by article 4.09 of QR&Os, had such security of tenure as in the context of a court martial to comply with paragraph 11*(d)* of the *Charter*. On the issue

of security of tenure for the judge advocate, Strayer C.J., as he then was, stated at paragraphs 15 to 17:

> 15 As noted above a judge advocate must be a military trial judge who, according to article 4.09 of the Q.R. & O. is appointed for a fixed term ranging from two to four years. The judge advocate for a particular hearing is designated by the Chief Military Trial Judge. At the time of the trial in *Généreux*, a judge advocate was appointed by the Judge Advocate General on a case by case basis and the Judge Advocate General was also responsible for appointing the prosecutor and supervising the prosecution. The Supreme Court of Canada, in finding that this arrangement did not provide for sufficient security of tenure stated:
>
> > ... The point is, however, that 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.
>
> As a result the Court found that the system then in place, providing for the appointment of judge advocates on a case by case basis, with their return immediately afterward to non-judicial functions in the military, did not meet the requirements of paragraph 11*(d)*.
>
> 16 Before the Supreme Court decision in *Généreux,* the Q.R. & O. had already been amended to incorporate the present article 4.09 quoted above, providing for judge advocates to be chosen from among military trial judges who are appointed, not on a case by case basis, but for a fixed term from two to four years. Chief Justice Lamer had examined this amendment and, writing on behalf of the majority, stated as follows:
>
> > However, I would note that recent amendments to the Q.R. & O., which came into force on January 22, 1991, subsequent to the trial in this case, appear to correct the primary deficiencies of the judge advocate's security of tenure. Under new art. 4.09 Q.R. & O., any officer who may act as judge advocate at a General Court Martial is first appointed to the position of a military trial judge for a period of two to four years. In addition, art. 111.22 Q.R. & O. now provides that the Chief Military Trial Judge, and not the Judge Advocate General, has formal authority to appoint a judge advocate at a General Court Martial. These are not before us and I refer to them solely for the purpose of completeness.
>
> In the present case the respondent relies on such statements as authority for the validity of the existing provisions for security of tenure of judge advocates. The appellant contends that such statements on the part of the Supreme Court were merely *obiter dicta* as the provisions of the amended article 4.09 were not in issue in *Généreux*. While the statement quoted above may, strictly speaking, be *obiter dicta* I believe we should not depart from it. The Court was there dealing with essentially

> the same issue, the nature of the constitutional requirement of security of tenure when applied to the position of judge advocate. The Court stated that a judge advocate or military judge should not "during a certain period of time, depend on the discretion of the executive". Article 4.09 provides a period of time of two to four years during which a military judge may serve without being dependent on the discretion of the executive. I think we must take the comment of the Chief Justice that article 4.09 appeared "to correct the primary deficiencies of the judge advocate's security of tenure" as a considered view of what the Court would regard as a "certain period of time". Certainly it is consistent with the ratio of the *Généreux* decision, both that of the majority and that of the concurring minority.
>
> 17 I therefore conclude that the Judge Advocate in this case, having enjoyed the security of tenure prescribed by article 4.09, had such security of tenure as in the context of a court martial complies with paragraph 11*(d)* of the *Charter*.

[37] In *R. v. Lauzon*, the Court Martial Appeal Court examined the appellant's argument that the Standing Court Martial was not an independent tribunal within the meaning of section 11*(d)* of the *Canadian Charter of Rights and Freedoms (Charter)*. After reviewing the essential characteristics of judicial independence, the court stated at paragraph 19:

> [19] Lastly, criminal prosecutions brought before a Court Martial attract the protection offered by section 11*(d)* of the *Charter* to any accused person. We hasten to add that in exercising this jurisdiction, Courts Martial apply the *Charter* rights and guarantees and use the powers granted under section 24 of that *Charter*. In other words, they play an important role in the application of the principles of the Constitution and the protection of the values included therein.

Relying on *Edwards*, the court dealt with the issue of tenure for military judges and, for the first time, that of renewal, at paragraphs 26 and 27:

> [26] As this Court of Appeal decided in *R. v. Edwards*, [1995] A.C.A.C. no. 10, the posting of members to military trial judge positions for a fixed term, even if this term is not for life, guarantees institutional independence. The same is true for the process by which judges are now assigned to hear cases by the Chief Military Trial Judge and no longer by the convening authority who also appointed the prosecutor *(R. v. Edwards, supra*). However, these were the only questions before the Court. In the case at bar, the appellant is challenging not the term of the appointments to military trial judge positions as in *Edwards*, but the fact that these appointments are renewable. In other words, the appellant submits that the possibility of reappointment interferes with the principle of the security of tenure of military trial judges.
>
> [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. Unfortunately in the case at bar, the reposting is done simply at the ministerial level by the Minister himself or herself, who can decide not to renew the term of a military trial judge who has taken positions which are unpopular with

> the Department or more generally with the Executive. While the recommendation to renew the term of a military trial judge comes from the Chief Military Trial Judge, the Chief Military Trial Judge's own posting is also done by the Minister. And that is not all. This reposting is done on the recommendation of the Judge Advocate General who, with his or her staff, regularly argues cases for the Minister before the military trial judges and the Chief Military Trial Judge. Furthermore, while the military trial judge may only be removed for cause, a refusal to repost is 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 duties without cause. With respect to the appointment and reappointment of the Presidents of the Standing Court Martial itself, article 113.54 of the QR&O, and more precisely paragraphs 3 and 4, is to the same effect as article 4.09 and consequently suffers the same shortcomings. As the Presidents decide on military discipline cases where the interests of the Minister are directly in issue, the lack of standards for reappointment does not offer sufficient objective guarantees of independence.

[38] Shortly after, the Court Martial Appeal Court delivered another decision on the issue of judicial independence in the context of a Standing Court Martial, this time in *R. v. Bergeron*. The court stated at paragraphs 20 to 29:

> [20] The respondent noted that since *Lauzon* had been heard, but before the appellant's trial, the Ministerial order regarding organization signed by the Minister of National Defence on September 27, 1997 had reorganized the Office of the Chief Military Trial Judge as a separate unit of the Canadian Forces pursuant to s. 17(1) of the *NDA*. In the respondent's submission, therefore, the institutional and organizational links between the Minister, the Judge Advocate General and the military trial judges had been significantly altered: the latter were assigned as members of the Office of the Chief Military Trial Judge, a separate unit which was not part of the Office of the Judge Advocate General.
>
> [21] We recognize the scope of this change, but we are not persuaded that by itself it responds to the concerns expressed by the Court in *Lauzon* regarding the process of reappointing and removing military trial judges and the determination of their salaries, which as the respondent admitted have not changed since that judgment was rendered.
>
> [22] For this reason, we are not persuaded that we should disregard the reasoning in *Lauzon* on account of the Ministerial organization order of September 27, 1997.
>
> [23] The respondent further argued that the Court should apply the judgment rendered by Strayer C.J. in *Edwards*. If we understand her argument correctly, *Lauzon* is inconsistent with *Edwards*, in which the Chief Justice dismissed a constitutional argument dealing with a disciplinary court martial. It is important to note that in *Edwards* the point before the Court was whether, because of the regulations governing its composition, a disciplinary court martial was an independent tribunal. According to the argument made in that case, the Judge Advocate was not independent and the members of the disciplinary court martial, because of the method chosen for their appointment, were not sufficiently independent of the convening authority. The respondent relied in particular on the following passage from that judgment, at 5:

[Translation]

> The appellant contends that the Judge Advocate appointed and holding office pursuant to this regime does not have sufficient security of tenure to meet the requirements of an independent tribunal prescribed by paragraph 11*(d)* of the *Charter*. In particular it is argued that an appointment of from two to four years can be seen as leaving the Judge Advocate susceptible to external pressures on the assumption that he or she will be concerned, particularly as the end of such term approaches, to gain favour with military authorities either to achieve a new appointment as Military Trial Judge or a preferred new appointment elsewhere in the military.

[24] Although the Chief Justice admitted that the appellant's argument concerned not only the appointment of the Judge Advocate, but also his reappointment, he limited his judgment to the appointment process and only considered s. 4.09 of the QR&O in the context of *R. v. Généreux*, [1992] 1 S.C.R. 259. He concluded, at 11:

> In the present case the respondent relies on such statements as authority for the validity of the existing provisions for security of tenure of judge advocates. The appellant contends that such statements on the part of the Supreme Court were merely *obiter dicta* as the provisions of the amended section 4.09 were not in issue in *Généreux*. While the statement quoted above may, strictly speaking, be *obiter dicta* I believe we should not depart from it. The Court was there dealing with essentially the same issue, the nature of the constitutional requirement of security of tenure when applied to the position of judge advocate. The Court stated that a judge advocate or military judge should not "during a certain period of time, depend on the discretion of the executive". Section 4.09 provides a period of time of two to four years during which a military judge may serve without being dependent on the discretion of the executive. I think we must take the comment of the Chief Justice that section 4.09 appeared "to correct the primary deficiencies of the judge advocate's security of tenure" as a considered view of what the Court would regard as a "certain period of time". Certainly it is consistent with the ratio of the *Généreux* decision, both that of the majority and that of the concurring minority.
>
> I therefore conclude that the Judge Advocate in this case, having enjoyed the security of tenure prescribed by section 4.09, had such security of tenure as in the context of a court martial complies with paragraph 11*(d)* of the *Charter*.

[25] Further, in *Lauzon* the Court made the following distinction with *Edwards*, at paragraphs 25 and 26:

> [25] Pursuant to paragraphs 4.09(3) and (5) of the QR&O, the postings of members to military trial judge

> positions are for a fixed term of two to four years and these postings are renewable:
>
> > 4.09(3) The fixed term under paragraph (2) shall normally be four years and shall not be less than two years.
> >
> > 4.09(5) An officer is eligible to be posted again to a position referred to in paragraph (1) on the expiration of any first or subsequent fixed term
> >
> > > (a) in the case of the Chief Military Trial Judge upon the recommendation of the Judge Advocate General, and
> > >
> > > (b) in any other case, on the recommendation of the Chief Military Trial Judge.
>
> [26] As this Court of Appeal decided in *R. v. Edwards*, [1995] A.C.A.C. No 10, the posting of members to military trial judge positions for a fixed term, even if this term is not for life, guarantees institutional independence. The same is true for the process by which judges are now assigned to hear cases by the Chief Military Trial Judge and no longer by the convening authority who also appointed the prosecutor ... However, these were the only questions before the Court. In the case at bar, the appellant is challenging not the term of the appointments to military trial judge positions as in *Edwards*, but the fact that these appointments are renewable. In other words, the appellant submits that the possibility of reappointment interferes with the principle of the security of tenure of military trial judges.

[26] It should also be noted that in *Lauzon* the Court limited its finding of invalidity to s. 177 of the *NDA*, which provides for the establishment of Standing Court Martials whose president is "appointed by or under the authority of the Minister", and the sections of the QR&O which deal expressly with the reappointment and removal of military trial judges and with determining their salaries.

[27] For these reasons, we dismiss the respondent's argument that the judgment in *Lauzon* is inconsistent with *Edwards*. For the reasons stated in *Lauzon*, which need not be reproduced here, we feel that the appeal should be allowed in part and that s. 177 of the *NDA*, concerning the process of appointing the members of a Standing Court Martial, as well as ss. 4.09(1), 4.09(5), 4.09(6), 101.14(2), 101.14(4), 101.16(10), 113.54(4) and 204.22 of the QR&O concerning the process of reappointing and removing military trial judges and the determination of their salaries, should be declared to be invalid and of no force or effect.

[28] Finally, since this Court cannot disregard the reasoning in *Lauzon*, it was asked to direct that there be a new trial in a provincial court. As the charges laid against the appellant fall under not only the *Criminal Code* but also certain sections

> of the *National Defence Act*, the Court is not persuaded that a provincial court has the necessary jurisdiction to deal with the matter.
>
> [29] Having found that no real or substantial injustice existed as a reason for overturning the convictions imposed by the President of the Standing Court Martial, the appeal against the convictions will be dismissed. However, as the Court is affected by the same constitutional problem as in *Lauzon*, in view of the draft amendments to the organizational structure of courts martial which are currently before Parliament and the advisability of giving the government a reasonable time in which to make the appropriate adjustments, the Court makes an order suspending until September 18, 1999 the finding that ss. 177 of the *NDA* and 4.09(1), 4.09(5), 4.09(6), 101.14(2), 101.14(4), 101.16(10), 113.54(4) and 204.22 of the QR&O are invalid.

[39] Although this court is bound by the rule of *stare decisis*, it must examine whether the court possesses the essential characteristics that are required of an independent and impartial tribunal in light of its own context and in light of previous appellate decisions. The court must not only examine the status of this institution objectively under its current legislative and regulatory scheme, it must examine the Standing Court Martial structure in taking into account the concept of judicial independence which continues to evolve over time.

BACKGROUND AND HISTORICAL CONTEXT SINCE *LAUZON*

The First Dickson Report

[40] In 1997, two special reports as well as an important Commission of Inquiry reviewed, amongst other subjects, issues concerning military justice in the Canadian Forces. The Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada, chaired the Special Advisory Group on Military Justice and Military Police Investigation Services. The Special Advisory Group was given a mandate to assess the Code of Service Discipline in light of its underlying purpose and the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad. The report of the Special Advisory Group was submitted on March 14, 1997.

Somalia Commission of Inquiry

[41] A Commission of Inquiry, chaired by the Honourable Justice Gilles Létourneau, was established to inquire into and report on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia. The Commission of Inquiry submitted its report to the Government on June 30, 1997.

Dickson Special Advisory Group Second Report

[42] The Special Advisory Group prepared a second report, in response to a request by the former Minister of National Defence, Doug Young, on the quasi-judicial roles of the Minister under the Code of Service Discipline. This second report was submitted to the Government on July 25, 1997. The Special Advisory Group concluded in its first report that there was a clear need to retain a separate and distinct military justice system, workable in peace or conflict, in Canada or abroad. However, it recommended comprehensive changes touching all aspects of military justice and military police investigative services. The need for changes to the military justice system and to military police investigation services in the Canadian Forces had been recognized by the Department and the Canadian Forces. The review by the Special Advisory Group complemented and supported ongoing internal reform. In its report on the Minister's quasi-judicial roles, the Special Advisory Group recommended that the Minister be divested of the majority of these roles to better avoid potential conflicts of interest between these roles and the Minister's executive duties and powers. The amendments to the *National Defence Act* were aimed to align the Canadian military justice system with current Canadian values and legal standards in trying to help preserve those parts of the system that were believed to be necessary to meet military requirements.

[43] The provisions of Bill C-25, which became an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, in force on 1 September 1999:

(1) attempted to clarify the roles and responsibilities of the military justice system's principal actors including the Minister of National Defence and the Judge Advocate General;

(2) attempted to establish clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions;

(3) abolished the death penalty as a punishment and substitute it with life imprisonment;

(4) authorized a military judge to preside over courts martial and to impose the sentence of the court;

(5) authorized non-commissioned members to sit as members of court martial panels at general and disciplinary courts martial when a non-commissioned member is being tried;

(6) created the Defence Counsel Services where the Minister appoints its director to hold office during good behaviour for a term not exceeding four years renewable and the Director would provide, and supervise

and direct the provision of, legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline. The Judge Advocate General may issue general instructions or guidelines in writing in respect of defence counsel services. (Sections 249.18 to 248.21 of the *National Defence Act*);

(7) created the office of the Director of Military Prosecutions to be responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The Director of Military Prosecutions also acts as counsel for the Minister in respect of appeals when instructed to do so. That same Director is appointed by the Minister for a term not exceeding four years renewable and holds office during good behaviour. He may be removed for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. The Director of Military Prosecutions acts under the general supervision of the Judge Advocate General who may issue general and specific instructions in writing in respect of prosecutions. (Sections 165.1 to 165.17 of the *National Defence Act)*; and

(8) created the position of Court Martial Administrator to convene courts martial, including appointing members at a General Court Martial and at a Disciplinary Court Martial, and to perform other duties under the *Act* or other duties prescribed in regulations by the Governor in Council. The Administrator, as we know, acts under the general supervision of the Chief Military Judge. (Sections 165.18 to 165.2).

[44] The amendments to the *National Defence Act* had a significant impact on the office of military judge. I'm not talking about the office of the Chief Military Judge, but the office of military judge. The role and functions of a military judge is similar to the role and functions of a superior or provincial court judge in penal or criminal matters. The legislative framework of the office of a military judge is set out at sections 165.21 to 165.23 of the *National Defence Act*. The core characteristics of the office of military judge under the *Act* cover the appointment, the tenure of office and removal process, the re-appointment, the retirement age, the remuneration and the functions.

[45] The *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, brought significant changes to the office of military judge. The Governor in Council now appoints military judges amongst officers who are barristers or advocates of at least ten years standing at the bar of a province. They hold office during good behaviour for a term of five years but may be removed by the Governor in Council for cause on the recommendation of an Inquiry

Committee established under regulations made by the Governor in Council. A military judge is eligible to be re-appointed on the expiry of a first or subsequent term of office on the recommendation of a Renewal Committee also established under regulations made by the Governor in Council. A military judge ceases to hold office on reaching the retirement age prescribed by the Governor in Council in regulations. The remuneration of military judges is reviewed regularly by a Compensation Committee established under regulations made by the Governor in Council. Military Judges preside at all courts martial and they perform other judicial duties under the *Act* that are required to be performed by military judges. In addition to their judicial duties, military judges perform any other duties that the Chief Military Judge may direct, but those other duties may not be incompatible with their judicial duties. Finally, they may be appointed as a board of inquiry with the concurrence of the Chief Military Judge. This court believes that this framework created a true and modern military judiciary where the role and functions of a military judge are now very similar to that of other sitting judges in Canada. Based on the jurisdiction of courts martial presided by military judges, including the jurisdiction to try the most serious offences in criminal law, and the functions performed by these judges, it is impossible to compare the role and functions of a military judge with a judge presiding at an administrative tribunal wherever that tribunal would fall in the large spectrum of administrative tribunals.

After Lauzon - General Considerations

[46] If one compares the office of military judge today with the legislative framework in place when the decisions in *Généreux*, *Edwards*, *Lauzon* and *Bergeron* were rendered, it appears that the notion or concept of "posting" of an officer to a position of military judge for a fixed term, renewable, no longer exist. The "posting" of a service person to a place or to a specific assignment is a decision of the executive that does not necessarily represent the first choice of an individual. It must be noted that this notion of "posting" existed under the regulatory scheme that dealt with military judges when the Court Martial Appeal Court decisions were rendered in *Edwards*, *Lauzon* and *Bergeron*. The previous regulations implied that a person posted to a position of "military judge" was a legal officer employed within the Office of the Judge Advocate General prior to that posting. This person could have decided to pursue his or her legal career with the Office of the Judge Advocate General after the completion of his judicial posting. These postings were for a fixed but renewable term that could vary between two and four years. It could be terminated only pursuant to paragraph (6) to QR&O article 4.09, which read as follows:

> 4.09 **PERFORMANCE OF JUDICIAL DUTIES AT COURT MARTIAL**
>
> (6) The posting of an officer to a position referred to in paragraph (1) may only be terminated prior to the expiration of its fixed term upon
>
> (*a*) the written request of the officer,

> (*b*) the officer's acceptance of a promotion,
>
> (c) commencement of retirement leave prior to a release under Item 4 (Voluntary) or Item 5 (a) (Service completed, Retirement Age) of the table to article 15.01 (*Release of Officers and Non-commissioned Members*), or
>
> (*d*) direction by the Minister, under paragraph (10) of article 101.16 (*Conduct of Inquiry*), that the officer be removed from the performance of judicial duties.

These regulations were consistent with the comments made by Chief Justice Lamer, as he then was, in *Généreux* when he stated at paragraph 86:

> 86 I do not, however, consider that s. 11*(d)* requires that military judges be accorded tenure until retirement during good behaviour equivalent to that enjoyed by judges of the regular criminal courts. 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 not therefore be reasonable to require a system in which military judges are appointed until the age of retirement. (See, in this regard, the judgment of the Court Martial Appeal Court in *R. v. Ingebrigtson* (1990), 61 C.C.C. (3d) 541, at p.555). The requirements of s. 11*(d)* are sensitive to the context in which an adjudicative task is performed. The *Charter* does not require, nor would it be appropriate to impose, uniform institutional standards on all tribunals subject to s. 11*(d)*.

[47] Under the current legislative framework, any officer is eligible to be appointed as a military judge if he or she has been a member in good standing at the bar of a province for at least 10 years. This person to be appointed by the Governor in Council may be practising law in the Canadian Forces, the public sector or in private practice. His officer status, or her officer status, may be related to his employment as a reservist in a non-legal capacity such as an infantry or logistic officer, for example. In the court's view, the potential candidate to become military judge is no longer limited to the legal officer described by Chief Justice Lamer in *Généreux*. The pool of suitable candidates has been increased significantly to attract the best candidates and it is of general service knowledge that the selection process for suitable candidates to the military judiciary is now similar to that followed for other federal judicial appointments to ensure that only competent, deserving officers are considered for military judicial appointments.

[48] The functions of a military judge have also been significantly increased. Not only do they preside at courts martial, they also perform other judicial duties under the *National Defence Act* that are required to be performed by military judges. In addition to their judicial duties, military judges perform any other duties that are not incompatible with their judicial duties that the Chief Military Judge may direct. Finally, they may be appointed as a board of inquiry with the concurrence of the Chief Military Judge. This terminology is strikingly similar to the language found in various

federal and provincial statutes in order to describe the functions and duties of judges in various jurisdictions.

[49] It is also relevant to note that the amendments to the *National Defence Act* by Bill C-25 eliminated not only the word "judge advocate" but its concept. It must be understood that prior to the enactment and the coming into force of an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, a General or Disciplinary Court Martial was presided by an officer other than the judge advocate. The judge advocate did not perform the full extent of the judicial duties that are required of from judges presiding at a criminal trial. For example, the judge advocate did not perform the same functions that a superior court judge presiding at a jury trial performs. Unlike a superior court judge, the judge advocate appointed to officiate, not to preside, to officiate, at a court martial could determine questions of law or mixed law and fact arising before or after the commencement of the trial (former subsection 192(3)). This implies that a president of a General Court Martial could theoretically refuse to follow the advice of the judge advocate. It is also relevant to highlight that the president, not the judge advocate, decided several trial management matters. To illustrate this point, I would refer only to some of the previous sections of the *National Defence Act* such as former section 186 (View by Court Martial); section 189 (Adjournments); section 191 (Amendment of Charges). The modernization of the *National Defence Act* aligned these matters with the civilian justice system. It is now the role of the military judge who presides at all courts martial to determine all questions of law or mixed law and fact arising before or after the commencement of the trial (section 191). The military judge presiding at all courts martial is also now solely responsible for the conduct and management of the trial. One could argue that the most significant change with regard to the role and functions of the military judge since the adoption of Bill C-25 has to do with sentencing. Under the current legislative framework, it is now the military judge who determines the sentence (section 193), in the same manner than a superior court judge presiding at a jury trial unlike the situation prior to Bill C-25 where this judicial function was vested in the members of a General or Disciplinary Court Martial.

[50] Moreover, section 177 of the *National Defence Act*, as it read when the Court Martial Appeal Court rendered its decision in *Lauzon*, only required the military judge to preside at a Standing Court Martial to be or to have been a barrister or advocate of more than three years standing. As stated previously, military judges are now appointed by the Governor in Council to hold office during good behaviour from barristers or advocates of at least 10 years standing at the bar of a province.

Post Lauzon - Evolution of the Office of a Military Judge

[51] There should be no issue with the fact that the role and functions of a military judge have significantly evolved since the enactment and coming into force of an *Act to amend the National Defence Act and to make consequential amendments to*

other Acts, 1998, chapter 35. Let me provide with some examples. First, Division 3, *(Arrest and Pre-Trial Custody*), to Part III of the *National Defence Act* (Code of Service Discipline) has replaced the former Part VI of the *Act*. This new division now provides a full regime for the arrest, pre-trial custody and bail. Parliament modernized the *National Defence Act* in providing a legislative scheme largely similar to the Judicial Interim Release mechanism found in the *Criminal Code* (sections 515 to 522). Under this new framework, a custody review officer who does not direct the release of a person from custody shall, as soon as practicable, cause the person to be taken before a military judge for the purpose of a hearing to determine whether the person is to be retained in custody and the military judge conducts the hearing (sections 159 to 159.6). The Court Martial Appeal Court may review any direction of a military judge in that matter (section 159.9). Although, this scheme recognizes the military context, it seems that the role of the military judge in this judicial interim release process is largely similar to the role of a judge as oppose to a justice of the peace in the *Criminal Code*.

[52] Second, sections 173 and 174 of the *National Defence Act* now provides that a Standing Court Martial is authorized—in terms of Standing Court Martial, the *Act* says now that every military judge is authorized to preside at a Standing Court Martial, and a military judge who does so constitutes the Standing Court Martial, it says that a Standing Court Martial may try any officer or non-commissioned member who is liable to be charged, dealt with and tried on a charge of having committed a service offence. So those are the two components of those sections, now. In other words, any officer or non-commissioned member may now be tried by a Standing Court Martial presided by a military judge regardless of rank or function in the Canadian Forces. So that's the substance of sections 173 and 174 of the *National Defence Act*. This is a very important difference with the situation that existed before the Court Martial Appeal Court in *Lauzon* declared the previous section 177 of the *National Defence Act* invalid. The old section 177 read as follows:

> **177.** (1) The Governor in Council may establish Standing Courts Martial and each such court martial shall consist of one officer, to be called the president, appointed by or under the authority of the Minister, who is or has been a barrister or advocate of more than three years standing.
>
> (2) Subject to any limitations prescribed in regulations, a Standing Court Martial may try any person who under Part IV is liable to be charged, dealt with and tried on a charge of having committed a service offence, but a Standing Court Martial shall not pass a sentence including any punishment higher in the scale of punishments that imprisonment for less than two years.

The Governor in Council had used the authority provided in the old section 177 of the *National Defence Act* to make QR&O article 113.52. Chapter 113 (*Special General Courts Martial and Standing Courts Martial*), of the QR&Os was repealed by P.C. 1999-1305 of 8 July1999 effective 1 September 1999; (M) 1 September 1999 and (C) 1 September 1999). QR&O article 113.52 limited the jurisdiction of a Standing Court Martial in several ways. It read as follows:

113.52 - JURISDICTION OF STANDING COURTS MARTIAL

(1) A Standing Court Martial shall not try a civilian.

(2) A Standing Court Martial shall not try an officer of or above the rank of colonel.

(3) The president of a Standing Court Martial shall be an officer of a rank higher than the rank of the accused.

Parliament has decided that any officer or non-commissioned member may now be tried by a Standing Court Martial presided by a military judge, regardless of the rank of the accused or that of the sitting military judge. This is a significant departure from the past and it translates in a significant increase in the jurisdiction of a Standing Court Martial presided by a military judge. The court strongly believes that such an evolution towards a full acknowledgment of the judicial status vested in a military judge requires the highest level of judicial independence from the executive and the chain of command. It raises the importance to recognize that an officer who holds the office of military judge shall be free from any direct or indirect interference that could reasonably emanate from the highest level of the military hierarchy, including general or flag officers who are all subject to the Code of Service Discipline.

[53] Third, Parliament has created, in adopting an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, a forensic DNA analysis regime similar to the *Criminal Code* (sections 487.04 and further). Division 6.1 of the *National Defence Act* enables a military judge to deliver a DNA warrant or telewarrant authorizing the taking for the purpose of forensic DNA analysis, from a person subject to the Code of Service Discipline, of any number of samples of bodily substances that is reasonably required for that purpose. It also enable the Court Martial presided by a military judge to issue a DNA order authorising the taking of such samples from a person found guilty of a designated offence.

[54] Fourth, the military judge presiding at a court martial may, in the prescribed form, issue a warrant for the arrest of an accused person who has been duly summoned ordered to appear before a court martial if that person fails to appear as summoned or ordered or having appeared before the court martial, fails to attend before the court martial as required (section 249.23).

[55] Fifth, Parliament has significantly increased the powers of a Court Martial presided by a military judge as well as the powers of a military judge performing a judicial duty under the *National Defence Act* other that presiding at a court martial. Section 179 of the *Act* now provides:

179. (1) A court martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to

> (a) the attendance, swearing and examination of witnesses;
>
> (b) the production and inspection of documents;
>
> (c) the enforcement of its orders; and
>
> (d) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt.
>
> (2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

[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.

[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.

[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 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. The remarks made by Chief Justice Lamer at paragraph 31 in *Généreux*, are still relevant. It read, in part:

> 31. … 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. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the

> *Narcotic Control Act*. 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 ....

[59] The Canadian Military Justice System is an integral part of the broader Canadian Justice System. Members of the military judiciary are professional judges who deal with the most serious cases in the context of the armed forces. What is required to achieve a sufficient level of judicial independence for military judges who preside at courts martial must take into account the context in which these judges perform their judicial functions. By analogy, the size of the Canadian Forces is currently inferior to a city of 100,000 citizens. The omnipresence of the chain of command and the proximity of former legal colleagues, as the case may be, who continue to practise law in the Canadian Forces highlight the inherent difficulties that exist in order to maintain the appropriate and necessary distance or separation between the bench, the bar and the notables, as it is often the case in small communities.

[60] The necessary distance or separation that I have just described contributes to enhance judicial independence. It does not mean however that contacts between lawyers and judges should not exist outside the courtroom. Professional development is a good example of a proper interaction. It is certainly desirable if not necessary that lawyers, academics and judges share their common knowledge and experience with the large legal community. This benefits to all jurists and ultimately to all Canadians. However, a judicial office entails its own difficulties and constraints. It is essential that judges can share their common problems and issues with judicial colleagues on a case by case basis in formal seminars of permanent education. In order to do that, judges must be perceived as such by their colleagues in the context of judicial training for federally appointed and provincial court judges. To protect military judges from interference from the executive must not result in their professional isolation on the fringe of the broader judiciary because military judges need the same initial and permanent education as any other judge. This is essential to any competent judiciary and the military judges can only achieve the level of competence expected of all judges if they are allowed to achieve and maintain the same level of competence that their civilian judicial colleagues with the broader judicial community.

[61] Despite the creation of a genuine military judiciary through the expansion of the role and functions of military judges, one can only observe that Parliament has chosen that these judges would be appointed by the Governor in Council, but only for a fixed term of five years, renewable. In comparison with the framework existing at the time of the Court Martial Appeal Court decision in *Lauzon*, the term of office of a military judge has been increased by one year. The remarks made by Chief Justice Lamer in *Généreux*, at paragraph 66, are still relevant. He stated:

> 66 ... The status of a General Court Martial, in an objective sense, as revealed by the statutory and regulatory provisions which governed its constitution and

> proceedings at the time of the appellant's trial, must be examined to determine whether the institution has the essential characteristics of an independent and impartial tribunal. In the course of this examination the appropriate test to be applied under s. 11*(d)* should be borne in mind: would a reasonable person, familiar with the constitution and structure of the General Court Martial, conclude that the tribunal enjoys the protections necessary for judicial independence?

[62] This analysis raises serious questions as to what should constitute the substantial and sufficient guarantees to ensure the security of tenure to military judges who preside at all courts martial, under the current statutory framework. The court will therefore ask and answer the following question: Does the appointment of a military judge under section 165.21 of the *National Defence Act* contravenes section 11*(d)* of the *Charter*? If the answer to this question is "yes", is it justified under section 1?

[63] The court must answer "yes" to the first section. The appointment of a military judge under section 165.21 of the *National Defence Act* contravenes section 11*(d)* of the *Charter*.

[64] After a thorough analysis of the evidence, the context, the historic and the relevant legislative and regulatory provisions, the court concludes that this violation has not been demonstrably justified in a free and democratic society, pursuant to section 1 of the *Charter*.

[65] The nature of the functions and the increase role of the military judge as they clearly appear from the statutory and regulatory provisions which governs the constitution and proceedings of this Standing Court Martial at this time are such that the appointment of a military judge for a fixed term does not meet the minimal constitutional requirements of section 11*(d)* of the *Charter* in the context of modern military justice and the evolution of the concept of judicial independence. This court believes that 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, would conclude that a military judge appointed for a fixed term of five years presiding at a court martial does not possess such security of tenure as to be capable of deciding the cases that come before him or her on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decision. This situation has not been demonstrably justified under section 1.

[66] It is well recognized that section 11*(d)* violations can hardly be justified when they affect judicial independence. This question was examined by the Supreme Court of Canada in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick* [2002] 1 S.C.R. 405, where Gonthier J. stated at paragraphs 71 and 72:

> 71 As I indicated at the beginning of my analysis, judicial independence is protected by both the Preamble to the *Constitution Act, 1867* and s. 11*(d)* of the Charter. Thus, not only is it a right enjoyed by a party subject to the threat of

> criminal proceedings but it is also a fundamental element underlying the very operations of the administration of justice. In other words, judicial independence functions as a prerequisite for giving effect to a litigant's rights including the fundamental rights guaranteed in the *Charter*.
>
> 72 Given the vital role played by judicial independence within the Canadian constitutional structure, the standard application of s. 1 of the *Charter* could not alone justify an infringement of that independence. A more demanding onus lies on the government. Thus, in the *Provincial Court Judges Reference*, *supra*, at para. 137, it was indicated that the elements of the institutional dimension of financial security did not have to be followed in cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy. In this case, it is clear that such circumstances did not exist in New Brunswick at the time when Bill 7 was passed. Moreover, no arguments were made by the appellant in this regard.

Like in the *Mackin* case, the respondent has made no arguments, which could have addressed the infringement of judicial independence of this Standing Court Martial. During his oral submission, counsel for the respondent stated the following:

> "Second, the respondent does not make, *per se*, any argument under section 1 of the *Charter*. I will have something to say about the pressing and substantial purposes of the military justice system, as they relate to the question of the remedy, but beyond that, it's not the respondent's intention, and the respondent has not raised evidence that goes to section 1. And it's not the respondent's intention to make an argument that any *prima facie* limitations of the accused's rights are justified."

[67] The court will not repeat the comments of Chief Justice Lamer at paragraphs 60 to 65 of *Généreux* that dealt not only with the unique character of the military justice system, but also with the fact that any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of section 11*(d),* it cannot survive unless the infringements can be justified under section 1. This court believes that the system of military tribunals in Canada must comply with the evolution of the concept of judicial independence, which continues to evolve. If the court martial process, as opposed to the summary trial, plays such a vital role in the protection of an accused constitutional rights, as submitted by counsel for the respondent, it implies that the burden imposed on the government under section 1 is higher that it was before the decision of the Supreme Court of Canada in *Mackin*.

[68] It must be recognized that the statutory framework of military tribunals, particularly the Courts Martial presided by military judges, was significantly modified by an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, and by the amendments to the QR&Os. There is no issue with the fact that the necessity of maintaining a high level of discipline in the special conditions of military life is still a sufficiently substantial societal concern to satisfy the first arm of the proportionality test under a section 1 analysis. However, a Standing Court Martial presided by a military judge appointed under subsection 165.21(2) does not constitute an independent and impartial tribunal

under section 11*(d)* of the *Charter* and it does not, in this context, meet the second arm of the proportionality test. This court believes that the appointment of a military judge for a term of five years, renewable, does 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 and the current legislation. Where the court finds perfectly acceptable that officers may be appointed as military judge 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, it requires that the courts martial meet the highest possible standards of judicial independence. They protect the role of the court martial in the military justice system as well as the role of the presiding judge, but ultimately and more importantly the judged, that is the person subject to the Code of Service Discipline. The appointment of military judge for a fixed term renewable does not take sufficiently into account the evolution of the office of military judge or the expanded role and functions of a military judge under the current statutory framework in the context of a modern Canadian society. This framework and the recent evolution of the concept of judicial independence require that military judges must be appointed until reaching the age of retirement. Therefore the court believes that subsection 165.21(2) of the *National Defence Act* could not be justified under section 1 of the *Charter*.

[69] 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. In the context of the military justice system in which military judges presiding at courts martial are serving members of the Canadian Forces, the court believes that the exigencies of military service and the requirements of a system of military tribunals to be portable and efficient justify that military judges have a retirement age similar to that of other officers. It must be kept in mind that courts martial upholds the rule of law and the values of our Constitution anywhere on this planet to ensure the maintenance of discipline and for the benefit of every person subject to the Code of Service Discipline serving in Canada or abroad in a peacekeeping or humanitarian operation or in a conflict. The court is also not convinced that the age of retirement for military judges should be in a statute. This is not constitutionally required. However, the age of retirement should be similar for all military judges regardless of their rank. For that matter, it should be noted that the rank of a military judge is irrelevant to the appointment, is irrelevant also to the remuneration of the judge. It is also irrelevant with regard to the powers of a judge under the *National Defence Act* or the Queen's Regulations & Orders. This question raises an equality issue amongst judges but it has no impact on the independent status of the tribunal under section 11*(d)* of the *Charter*.

[70] With regard to the applicant's submissions dealing with the *Canadian Forces Superannuation Act*, the court would only say that they are just highly speculative and they are not based on evidence.

[71] The court agrees however with counsel that QR&O article 19.75 is not compatible with the statutory framework concerning the removal of military judges for cause set out in section 165.23 of the *National Defence Act*. The Chief of the Defence Staff and the Chief Military Judge, as an officer having the powers of an officer commanding a command, have no authority to relieve from military duty a military judge who perform only judicial duties or duties that are not incompatible with those judicial duties. Such power would encroach on the exclusive jurisdiction of the Inquiry Committee. It also undermines two conditions of judicial independence: security of tenure and institutional independence. Therefore, QR&O article 19.75 as it currently reads, contravenes section 11*(d)* of the *Charter* and it has not been justified under section 1. That is not to say that the Chief Military Judge, *es qualite*, would be precluded to fulfill its role and responsibilities to assign judicial duties or other duties that are not incompatible with judicial duties, which is part of institutional or administrative independence. Although counsel did not raise this, the court believes that QR&O article 101.08 (*Relief of Performance of Military Duty - Pre and Post Trial*), is equally problematic. Therefore, any corrective or remedial approach retained by the court with regard to QR&O article 19.75 should be adapted to ensure that QR&O article 101.08 complies with the *Charter*.

[72] With regard to the statutory and regulatory framework dealing with the current removal process applicable to military judges, this court believes that the applicant has not establish on a balance of probabilities that it contravenes section 11*(d)* of the *Charter*. There is no constitutional requirement that it should be set out in a statute. Moreover, the procedure to be followed by the Inquiry Committee does not have to be as detailed as it appears in the *Judges Act*, for example. The military judge subject of removal for cause after an inquiry by the Inquiry Committee is entitled by law to the highest standards of procedural fairness as this was recognized by the Supreme Court of Canada in the decision *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249.

Renewal Process: Composition of the Renewal Committee and the list of factors

[73] With regard to the issues dealing with the renewal process, the court does not have to answer to the applicant submissions having determined that 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, would conclude that a military judge presiding at a court martial does not possess such security of tenure as to be capable of deciding the cases that come before him or her on their merits without interference by any outsider with the way in which the judge conducts

his or her case and makes his or her decision, unless that judge is appointed until reaching the age of retirement.

Administrative or Institutional Independence - Organization of the Office of the Chief Military Judge

[74] The applicant has raised an issue to the effect that the organization documents creating the office of the Chief Military Judge issued by the Minister and issued by or under the authority of the Chief of the Defence Staff undermined the institutional independence of the Chief Military Judge and that of military judges. Based on the evidence before this court, there is no merit to this argument. These documents are simply made for organizational purposes. First, the creation of that office and the fact that it is embodied as a unit of the regular force does not undermine any component of judicial independence. Should the Minister and the Chief of the Defence Staff rescind these orders, this would not affect the role, jurisdiction and powers of military judges and that of the Chief Military Judge, which are set out in the *National Defence Act*. In the absence of any evidence, this court would be left with mere speculations or conjecture in order to determine whether there is any real or reasonable likelihood of a contravention to the third condition of judicial independence.

[75] The applicant submitted that the current grievance process infringes judicial independence largely because the Chief of the Defence Staff, the officer charged with the control and administration of the Canadian Forces under section 18 of the *National Defence Act*, is the final authority for all grievances including for the potential grievance submitted by a military judge. In addressing this issue, the court must keep in mind its own conclusion with regard that military judges shall be appointed until they reach the age of retirement. In these circumstances, the existence of a comprehensive grievance process applicable to all members of the Canadian Forces, including military judges, is not problematic *per se*. It may be argued that this process does not protect sufficiently military judges from potential interference by the executive because a sitting military judge would have to rely on that executive to correct a situation where the judge considers that he or she has been aggrieved. This is certainly not an ideal situation to preserve or protect judicial independence, but the court is not satisfied that 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, would conclude that a military judge who has security of tenure until reaching the age of retirement would be influenced in making his or her decisions because the Chief of the Defence Staff constitutes the final grievance authority. The grievance process provided in the *National Defence Act* from sections 29 to 29.28 possesses in the court's opinion, sufficient, important and objective safeguards notably the existence of the Canadian Forces Grievance Board, which is a body independent of the Canadian Forces as well as the judicial control exercised by the Federal Court to meet the

minimal standards of the personal and institutional dimensions of judicial independence and to allow a military judge to make his or her decision based strictly on merit.

Remedies - Declaration of Invalidity and Stay of Proceedings

[76] The court will now address what should be a fair, a just remedy in this case. The applicant requests the court to order that some statutory and regulatory provisions be declared invalid pursuant to section 52 of the *Constitution Act*, *1982*, as well as an order to stay the proceedings under section 24 (1) of the *Charter*.

[77] The respondent submits that any declaration of invalidity should not only be carefully formulated but it should be suspended for such a period as will allow Parliament to devise a legislative response that will ensure that the rights and freedoms of accused persons appearing before courts martial are respected. This suspension would be necessary in order to ensure the rule of law within the Canadian Forces and to protect the public. The respondent further argues that in the absence of an operating system of courts martial, the entire scheme by which the Canadian Forces are disciplined is vulnerable to legal chaos that would have a detrimental impact on the ability of the Government of Canada to effect its foreign, defence and security policies for the benefit of all Canadians.

[78] It must be noted that in *Lauzon*, the Court Martial Appeal Court concluded that section 177 of the *National Defence Act* had to be declared invalid because it provided for the establishment of Standing Courts Martial which consisted of "one officer, to be called the president, appointed by or under the authority of the Minister". The Court Martial Appeal Court came to the same conclusion of invalidity with regard to the regulations concerning the process of reappointing and removing military trial judges and the determination of their salaries. The Court Martial Appeal Court determined that the whole court was affected by this constitutional defect and there were no independent court and judges at this level to replace the Standing Court Martial and ensure military discipline, therefore the Court Martial Appeal Court applied the doctrine of necessity. Under sections 173 to 175 of the *National Defence Act*, as it reads today, a Standing Court Martial exists on its own and it does not have to be established. The military judge who is authorized to preside constitutes the Standing Court Martial. With regard to this authorization that I've just referred to, it can only be read with the exclusive authority of the Chief Military Judge to assign military judges to preside at courts martial under section 165.25 of the *Act*.

[79] This court believes that the wording of sections 173 to 175 of the *National Defence Act* does not require any remedial order under section 52 of the *Constitution Act*, *1982*. The constitutionality of the Standing Court Martial is not in issue unless the military judge who constitutes the court does not possess the substantial and sufficient guarantees of judicial independence. In this context, the doctrine of necessity does not apply because the court is satisfied that, after the analysis of the

interests at stake, the suspension of any declaration of invalidity is not required. The remedy granted by this court will not cause the entire scheme by which the Canadian Forces are disciplined to collapse and create a vulnerable legal chaos that would have a detrimental impact on the ability of the Government of Canada to effect its foreign, defence and security policies for the benefit of all Canadians.

[80] The remedies available under section 52(1) of the *Constitution Act*, *1982*, although they are not real remedies in any real sense, differ from those available under section 24(1) of the *Charter* because they lie on different foundations. Section 52(1) provides as follows:

> 52 (1) 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 and effect.

However, section 24(1) of the *Charter* reads:

> 24 (1) 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.

The supremacy of the Constitution expressed in section 52 of the *Constitution Act*, *1982* binds the State in its legislative action where section 24 (1) of the *Charter*, which is part of the Constitution, provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. For example, it is possible that a legislative provision does not offend the Constitution, but that an action made by a state agent contravenes a right protected under the *Charter*. However, an individual remedy under section 24(1) of the *Charter* will rarely be available in conjunction with an action under section 52 of the *Constitution Act*, *1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to section 52, that will be the end of the matter, the matter being the constitutional issue. No retroactive section 24 remedy will be available.

[81] In the context of *Charter* cases, the courts have developed a variety of means available to them under section 52(1) of the *Constitution Act*, *1982* in order to properly address the challenge posed by invalid legislation. These means were fully discussed by Chief Justice Lamer, as he then was, in *Schachter v. Canada* [1992] 2 S.C.R. 679, pp. 695 - 719. The basic rule laid down in *Schachter* requires a court to determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

[82] In *Constitutional Law in Canada*, Carswell, 1997, (Looseleaf Edition), Volume 2, Professor Peter W. Hogg lists the choices that are available to a court under section 52(1), at page 37-3:

1. Nullification, that is, striking down (declaring invalid) the statute that is inconsistent with the Constitution;

2. Temporary validity, that is, striking down the statute that is inconsistent with the Constitution but temporarily suspending the coming into force of the declaration of invalidity;

3. Severance, that is, holding that only part of the statute is inconsistent with the Constitution, striking down only that part and severing it from the valid remainder;

4. Reading in, that is, adding words to the statute that is inconsistent with the Constitution so as to make it consistent with the Constitution and valid;

5. Reading down, that is, interpreting a statute that could be interpreted as inconsistent with the Constitution so that it is consistent with the Constitution; and,

6. Constitutional exemption, that is, creating an exemption from a statute that is partly inconsistent with the Constitution so as to exclude from the statute the application that would be inconsistent with the Constitution.

[83] The court has already concluded that the appointment of a military judge for a term of five years contravenes section 11*(d)* of the *Charter* in the context of military justice and the evolution of the concept of judicial independence. The court has also determined that QR&O articles 19.75 and 101.08 were incompatible with section 165.23 of the *National Defence Act* and they also contravene section 11*(d)* of the *Charter*.

[84] The court must act with judicial restraint in light of the inconsistency of the deficient provisions in the circumstances. The evolution of the role and functions of the office of military judge stands out so clearly from the amendments to the *National Defence Act* by an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, that this court is convinced, based on the totality of the evidence, that Parliament intended the military justice system, through the Code of Service Discipline, to reflect the importance of the place that must be occupied by independent and impartial courts martial presided by military judges in the perspective of the system of military tribunals as a whole. These courts martial presided by military judges 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 military justice system. Therefore, the court considers that the minimal constitutional requirement of judicial independence implies that a military judge shall be appointed to hold office during good behaviour until reaching the age of retirement. With respect for those who would hold a different view, this court strongly believes that any approach falling short of an appointment until reaching retirement age would prove to be insufficient, would prove not only to be insufficient with regard to

the independent status of the court martial but it would be unrealistic, impractical, and risk to undermine the standards of professionalism that are required of a modern Canadian judiciary that shall apply to military judges.

[85] Based on the approach adopted by Lamer C.J. in *Schachter*, at pages 718 and 719, the court believes that severance should be used to remove the portion of subsection 165.21(2) of the *National Defence Act* that is inconsistent with the Constitution, that is the words: "for a term of five years". This would not affect the legislative purpose of ensuring that a court martial presided by military judge is independent and impartial. It is believed that it would also serve that objective. The reading of subsection 165.21(2) of the *Act* reveals that the choice of means used by Parliament to further that objective, the means being a fixed term of five years that is renewable, so the court is of the view that the reading of subsection—that the choice of means used by Parliament to further that objective is not so unequivocal that severance would constitute an unacceptable intrusion into the legislative domain. Severance does not, in the circumstances, involve an intrusion into the legislative decisions as to change the nature of the legislative scheme in question, and that scheme is to provide the system of military tribunals with courts martial that are independent and impartial. Also, the use of severance would have no meaningful budgetary repercussions.

[86] For the same reasons, the court believes that the method of "reading in" should be used in order to rectify the inconsistency of QR&O articles 19.75 and 101.08 with the Constitution with respect of judicial independence by making them inapplicable to military judges.

[87] With regard to the remedy under section 24(1) of the *Charter* dealing with a stay of proceedings, the court relies on the decisions of the Supreme Court of Canada in *Schachter* stated previously as well as *R. v. Demers* [2004] 2 S.C.R. 489, to state that the applicant is not entitled to a retroactive section 24(1) remedy in this case, and this is also not one of those cases where a prospective remedy in the form of a stay is available as contemplated by the Supreme Court of Canada in *Demers*.

CONCLUSION AND DISPOSITION

[88] For these reasons, the court grants the application in part and makes the following declarations under section 52(1) of the *Constitution Act*, *1982*:

(1) Subsection 165.21(2) of the *National Defence Act*, R.S.C. 1985, c. N-5, contravenes in part section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. The words "for a term of five years" contravenes section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*.

(2) Considering this court's ruling concerning the constitutionality of subsection 165.21(2) of the *National Defence Act*, R.S.C. 1985, c. N-5, the court concludes that subsection 165.21(3) of the *Act* contravenes section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. Therefore, the court strikes down subsection 165.21(3) of the *Act* and declares that it is of no force and effect. This declaration of invalidity is sufficient and it is not necessary to deal with the regulations made pursuant to the invalid provision.

(3) Article 19.75 of the Queen's Regulations and Orders for the Canadian Forces contravenes in part section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. In order to make article 19.75 of the Queen's Regulations and Orders for the Canadian Forces consistent with the Constitution, the court declares that paragraph 19.75(1) includes the words "to military judges or" inserted after the word "apply".

(4) Article 101.08 of the Queen's Regulations and Orders for the Canadian Forces contravenes in part section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. In order to make article 101.08 of the Queen's Regulations and Orders for the Canadian Forces consistent with the Constitution, the court declares that paragraph 101.08(1) includes the words "other than a military judge" inserted between commas after the word "officer".

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