Citation: *R. v. Corporal H.P. NGuyen*, 2005CM57

Docket: C200557

STANDING COURT MARTIAL
CANADA
QUEBEC
714TH COMMUNICATIONS SQUADRON
BELVÉDÈRE ARMOURY
SHERBROOKE, QUEBEC

Date: December 19, 2005

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

HER MAJESTY THE QUEEN
(Prosecutor-Respondent)
v.
CORPORAL H.P. NGUYEN
(Accused-Petitioner)

DECISION ON A MOTION FILED UNDER SUBSECTION 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Delivered orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] This is a motion by the defence under article 112.05(5)(*e*) of the Queen's Regulations and Orders for the Canadian Forces (QR&O) on the ground that this standing court martial is not an independent and impartial tribunal contrary to section 11(*d*) of the *Canadian Charter of Rights and Freedoms* because the military judges who preside over these courts martial do not enjoy sufficient guarantees of judicial independence. This motion is one of three basically similar motions that have been filed in a standing court martial composed of this same military judge. The other cases are those of the standing court martial of *Corporal J.B. Joseph*, which began at North Bay,

Ontario, on October 4, 2005, and of *Former Leading Seaman Lasalle*, which began on November 1, 2005, at Gatineau. Apart from a few minor differences, the evidence and arguments cited in this case are similar to those that were presented in the case of *Former Leading Seaman Lasalle*.

[2] These motions raise, for the first time since the decisions 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 the independence of courts martial in light of section 11(*d*) of the *Canadian Charter of Rights and Freedoms* following the amendments made to the *National Defence Act* and the regulations thereunder since 1998. In the recent judgment *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, at paragraph 4, the Supreme Court reminded us that, and I quote:

> 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). Independence is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process; *Beauregard*, at p. 70.

This Court is convinced that these principles apply to courts martial in Canada. Although they are vested with important duties, the jurisdiction of military judges is more limited than that of the superior court judges and even provincial court judges. The military judges who preside at courts martial have criminal jurisdiction only in regard to persons — whether civilian or military — who are subject to the Code of Service Discipline in Canada or abroad. The Court acknowledges that the military judges' role as a protector of the Constitution has a more limited scope, therefore, than that of the superior court or provincial court judges. Consequently, their judicial independence may well be secured under less rigorous conditions. However, a review of the court martial structure must not only consider the statutory and historical context peculiar to military tribunals, it must recognize its relationship with the country's other courts and tribunals.

[3] This question of the independence of the courts has been addressed in some important decisions since *Valente v. The Queen*, [1985] 2 S.C.R. 673. In that judgment, Mr. Justice Le Dain stated, at p. 692, and I quote:

> 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] It must be said that this notion of independence has evolved both from the standpoint of essential characteristics — security of tenure, financial security and administrative independence — and in terms of the requisite independence within the spectrum of the courts system. There are two dimensions to independence of the judiciary: the individual independence of a judge and the institutional independence of the court over which he is presiding. These two dimensions are a function of the existence of the objective standards that preserve the role of the judges (*Valente*, p. 687, *Beauregard*, p. 70 and *Ell*, para. 28). The Supreme Court restated the content and conditions of judicial independence in *Ell v. Alberta*, [2003] 1 S.C.R. 857, at paragraphs 28 to 31, where Mr. Justice Major stated on behalf of the Court, and I quote:

> 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.
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> 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.
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> 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:
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> > . . . 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 . . . .

[5] The concept of judicial independence is a prerequisite to the judge's impartiality and must be assessed objectively. The Court must ask itself whether a reasonable person, informed of the relevant statutory provisions, their history and the

traditions surrounding them, and after contemplating the question in a realistic and practical way, would conclude that this standing court martial is an independent tribunal. But there is more. The emphasis must be placed on the existence of an independent status. Furthermore, the Standing Court Martial must be perceived to be independent. In *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, Mr. Justice Gonthier, for the majority, added 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.

That being said, the analysis must be made taking into account the nature of the Standing Court Martial and the interests at stake, as the Supreme Court noted in paragraph 30 of *Ell*, *supra*.

THE EVIDENCE

[6] The evidence before this Court is composed of the following items:

(1) the issues within the realm of judicial notice under Rule 15 of the Military Rules of Evidence;

(2) the issues within the realm of judicial notice under Rule 16 of the Military Rules of Evidence;

(3) the exhibits filed with the Court on consent of counsel and for the sole purposes expressed on the consent of these counsel; and

(4) the joint submission on the facts filed with the Court, exhibit R1-5.

POSITION OF THE PARTIES

The applicant

[7] The applicant alleges that certain provisions of the *National Defence Act* and the QR&O do not provide the necessary guarantees to ensure the independence and impartiality of a standing court martial. More specifically, the applicant argues that a military judge appointed under the present legislation does not enjoy significant and sufficient guarantees of security of tenure, financial security and institutional independence. The applicant argues, first, that this Court must distinguish the judgments in *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.J. No. 10; and *R. v. Lauzon*, [1998] C.M.A.J. No. 5, which dealt with the independence and impartiality of courts martial prior to the amendments to the *National Defence Act* by the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, assented to December 10, 1998, in force on September 1, 1999, because they no longer correspond to the state of the law on judicial independence. He adds that the state of the law in Canada has evolved so much since the Supreme Court decision in *Ell v. Alberta*, [2003] 1 S.C.R. 857, that even the new statutory and regulatory framework adopted in the wake of the amendments to the *National Defence Act* does not provide such significant and sufficient guarantees. The applicant argues that to hold a trial in such circumstances would violate the right of the accused to an impartial and independent trial and is not justifiable under section 1 of the *Charter*.

[8] The applicant asks this Court, therefore, to declare invalid and of no force or effect — under section 52 of the *Constitution Act, 1982* — the following statutory and regulatory provisions in relation to the process of appointment of military judges, their removal, their reappointment, the determination of their remuneration and the rates and terms by which they are paid:

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

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

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

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

(5) section 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&O; and

(6) article 19.75 of the QR&O.

Finally, the applicant asks the Court, in addition to the declaration of invalidity, to order a stay of the proceedings against the applicant under section 24(1) of the *Canadian Charter of Rights and Freedoms*. In his oral submissions, the applicant also asked this Court to grant him a constitutional exemption from prosecution should the Court find that one or more of the impugned provisions was unconstitutional but decided to suspend the effect of the declaration(s) of invalidity.

<u>*Security of tenure*</u>

Fixed five-year term of office

[9] The applicant submits that the military judges who preside at Standing Courts Martial do not have sufficient security of tenure from the standpoint of either the individual dimension or the institutional dimension. He submits that the fixed term of appointment, as it was understood by the Supreme Court in *Généreux*, is not *per se* unconstitutional. The difficulty lies in the possibility that a former military judge might return to the practice of law within the Canadian Forces and in that capacity become a legal advisor to the executive or a member of that executive, notwithstanding the restrictions imposed on that former judge by the rules of professional ethics of the Bar of a province that would be applicable to him. The applicant argues that a military judge should have security of tenure comparable to that of the judges of the superior courts of the provinces or the judges of the provincial courts, that is, until the age of retirement. He relies primarily on *Ell v. Alberta*, [2003] 1 S.C.R. 857, in particular paragraphs 31 and 32, and I quote:

> 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:
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> > . . . 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*.
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> 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.
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> 32 The ultimate question in each case is whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent: *Valente*, *supra*, at p. 689. The perception of independence will be upheld if the essence of each condition of independence is met. The essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office. See *Valente*, *supra*, at p. 698:
>
> > The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

The applicant invites the Court to examine closely the new provisions in the *National Defence Act* and in particular section 179 of the Act, which reads as follows, and I quote:

> 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
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> > (*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.
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> (2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

The applicant's submissions are to the effect that by granting the court martial, that is, the presiding judge, the same attributes as a superior court of criminal jurisdiction, Parliament has raised the bar for security of tenure of military judges to what is

constitutionally required for superior court judges. Accordingly, only the appointment of a military judge to the age of retirement will fulfil the minimal requirements of section 11(*d*) of the *Charter*.

Removal

[10] Concerning removal, he submits to the Court that a question as important as this should be in the Act instead of the regulations, and that it should be as detailed as the provisions in sections 64 and 65 of the *Judges Act*, R.S.C. 1985, c. J-1. In the applicant's view, the renewal committee is not fully protected against interference from the executive, at least in appearance, and the military judge has less protection than that enjoyed by a judge in another court.

Relief from performance

[11] Applicant also submits that the security of tenure of military judges is also affected by the possibility that the Chief of Defence Staff and the Chief Military Judge, as an officer commanding a command under article 4.091 (*Powers and Jurisdiction of the Chief Military Judge*), may, theoretically, relieve a military judge of performance of his military duty under article 19.75 (*Relief from Performance of Military Duty*) of the QR&O.

Retirement age

[12] Finally, the applicant contends — from the standpoint of security of tenure or financial security — that the age of retirement of a military judge, whatever it may be, should be provided for in the *National Defence Act* rather than in the QR&O because this issue could then no longer be subject to influence by the executive.

Renewable term

[13] The applicant also submits that if the Court finds that the standing court martial — presided over by a military judge appointed for a five year term — satisfies the minimal standards of constitutional validity, such is not the case for the reappointment process. First, all of the reappointment provisions should be contained in the Act alone. Second, he argues that the mere fact that a judge has to solicit a reappointment creates, in a reasonable and well-informed person, an appearance of dependence.

[14] He adds that the renewal committee provisions under article 101.15 (*Renewal Committee*) allow the executive to appoint the majority of the members. Furthermore, these persons might be very close to the executive. The possibility of such a situation does not provide the guarantees needed to achieve the requisite independence of military judges because this committee is not independent of the

executive authority. The mere fact that the executive can appoint a person who had no relationship with that executive cannot, the applicant argues, validate an unconstitutional regulatory provision. The applicant relies in particular on *Barreau de Montréal v. Québec (Procureure générale)*, R.J.Q. 2058 (Q.C.A.), where the Quebec Court of Appeal ruled on the renewal procedure for members of the Tribunal administratif du Québec (TAQ) in light of section 23 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. The Court held that a sensible and well-informed person, having analyzed the situation in depth, would reasonably apprehend that the members of the TAQ, and in particular during the final year of their term in office, would not have the requisite independence of mind to judge in a fully objective way. More especially, this person might reasonably believe that it was more probable that these members would be influenced in their decision by the presence, on the committee that was to recommend their reappointment, of representatives of the government and of the chairperson of the TAQ, who were there by right. The applicant submits that the minimal standards of constitutional validity pertaining to the composition of the renewal committee responsible for recommending the reappointment of military judges cannot be less than the minimal constitutional standard applicable to an administrative tribunal.

[15] The applicant also challenges the factors that must be considered by the renewal committee under article 101.17 (*Recommendation by Renewal Committee*) of the QR&O. On the one hand, he argues, the list of factors must be exhaustive. On the other hand, the factors provided in article 101.17 are generally vague, imprecise or simply irrelevant in the context of a reappointment, with the exception of article 101.17(2)(*a*)(i). Concerning the factor addressed to the official language requirements, the applicant argues that it is relevant only at the time when the judges are appointed. This question, too, falls within the exclusive jurisdiction of the Chief Military Judge and the consideration of this factor by the committee would violate his administrative independence.

Financial security

[16] Concerning financial security, an essential characteristic of judicial independence, the applicant argues that the degree of independence of the military judges compensation committee established in article 204.23 of the QR&O pursuant to section 165.22 of the *National Defence Act* is not sufficient, at least in appearance. He acknowledges that there is no problem *per se* with the language used in the QR&O since it substantially reproduces the corresponding provisions of the *Judges Act*, except that the latter are provided for in the legislation. It is rather the fact that the provisions are subject to the regulatory authority of the executive that gives rise to an apprehension of an appearance of dependency, he argues. By way of comparison, the provisions applicable to federal judges, pertaining to the same subjects, are enacted through legislation and consequently have the authority of the Parliament of Canada. The applicant submits that if the procedures for adoption, amendment, publication and

review are compared, a regulation is more readily subject to executive ascendancy than a statute. Judicial independence requires that these issues be governed by the enabling legislation.

Institutional independence

[17] The institutional independence of the standing court martial and of military judges is also insufficient, according to the applicant. His reasoning is based on the nature and content of the organizing document of the Office of the Chief Military Judge, the Canadian Forces Organization Order (CFOO) 3763, issued under the authority of the Chief of Defence Staff in February 2002, and on the nature and content of Order 2000007, dated February 7, 2002, by the Minister of National Defence, authorizing the establishment of the Office of the Chief Military Judge under subsection 17(1) of the *National Defence Act*. The applicant argues that the independence of military judges is threatened because the legislation simply creates the position of Court Martial Administrator, Military Judge and Chief Military Judge. There is no real institution, that is, a court that would be a genuine administrative entity distinct from the executive. The applicant argues that the fact that the Office of the Chief Military Judge is organized according to a Ministerial order and a CFOO of the Chief of Defence Staff can affect the security of tenure of military judges and institutional independence because the only organization to which the military judges belong is the Office of the Chief Military Judge, constituted by a representative of the executive, the Minister of National Defence, via the Chief of Defence Staff. He alleges that the executive could modify or neutralize the organization or functioning of the Office of the Chief Military Judge through a simple change in these documents. An example of the lack of institutional independence of the judges is the fact that the Chief of Defence Staff constitutes the final authority on a grievance filed by a judge. The applicant further alleges that under chapter 21 (*Summary Investigations and Boards of Inquiry*) of the QR&O, the Chief of Defence Staff or the Minister could use their powers to order a summary investigation or a board of inquiry to get a military judge, even one enjoying immunity from prosecution, to explain the reasons for a decision. The fact that such situations have not occurred is not relevant, the applicant argues, for the purpose of finding out whether a reasonable person aware of these questions could objectively infer that the power conferred on the executive gives rise to an apprehension of a situation of dependency. Accordingly, the applicant argues that a person who is reasonably informed and familiar with the constitution and structure of courts martial under the *National Defence Act* can conclude that the position of military judge does not have the security of tenure, financial security or institutional independence that is necessary if the standing court martial is to be considered an independent and impartial tribunal within the meaning of paragraph 11(*d*) of the *Charter*. The applicant also raised very briefly and in the alternative the question that the grievance procedure applicable to the Canadian Forces encroaches on judicial independence, and I will address this issue later in this decision.

Re: Relief sought by applicant

[18] The applicant is therefore asking this Court, over and above the declaration(s) of invalidity, to order a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms*. In his oral submissions, the applicant also asked this Court to grant him a constitutional exemption from prosecution should the Court find that one or more of the impugned provisions was unconstitutional but decide to stay the declaration(s) of invalidity. He also was insistent that the Court not temporarily suspend any declaration of invalidity. In his view, such a suspension is not necessary since there is no impediment to a civilian court — a court of criminal jurisdiction in Canada — trying a soldier for a purely military offence under the *National Defence Act*. The applicant argues that sections 71, 165.2 and 165.11 of the *National Defence Act*, sections 468 and 469 of the *Criminal Code* and section 34 of the *Interpretation Act* indicate that an offence like the one that is created in section 129 of the *National Defence Act* for conduct to the prejudice of good order and discipline may be tried in a superior court.

The respondent

[19] The respondent argues, on the contrary, that the Standing Court Martial is an independent and impartial tribunal because:

> (1) a military judge presiding at a court martial has security of tenure;
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> (2) a military judge presiding at a court martial has financial security; and
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> (3) a military judge presiding at a court martial has institutional administrative independence.

The respondent further submits that if this Court were to find that the Standing Court Martial is not an independent and impartial tribunal, any relief that is ordered should consist of declarations of invalidity that are suspended or a reading in of additional guarantees to ensure that military judges and standing courts martial can continue to exercise their jurisdiction pending the enactment by Parliament of appropriate measures to ensure compliance with the applicant's rights and freedoms.

Security of tenure

Fixed five-year term of office

[20] The respondent submits that the applicant has not successfully demonstrated that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue

in a realistic and practical way — and after examining it in depth — would conclude that a military judge presiding at a court martial does not enjoy sufficient security of tenure to be able to try the cases that come before him on the merits without intervention by anyone from outside in the manner in which the judge conducts the case and delivers his decision.

[21] Paragraph 11(*d*) of the *Charter*, the respondent says, does not guarantee an ideal degree of independence. The applicable test for determining whether a particular tribunal has the characteristics of independence must instead be applied in a flexible and contextual manner that takes into account the particular circumstances surrounding the tribunal. The respondent submits that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge presiding at a court martial does enjoy sufficient security of tenure to be able to try the cases that come before him on the merits without intervention by anyone from outside in the manner in which the judge conducts the case and delivers his decision. Relying on decisions of the Supreme Court in *R. v. Généreux* and of the Court Martial Appeal Court in *R. v. Lauzon*, the respondent submits that security of tenure does not require that a military judge be appointed until a pre-established retirement age. It suffices that the military judge be appointed for a definite term during which he can be removed only for cause. The respondent contends that a military judge could return to the practice of law, theoretically, within the Canadian Forces without this posing any problem, although his financial conditions might be inferior to those existing at the time when he was performing exclusively judicial duties. A former judge who became an attorney again would be governed by his code of professional conduct, and the objective rules for promotion within the Canadian Forces are sufficient to ensure that an accused need not fear that the military judge would not act independently and impartially throughout his term of office. Furthermore, this would not affect the requisite financial security because the important thing, the respondent says, is that the military judge's salary be established independently throughout his term of office.

[22] The respondent rejects the applicant's contention that section 179 of the *National Defence Act* effectively elevates military judges to the status of superior court judges. She submits that this provision existed, at least partially, before the *Généreux* and *Lauzon* judgments and that courts martial already had the powers or some of the powers of a superior court of criminal jurisdiction. However, the Court hastens to explain that section 179 of the *National Defence Act*, before it was amended by the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, was addressed only to an accused person's representation at a court martial. Section 179 read as follows:

> 179. In any proceedings before a service tribunal, the accused person has the right to be represented in such manner as is prescribed in regulations made by the Governor in Council.

[23] Finally, the respondent adds that the protection of the security of tenure of the superior court judges is based on section 99 of the *Constitution*. Thus the *Ell* judgment did not represent any change or advance jurisprudentially affecting the security of tenure either of superior court judges or of military judges.

Removal

[24] Concerning removal, the respondent submits that the regulatory provision setting out the specific reasons the renewal committee may rely on in finding ground for removal is virtually identical to the one set out in the *Judges Act*. The respondent acknowledges, however, that the renewal committee procedure is not as detailed as the one that appears in section 64 of the *Judges Act*, particularly in regard to holding an oral hearing, but she argues that such an oral hearing is mandatory in light of the common law and in particular the rules of administrative law in relation to the duty to act fairly.

Retirement age

[25] On the issue of the age of retirement of military judges, the respondent submits that judicial independence requires that military judges be treated in the same way. In other words, the retirement age of a military judge cannot be other than the one that appears in the table appearing in article 15.17 of the QR&O which applies to his rank. It would be contrary to the applicable principles concerning security of tenure and financial security if the executive could offer a military judge the possibility to have table H in article 15.17 (*Release of Officers – Age and Length of Service*) applied to him in a discretionary way. The respondent submits that Parliament is under no obligation to make express provision in the *National Defence Act* for the age of retirement of military judges.

Renewable term

[26] On the question of the renewable term, the respondent contends that if it is agreed that the renewal of a military judge's term is constitutionally acceptable — which is agreed in theory, she says, by the Court Martial Appeal Court — that implies that such constitutionality will be satisfied if there are significant and sufficient guarantees. The respondent argues that the factors considered by a renewal committee may differ from those that will be assessed by an inquiry committee responsible for making a recommendation on removal from office. She argues that the significant and sufficient guarantees require that the renewal committee be independent of both the judge in question and the Governor in Council, and that its composition, the procedure and the factors to be considered do not give rise to a reasonable apprehension that the military judge will be influenced in the exercise of his judicial duties. The respondent submits that the applicant's arguments — that the committee might be controlled by the executive because it is the executive that appoints two of its members — have no basis in law because such a situation is precluded under the common law. The common law, she argues, prevents the Minister of Justice or the Minister of National Defence from appointing persons who are so close to the executive that they would end up controlling the renewal committee. Procedurally, the respondent argues that here too the common law and the rules of administrative law on the duty to act fairly are an integral part of the renewal process even if the regulations are silent on this.

[27] The respondent answered numerous questions by the Court concerning the factors that ought to be considered by the renewal committee under article 101.17 (*Recommendation by Renewal Committee*) of the QR&O. According to her submissions, these factors are sufficiently precise and there is no requirement in law that the list be exhaustive, since the committee may consider any factor or sub-factor that is relevant. Each of the factors that the committee must consider is sufficiently precise and objective, she says, and they relate to the need for a fair and effective military justice system within the Canadian Forces. The respondent submits that these requirements impose sufficient restrictions on the committee's discretion, particularly in light of the prohibition on considering the record of decisions by the military judge, that they preclude any reasonable apprehension that the committee would formulate its recommendations on the basis of factors that might lead a military judge to rule on the cases that come before him on the basis of any irrelevant factor whatsoever.

[28] In terms of the specific factors, the respondent submits that the one related to the official languages requirement is relevant and does not encroach upon the administrative independence of the Chief Military Judge. As to continuity, the respondent submits that this factor should be construed positively, that is, in favour of the renewal of terms. The factor pertaining to compelling military requirements is an exceptional factor, she says. It would very seldom be applied, but the actual existence of this factor does not give rise to any reasonable apprehension of a lack of independence of military judges. Finally, the respondent argues that the criterion pertaining to military

judges' physical condition is relevant. The fact that it is related to the physical condition of an officer of the legal classification is not problematic, she says. Military judges must be deployable to the same location as the military counsel appearing before them on courts martial. This is an enrolment standard, in her view, and not a medical standard that might be required of a military counsel in a particular context. She adds that it is a different criterion from the one that exists for the inquiry committee responsible for removal. The respondent acknowledges that the statutory and regulatory renewal and removal provisions are not ideal, but she argues that they do not have the effect of creating an apprehension — in a reasonable, sensible and well informed person — that a military judge will be influenced in the way in which he performs his judicial duties.

Financial security

[29] Concerning financial security, a characteristic essential to judicial independence, the respondent argues that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge presiding at a court martial has the financial security needed to enable him to try the cases that come before him on the merits without intervention by anyone from outside in the way in which the judge conducts the case and delivers his decision.

[30] The respondent notes that the principle of financial security is one that applies to military judges during the period in which they make judicial decisions. The fact that a former military judge can be paid less than the salary he was getting when acting as a military judge is irrelevant, she says, for the purpose of knowing whether he did or did not have financial security as a military judge. Financial security means basically that the right to salary and pension is covered by legislation or regulation and is not subject to arbitrary interference by the executive in a way that might affect judicial independence. The respondent submits that the applicant has failed to demonstrate that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge presiding at a court martial does not have the financial security needed to enable him to try the cases that come before him on the merits without intervention by anyone from outside in the way in which the judge conducts the case and delivers his decision.

Institutional independence

[31] Concerning the question of institutional independence of the standing court martial and military judges, the respondent submits that this contention is based on a mistaken interpretation of the Ministerial organization orders and Canadian Forces Organization Orders, which "[TRANSLATION] are documents of an organizational nature

that should not be used for any other purpose". These orders place support and logistical infrastructure staff at the disposal of the Canadian Forces in order to enable the military judges to perform their judicial duties, and they provide for the supervision of these employees by the Chief Military Judge. The respondent submits that the chief military judge — and the court martial administrator, who performs his duties under the general direction of the Chief Military Judge — derive their administrative authority not from a Canadian Forces Organization Order but from the *National Defence Act* and the QR&O. The exercise of this administrative authority is facilitated by the existence of these orders. However, the respondent argues, even if these orders were repealed there would be no reasonable ground to apprehend that a military judge could be influenced in the performance of his judicial duties.

Re: Relief sought by applicant

[32] Concerning the requested relief, the respondent submits that no relief is necessary because the applicant has failed to discharge his burden of proof, but she adds that if the Court were to conclude that the motion is justified, in whole or in part, and to declare invalid certain provisions of the *National Defence Act* or the regulations thereunder, the Court should not order a stay of the proceedings in light of the Supreme court decisions in *Schachter* and *Demers*. She argues that the applicant has failed to establish any individual infringement of his rights that would warrant such relief. She argues that if the Court rules it is necessary to award relief under subsection 52(1), the additional individual relief sought by the applicant is superfluous. The respondent argues, on the one hand, that the applicant has not established that his case is one of the extreme cases the Supreme Court was alluding to in *O'Connor*; on the other hand, any relief should be formulated surgically and any declaration of invalidity should be suspended to enable Parliament to make the necessary corrections and to allow the Canadian Forces to continue to operate effectively by, *inter alia*, maintaining discipline. This suspension is necessary, she says, to ensure the rule of law within the Canadian Forces and to protect the public. The respondent submits that absent a functional system of courts martial, the disciplinary regime within the Canadian Forces would be vulnerable to legal chaos, which would have adverse repercussions on the capacity of the government of Canada to implement its foreign affairs, defence and security policies to the benefit of all Canadians. Finally, the respondent submits that this is not a case in which the Court could apply the doctrine of constitutional exemption. The applicant's request, she says, amounts to a stay of proceedings. Citing the Supreme Court decision in *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519, the respondent submits that there is no special consideration that would entitle the applicant to the benefit of a constitutional exemption that differentiates him from other accused who appear before courts martial.

DECISION

Analysis of the law in light of the facts

[33] Section 2 of the *National Defence Act* defines "court martial" as follows:

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

The amendments made to the *National Defence Act* by the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, produced some changes in the military justice system, modernized the military code of discipline and helped to improve the integrity and impartiality of the system. It is worth pointing out that the major *Charter* decisions concerning the independence of courts martial — *R. v. Généreux,* [1992] 1 S.C.R. 259 in the case of a general court martial; *R. v. Ingebritson* [1990] C.M.A.J. No. 2 in the case of a standing court martial; *R. v. Edwards,* [1995] C.M.A.J. No. 10 in the case of a disciplinary court martial; *R. v. Lauzon* [1998] C.M.A.J. No. 5 also in the case of a standing court martial; and *R. v. Bergeron,* [1999] C.M.A.J. No. 3 in the case of a standing court martial — were made on the basis of legislation existing prior to the coming into force of this reform of military justice in 1998. The Court will conduct a brief overview of these important decisions.

[34] In *R. v. Généreux*, the Supreme Court had already indicated that the requirements pertaining to judicial independence could be adapted in the case of special circumstances, as in the case of military justice. The Court's review of course concerned the General Court Martial as it existed at the time. Chief Justice Lamer, as he then was, wrote, 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) [and it is Lamer C.J. who is quoting]:
>
> > 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.

And that is the end of the quotation by Chief Justice Lamer. At paragraph 64, Lamer C.J. continues:

> 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 he 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 clear that the reasoning of the majority in *R. v. Généreux*, in terms of the statutory and regulatory provisions then governing the constitution of a general court martial, was directed to preserving the promotional opportunities of military judges in their career within the Office of the Judge Advocate General. If we consider the concept of judicial independence that is applicable in 2005, we may well ask ourselves whether it would even be possible to imagine that a military judge could even dream of his promotional opportunities within the military establishment following his judicial duties, while occupying his responsibilities as a judge, without this being profoundly contrary to the minimal rules of ethics and irremediably affecting the requirements of independence and impartiality.

[35] In *Edwards*, the Court Martial Appeal Court considered the composition of the disciplinary court martial in light of the requirements in section 11(*d*) of the *Canadian Charter of Rights and Freedoms*. First, the Court explained that the Queen's Regulations and Orders for the Canadian Forces (QR&O) had been amended on December 20, 1990 to include provisions with respect to the selection and tenure of judge advocates. The Supreme Court of Canada had examined these amendments in *R. v. Généreux*, indicating that the amendments appeared to correct the primary deficiencies of the judge advocates' security of tenure. The Court Martial Appeal Court held, in *Edwards*, that while this finding might be, strictly speaking, *obiter dicta*, it should not depart from it. Accordingly, the Court Martial Appeal Court concluded that the judge advocate in this case, having enjoyed the security of tenure prescribed by article 4.09 of the QR&O, had such security of tenure in the context of a court martial as would comply with paragraph 11(*d*) of the *Charter*. Concerning the security of tenure of the judge advocate, Chief Justice Strayer, 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 [it is Strayer C.J. who is quoting]:
>
> > ... 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*).

And Chief Justice Strayer continues, at paragraph 16:

> 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.

And, returning now to Chief Justice Strayer:

> 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*.

[36] In *R. v. Lauzon*, the Court Martial Appeal Court considered the appellant's contention that the Standing Court Martial was not an independent tribunal within the meaning of paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. After enumerating the essential ingredients of judicial independence, Mr. Justice Létourneau, on behalf of the Court, added at paragraph 19, and I quote:

> 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 the judgment in *Edwards*, the Court addressed the issue of security of tenure of military judges and, for the first time, the renewal of terms of office, in 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.

[37] The Court Martial Appeal Court ruled shortly afterward on the question of the independence of the standing court martial in *R. v. Bergeron*, and stated, at paragraphs 20 to 29, and I quote:

> 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:

So at this point it is Mr. Justice Létourneau who is quoting Chief Justice Strayer:

> 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*.

And now, Mr. Justice Létourneau continues, at paragraph 25 — not Mr. Justice Létourneau but the Court, in *Bergeron*, continues at paragraph 25:

> 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 (*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.

So now the Court, in *Bergeron*, continues at paragraph 26:

> 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.

[38] This Court is bound by the rule of *stare decisis*. That said, it must determine whether the standing court martial has the essential characteristics of an independent and impartial tribunal in light of the particular context of this case in comparison with previous decisions. It is necessary not only to examine objectively the status of this institution, as it is indicated in the statutory and regulatory provisions

governing its constitution and proceedings at the time of trial, but to examine it in the context of the concept of judicial independence, which continues to evolve with time.

BACKGROUND AND HISTORY SINCE *LAUZON*

The first Dickson report

[39] During 1997 two special reports and one major investigation dealt, *inter alia*, with issues in relation to the military justice system. The Special Advisory Group on Military Justice and Military Police Investigative Services was chaired by the Right Honourable Brian Dickson, a former chief justice of the Supreme Court of Canada. The Special Advisory Group was mandated to evaluate the Code of Service Discipline in light of its fundamental objective and the need to have mobile military tribunals which, using methods that are both quick and fair, are capable of functioning in peacetime as in war, in Canada and abroad. The Special Advisory Group presented its report on March 14, 1997 and it is the first Dickson report.

Somalia Commission of Inquiry

[40] A commission of inquiry chaired by the Honourable Mr. Justice Gilles Létourneau was constituted for the purpose of investigating and reporting on the chain of command system, its leadership, discipline, operations, acts and decisions of the Canadian Forces and the measures and decisions taken by the Department of National Defence in connexion with the deployment of the Canadian Forces in Somalia. The Commission of Inquiry presented its report to the government on June 30, 1997.

The second Dickson report

[41] The Special Advisory Group drafted a further report, at the request of the former Minister of National Defence, on the Minister's quasi-judicial functions under the Code of Service Discipline. The report in question was presented to the government on July 25, 1997. The Special Advisory Group concluded in its first report that it was absolutely necessary to retain a separate and distinct system of military justice capable of functioning in peacetime as in war, in Canada or abroad. However, it recommended some major changes in all aspects of military justice and military police investigation services. The Department and the Canadian Forces had already acknowledged the need to make some changes in the military justice and military police investigation services. The review conducted by the Special Advisory Group complemented and supported the internal reform already under way. In its report on the Minister's quasi-judicial functions, the Special Advisory Group recommended that the Minister be released from a majority of these functions so as to avoid the risks of conflict of interests between these functions and the Minister's duties and executive powers. The amendments to the *National Defence Act* were designed to allow a closer relationship between the military justice system and present Canadian values and legal

criteria while attempting to preserve those characteristics of the system that seemed necessary in order to respond to service needs.

[42] The provisions of Bill C-25, which became the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, which came into force on September 1, 1999:

> (1) were intended to clarify the roles and responsibilities of the principal actors in the military justice system, including the Minister of National Defence and the Judge Advocate General;
>
> (2) were intended to establish clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions;
>
> (3) abolished the death penalty and substituted the punishment of life imprisonment;
>
> (4) authorized a military judge to preside at courts martial and impose the court's sentences;
>
> (5) authorized the participation of non-commissioned members as members of court martial committees in the context of general or disciplinary court martial proceedings involving non-commissioned members;
>
> (6) created the position of Director of Defence Counsel Services appointed by the Minister to hold office during good behaviour for a term not exceeding four years, eligible to be reappointed, to 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 and to provide such services. The Director of Defence Counsel Services thus performs his duties under the general supervision of the Judge Advocate General who may issue general instructions or guidelines in writing in respect of defence counsel services, etc. (Sections 249.18 to 249.21 of the *National Defence Act*);
>
> (7) created the position of Director of Military Prosecutions, appointed by the Minister to hold office for a term not exceeding four years but removable for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. The Director of Military Prosecutions prefers all charges to be tried by court martial and conducts all prosecutions at courts martial. He also acts as

> counsel for the Minister in respect of appeals when instructed to do so. (Sections 165.1 to 165.17 of the *National Defence Act*);
>
> (8) created the position of Court Martial Administrator who convenes a court martial in accordance with the determination of the Director of Military Prosecutions and, in the case of a General Court Martial or a Disciplinary Court Martial, appoints its members. The Court Martial Administrator performs such other duties as may be specified by the Act or prescribed by the Governor in Council in regulations. He acts under the general supervision of the Chief Military Judge. (Sections 165.18 to 165.2 of the *National Defence Act*).

[43] The amendments to the *National Defence Act* had a significant impact on the function of a military judge. The role and functions of a military judge were now intrinsically comparable to those of a judge hearing exclusively criminal matters in a superior court or provincial court. Sections 165.21 to 165.23 of the *National Defence Act* constitute the statutory framework of the military judge's function. The major characteristics of this function under the Act pertain to the appointment, term and removal, retirement age, compensation and duties of military judges.

[44] The *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, produced many changes in the responsibilities of a military judge. Military judges are appointed during good behaviour for a five-year term by the Governor in Council from among the barristers or advocates of at least ten years standing at the bar of a province, subject to removal 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 recommendation of a Renewal Committee likewise 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. They preside at courts martial and shall perform other judicial duties under this Act that are required to be performed by military judges. They shall 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, with the concurrence of the Chief Military Judge, be appointed as a board of inquiry. This Court is of the opinion that these statutory provisions effectively create a genuine modern military judiciary and that the function of military judge is similar to that of the judges who fulfill their duties within Canada's courts. A military judge's responsibilities, combined with the jurisdiction of courts martial to try persons subject to the Code of Service Discipline for the most serious offences, preclude any argument that it is comparable with the office of a judge or member of an administrative tribunal, irrespective of where such a tribunal is situated in the extensive range of administrative tribunals.

General considerations after Lauzon

[45] If today's situation is compared with the one that existed at the time of the decisions in *Généraux*, *Edwards*, *Lauzon* and *Bergeron*, there is no room left in the military judge's function for the notion of assigning an officer to a military judge's position for a fixed, renewable term. The assignment of a soldier to a specific place or employment is a decision to be made by the military's executive authority, and the place or employment need not represent the soldier's first choice. This notion of "assignment" or "posting" existed at the time of the regulations in effect when the decisions of the Court Martial Appeal Court were handed down in *Edwards*, *Lauzon* and *Bergeron*. The old regulations were based on the understanding that the individuals assigned to military judges' positions were military lawyers working in the Office of the Judge Advocate General, prior to this posting, who might afterwards choose to advance their military career with the Office of the Judge Advocate General. Their posting was for a fixed and variable albeit renewable term and could only be terminated under subclause (6) of article 4.09 of the QR&O, which read as follows:

> 4.09(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 old regulations were consistent with the remarks of then Chief Justice Lamer in *Généreux*, at paragraph 86, and I quote:

> 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*).

[46] Under the system now in force, any Canadian Forces officer is eligible to be appointed a military judge if he is a member in good standing at the Bar of a province for at least 10 years. A person suitable for appointment as a military judge by the Governor in Council may now, for all intents and purposes, be an infantry officer in the Reserve carrying on a private law practice, or a Crown attorney. It is almost inconceivable that such an officer could now be the one described by then Chief Justice Lamer in *Généreux*. The pool of suitable candidates for posting as a military judge has been substantially enlarged.

[47] The selection process for suitable candidates for appointment as military judges is now similar to the one that exists for federally appointed judges. In his *Annual Report to the Minister of National Defence on the administration of military justice in the Canadian Forces*, for the period from April 1, 2004 to March 31, 2005, exhibit R1-4/2, the Judge Advocate General stated, at paragraphs 4.1 and 4.2, and I quote:

> 4.1 Military Judges
>
> The Governor in Council may appoint any officer who is a barrister or advocate of at least 10 years standing at the bar of a province to the military judiciary.1 A process similar to that followed for other federal judicial appointments ensures that only competent, deserving officers are considered for military judicial appointments.
>
> 4.2 Military Judges Selection Process
>
> The Military Judges Selection Committee (MJSC) is responsible for preparing a list of potential candidates to become military judges. Members of the MJSC are appointed by the Minister of National Defence to represent the bench, the civilian bar and the military community.[2] To be considered for judicial appointment, qualified officers are assessed on their professional competence and experience, personal characteristics, social awareness, and any potential impediments to appointment.
>
> All MJSC proceedings and consultations are confidential. As each candidate's assessment is completed, the MJSC is asked to rate the candidate as "recommended," "highly recommended" or "unable to recommend." The assessment is then forwarded to the Minister of National Defence who is responsible for recommending candidates to the Governor in Council when the need arises.
>
> Completed assessments are valid for a period of three years. The previous assessment expired and the MJSC is in the process of creating a new list which should be finalized during the next reporting period.
>
> [2] The Committee is composed of a lawyer or judge nominated by the Judge Advocate General, a civilian lawyer nominated by the Canadian Bar Association, a civilian judge nominated by the Chief Military Judge, an officer holding the rank of major-general or higher and a chief warrant officer or chief petty officer first class nominated by the Chief of Defence Staff.

[48] The military judges' function has also been substantially expanded. Of course, they preside at courts martial and perform the other judicial functions assigned to them under the scheme of the Act. They may also perform any other function assigned to them by the Chief Military Judge that is not incompatible with their judicial

functions. Finally, they may, with the concurrence of the Chief Military Judge, be appointed as a board of inquiry. This terminology is similar to the existing terminology for judicial functions irrespective of the jurisdiction and powers of the courts as a whole.

[49] It is appropriate to note that the Bill C-25 amendments to the *National Defence Act* eliminated the very notion of judge advocate. It should be understood that prior to the coming into force of the *National Defence Act* as amended by the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, and thus prior to the coming into force of the amending legislation, General Courts Martial and Disciplinary Courts Martial were presided over by an officer other than the judge advocate. This judge advocate did not perform functions similar to those of a judge presiding at a jury trial. On the one hand, the judge advocate could rule on questions of law or mixed law and fact. This implies that the president of the General or Disciplinary Court Martial could refuse to follow the opinions expressed by the judge advocate. This situation was corrected to ensure that it is now the military judge presiding at a General or Disciplinary Court Martial who determines all questions of law or mixed law and fact arising before or after the commencement of the trial. This is section 191 of the Act. This amendment effectively reflects the situation that exists at a trial by jury in Canada. On the other hand, it was up to the members of these courts martial to determine the offender's sentence, where applicable. Under the statutory framework now in force, only the military judge, who presides at all courts martial, determines the sentence in the same way as a superior court judge presiding at a criminal trial before a jury or by judge alone. This is section 193 of the Act.

[50] Furthermore, section 177 of the *National Defence Act*, in force before the decision of the Court Martial Appeal Court in *Lauzon*, required only that the military judge presiding at a standing court martial be an officer with at least three years standing at the bar of a province. As illustrated earlier, military judges will now be appointed to hold office during good behaviour by the Governor in Council from among the lawyers with at least ten years standing at the bar of a province.

Special considerations and evolution of the military judge's office after Lauzon

[51] The military judge's office has evolved since the enactment of the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35. It is worth describing, as examples, some situations that testify to this evolution. First, Division 3 (*Arrest and Pre-Trial Custody*) in Part III of the *National Defence Act*, the Code of Service Discipline, has replaced the old Part IV (*Arrest*) of the Act. This new section represents a complete scheme covering the period from the arrest of an individual to his preventive detention and release. Parliament has modernized the Act by equipping the Code of Service Discipline with a judicial conditional release procedure similar to the one in the *Criminal Code*, in sections 515 to 522. The military judge must now hold a hearing to review the decision of a custody review officer to retain a person in preventive custody, sections 159 to 159.6. The military judge's

decision may in turn be reviewed by a judge of the Court Martial Appeal Court. Although this scheme reflects the military environment, it appears that the military judge's role is now more analogous to a judge's function than it is to that of the justice under the *Criminal Code* scheme.

[52] Second, section 173 of the *National Defence Act* provides that a military judge presiding over a standing court martial — a trial before judge alone — now has jurisdiction to 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. In other words, any officer or non-commissioned officer may now be tried by a standing court martial presided over by a military judge, without restriction as to the accused's rank or his function within the Canadian Forces. This is a significant difference from the situation that existed before section 177 of the *National Defence Act* was invalidated by the Court Martial Appeal Court in *Lauzon*. That section 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 than imprisonment for less than two years.

But it was under the old section 177 of the *National Defence Act* that the Governor in Council had made article 113.52 of the QR&O. Chapter 113 (*Special General Courts Martial and Standing Courts Martial*) was repealed by P.C. 1999-1305, dated July 8, 1999, in force on September 1, 1999; and the departmental regulations were abolished of course on September 1, 1999. The purpose of article 113.52 of the QR&O was to limit the jurisdiction of the court martial; it read as follows and I quote:

> (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 therefore chosen that anyone subject to the Code of Service Discipline may now be tried by a standing court martial presided over by a military judge sitting alone, irrespective of the rank of the accused or the military judge. This is a clear demarcation in the office of the military judge under the present legislation. This situation requires, in the opinion of this Court, an especially high degree of independence from the executive and the chain of command. It raises the importance of

recognizing that an incumbent of the office of military judge must be immune from any direct or indirect interference that might reasonably emanate from persons occupying the highest military functions, including the general officers all of whom are subject to the Code of Service Discipline.

[53] Third, Parliament has created — by enacting the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35 — a regime similar to the one that exists in the *Criminal Code*, in sections 487.04 and following, for forensic DNA analysis. Division 6.1 (*Forensic DNA Analysis*) of the *National Defence Act* allows a military judge, for example, to issue a 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, under section 196.12. A court martial presided over by a military judge may also make a similar order if a person is found guilty of a designated offence (section 196.14 of the *National Defence Act*).

[54] Fourth, a court martial presided over by a military judge may issue a warrant in the form prescribed in regulations made by the Governor in Council for the arrest of the accused person if the accused person (*a*) fails to appear as summoned or ordered; or (*b*) having appeared before the court martial, fails to attend before the court martial as required. This is section 249.23. This function has devolved to a justice of the peace under section 124 of the *Criminal Code*.

[55] Fifth, Parliament has significantly increased the power of the military judge when he presides at a court martial or exercises any other judicial duty assigned to him by law. Section 179 of the *National Defence Act* reads as follows, and I quote:

> 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 the former Chief Justice Lamer held in 1992, in *Généreux*, the Constitution does not necessarily require that military judges enjoy security of tenure equivalent to that of the judges of the regular criminal courts. It is equally true, as the Court Martial Appeal Court has held, that the appointment of military judges for a fixed

and renewable term is not *per se* unconstitutional. Similar considerations apply in the context of the appointment of retired judges to act as deputy judges for definite periods, which likewise is not unconstitutional in itself.

[57] Any examination of these issues must however rest on the status of the institution as indicated in the statutory and regulatory provisions governing its constitution and proceedings at the time of trial. Such an examination must take into account the context of the evolution of the very notion of judicial independence, which continues to evolve over time.

[58] The nature of the duties and the increased role of military judges since the decision in *Lauzon* is the cornerstone of this statutory and regulatory evolution. These factors are not just part of the modern context of the military courts and their history. They testify to Parliament's desire to bring the military justice system more closely into line with present Canadian values and legal criteria while attempting to preserve those features of the system that seemed necessary in order to respond to uniquely military needs. These comments by former Chief Justice Lamer, beginning at the second sentence of paragraph 31 in *Généreux*, continue to be equally relevant, and I quote:

> 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 part of the Canadian justice system. The military bench is composed of professional judges versed in matters affecting the Canadian Forces. Various forms may be adapted to ensure their independence of the executive and the chain of command. The measures needed to preserve each of the essential features of the judicial independence of the courts martial presided over by military judges — security of tenure, financial security and administrative independence — may likewise vary in importance. These measures must reflect the context in which these professional judges carry out their duties. Military judges perform their judicial duties within a military community the size of a city of less than 100,000 inhabitants. The ubiquity of the executive and the chain of command and the proximity of lawyers who are former attorney colleagues continuing to operate within the Canadian Forces point to the inherent difficulties that exist in attempting to

keep an appropriate and necessary separation between lawyers, judges and VIPs, as is often the case in small communities.

[60] The necessary separation of judges and counsel does of course help to preserve judicial independence, but it is not absolute. In terms of professional development, it is altogether desirable on the one hand that all of the actors in the legal profession — law professors, judges and lawyers — get together to share their experiences and their skills to the overall benefit of the legal community. On the other hand, inherent in the very nature of the judge's responsibilities are particular developmental requirements and constraints. It is imperative that military judges be able to share the concerns peculiar to their judicial functions with other judges — and be perceived as such — whether it is in the context of training programs for federal, provincial or territorial judges or through informal discussions with other judicial colleagues. The desire to protect the independence of courts martial and military judges should not result in their professional isolation on the margin of the judiciary as a whole. It would be just as unacceptable to isolate military lawyers from the professional activities directed to their civilian colleagues who are members in good standing of their respective bar. The independence of the military judges must include, as a corollary, the opportunity to participate fully in the professional development activities of the judiciary as a whole in order to maintain thereby the same level of excellence as the federal, provincial and territorial judges.

[61] It seems paradoxical that notwithstanding the creation of a true military judiciary and the increased role and duties of military judges, Parliament thought that a renewable fixed five-year term, that is, just one year longer than under the former scheme, was sufficient. It should be recalled that the Right Honourable Chief Justice Lamer stated in paragraph 66 of *Généreux*, and I quote:

> 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] Such an examination raises some serious questions about the weight and adequacy of the security of tenure protections given to the military judges who preside at all courts martial. The Court is of the view that the first question must be: Does the appointment of a military judge to hold office during good behaviour for a term of five years, subject to removal by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council under subsection 165.21(2) of the *National Defence Act*, violate section 11(*d*) of the *Charter*? If so, is this violation justified under section 1?

[63] Does the appointment of a military judge to hold office during good behaviour for a term of five years, subject to removal by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council under subsection 165.21(2) of the *National Defence Act*, violate section 11(*d*) of the *Charter*? The Court must answer "yes" to this first question. The appointment of a military judge to hold office during good behaviour for a term of five years, subject to removal by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council under subsection 165.21(2) of the *National Defence Act*, does violate section 11(*d*) of the *Charter*.

[64] After a detailed analysis of the evidence filed in this Court, the context, history and relevant statutory provisions as a whole, the Court is of the opinion that this violation is not demonstrably justified in a free and democratic society, in accordance with section 1 of the *Canadian Charter of Rights and Freedoms*.

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

[66] Infringements of section 11(*d*) of the *Charter* are hard to justify when they affect judicial independence. This issue was forcefully addressed by the Supreme Court 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.

As in the *Mackin* judgment, the respondent has adduced no evidence that would justify her constitutional breaches. During her oral submissions the respondent referred to paragraphs 60 to 65 of the *Généreux* judgment, which concerned the uniqueness of the military justice system. The respondent's counsel went on to say:

> [TRANSLATION] The respondent is not submitting any section 1 *Charter* argument as such. We will of course be discussing some pressing and substantial objectives of a system of military justice that were recognized by the Supreme Court in *Généreux* and that will be part of my submissions in terms of relief should the Court reach that stage.

[67] The Court has no intention of quoting anew paragraphs 60 to 65 of *Généreux*. The remarks by former Chief Justice Lamer did concern the uniqueness of the military justice system, but they also concerned the fact that this system was itself subject to *Charter* review. He added that if its organization was undermining the fundamental principles of section 11(*d*), it could survive only if the infringements were justifiable under section 1. The Court is of the opinion that the evolution in the vital role of judicial independence up to now, a concept in constant evolution, applies to the system of service tribunals in Canada. If, as the respondent argues, a court martial plays this vital role in the protection of *Charter* rights, unlike a trial by summary proceeding, it must be acknowledged that the vital role of judicial independence within the court martial structure now imposes a greater burden on the government from the standpoint of section 1 than it did prior to the decision in *Mackin*.

[68] Equally important still, it must be said, is the maintenance of order and discipline within the Canadian Armed Forces. This social concern satisfies the first prong of the section 1 analysis. Unfortunately, as I indicated earlier, a standing court martial presided over by a military judge appointed under subsection 165.21(2) is not an independent and impartial tribunal in accordance with paragraph 11(*d*) of the *Charter* and cannot satisfy the test of proportionality. This Court is of the opinion that the appointment of military judges to hold office during good behaviour for a renewable five year term is not a minimal infringement of the *Charter* right to be tried by an independent and impartial tribunal in the context of military justice and the present legislation. In the context in which the Court agrees that military judges can be officers who carry out only judicial functions or functions that are not incompatible with those functions, a system of military tribunals composed on the one hand of summary proceedings and on the other of courts martial presided over by military judges who play an important constitutional role can be justified only by requiring that the court martial

enjoy the highest possible standards of judicial independence. These standards are intrinsically linked to the true rule of the court and its judges. They are based as well on the evolution of the law in matters of judicial independence, which transcend the military justice system. The appointment of a military judge for a fixed renewable term of office does not adequately reflect the increase in the status and powers conferred on military judges under the present legislation and in the context of a modern Canadian society. Consequently, subsection 165.21(2) of the *National Defence Act* is not justifiable under section 1 of the *Charter*.

[69] Such appointment need not, however, be for life or until a retirement age comparable to that of the judges in Canada's courts. The Court believes that it is justifiable, given the special requirements of a system of service tribunals in which presiding judges at courts martial come from the Armed Forces, whether regular or reserve forces, that military judges cease to occupy their office once they reach a retirement age comparable to the age imposed on all officers of the Canadian Forces. This is because of the requirements of military service and the rationale for a system of service tribunals that must be portable and effective in all regions of the globe in order to ensure the maintenance of discipline within the Canadian Forces, but also in order to protect the rule of law, including the *Charter*, for the benefit of all Canadian military personnel and all those subject to the Code of Service Discipline irrespective of where they are, whether in a theatre of war or on humanitarian missions. The Court is not persuaded that the retirement age of military judges should appear in the Act. But it should be the same for all military judges irrespective of rank. Moreover, the appointment, remuneration and powers of the military judges does not reflect their rank under the Act or the regulations thereunder. The Court is of the opinion that this question pertains not to section 11(*d*) of the *Charter* but rather to the equal treatment of military judges.

[70] Beyond the statutory objective described in *Généreux*, it must be recognized that the statutory framework of the service tribunals, and in particular of the court martial, was significantly altered by the enactment of the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, and the amendments to the QR&O. But it is not the existence of the unique system of service tribunals that is challenged here, or the statutory and regulatory provisions applicable at the time of the *Généreux* decision.

[71] Having said that, this Court thinks it would be entirely conceivable for a military judge to be appointed to hold office during good behaviour for a fixed and renewable term of office if the present military judiciary were to enjoy this minimal guarantee of security of tenure until the age of retirement. This would help to respond to sporadic needs when the demand for judicial resources necessitates an increase in the number of judges for a definite or variable period. However, the question of part-time military judges has its own difficulties and would in turn necessitate some important protective measures sufficient to preserve judicial independence. These requirements

would of course have to take into consideration the rules laid down by the Supreme Court of Canada in the *Lippé* judgment, but also decisions by all the courts that have had to examine the issue of part-time judges since *Lippé*. Parliament could assign these judicial functions in a number of ways. For example, it might appoint military judges to hold office for a fixed term during good behaviour from among the civilian judges who already enjoy judicial independence. It might also appoint former military judges who are now retired. There are a multitude of possibilities and it is not the role of this Court to intrude on the process of developing legislation. But the approach that is adopted will have to comply with the minimum conditions intended to ensure the judicial independence of these judges, where applicable. The Court finds highly relevant and instructive the comments by Vertes J. in *Reference re: Territorial Court Act (N.W.T.), S. 6(2)*, [1997] N.W.T.J. No. 66 (N.T.S.C.) and those by Associate Chief Justice Robert Pidgeon of the Superior Court of Québec in *Williamson c. Mercier*, [2004] J.Q. No. 4222, on the question of the exercise of part-time judicial functions or the use of retired judges for definite terms.

[72] The Court shares the opinion expressed by counsel in relation to relief from performance of military duty by a military judge under article 19.75 of the QR&O. This regulatory provision is incompatible with section 165.23 of the *National Defence Act*. Neither the Chief of Defence Staff nor the Chief Military Judge as the commanding officer of a command has the power to relieve a military judge from his military duties, which are exclusively covered in section 165.23. This encroaches upon the duties of the Inquiry Committee and undermines the essential characteristics of judicial independence in relation to security of tenure and institutional independence. Accordingly, article 19.75 as drafted is in breach of paragraph 11(*d*) of the *Charter* and has not been justified under the section 1 review. However, that would not prevent the Chief Military Judge, in that capacity, from performing his duties and responsibilities in a way that is consistent with his own administrative independence in relation to his discretionary authority to allocate judicial duties or duties that are not incompatible with those judicial duties. The Court is of also of the opinion that article 101.18 (*Relief from Performance of Military Duty – Pre and Post Trial*) of the QR&O suffers the same deficiencies as article 19.75. Any remedial measure in relation to article 19.75, if applicable, should be applied in relation to article 101.08.

[73] Concerning the statutory and regulatory framework of the process for removal of military judges, this Court is not persuaded that the removal scheme as a whole need be covered in the Act, as is the case under the *Judges Act*. I share the prosecuting attorney's comment that this represents an ideal that is not a prerequisite to security of tenure of military judges notwithstanding a less detailed procedure than the one provided for in the *Judges Act*. There is no doubt that the rules and principles developed by the Supreme Court of Canada in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 apply to the removal procedure for a military judge. The nature of these removal procedures imposes a strict obligation to act fairly on

the Inquiry Committee established by the Governor in Council under subsection 165.21(2) of the *National Defence Act*.

Reappointment: Composition of the Inquiry Committee and factors

[74] In view of this Court's conclusion that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge appointed under section 165.21 of the *National Defence Act* does not have significant and sufficient guarantees of security of tenure if they fall short of an appointment to hold office during good behaviour until the age of retirement, which can enable him to try cases that come before him on the merits without intervention by any outside person in the way in which the judge conducts the case and delivers his decision, it is not necessary to analyze the composition of the Renewal Committee examining the renewal of the military judge's term of office or the factors that it must consider in performing its task.

Administrative Independence — Organization of the Office of the Chief Military Judge and chapter 21 of the QR&O: Summary Investigations and Boards of Inquiry

[75] The applicant argued that because the Office of the Chief Military Judge is organized under a Ministerial order and a CFOO of the Chief of Defence Staff, that is, a unit constituted by a representative of the executive, the Minister of National Defence via the Chief of Defence Staff, this can affect the security of tenure and institutional independence of the military judges since this is the only organization to which they belong. He alleges that the executive could alter or neutralize the organization or functioning of the Office of the Chief Military Judge through a mere alteration in these documents. An example of the lack of institutional independence of the judges, he argues, is the fact that the Chief of Defence Staff constitutes the final authority on a grievance filed by a judge. On the one hand, the organization of the Office of the Chief Military Judge as a unit of the Regular Force does not in itself lessen the administrative independence of the military judges and the Chief Military Judge. The abolition or alteration of purely organizational documents and their replacement by others has no impact in itself on the components of security of tenure of the judges that are provided in the Act. Absent any evidence, this Court would have to rely on hypotheses and conjecture of a speculative nature in order to accept the applicant's submissions on these questions.

[76] The applicant further alleges that under chapter 21 (*Summary Investigations and Boards of Inquiry*) of the QR&O, the Chief of Defence Staff or the Minister could use their powers to order a summary investigation or board of inquiry to get a military judge, even one with immunity from prosecution, to explain the reasons for a decision. This statement is erroneous. This question was settled by the Supreme Court in *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796, which even held that the case law

and general principles on judicial independence clearly establish that even a judge of the Supreme Court hearing a civil matter does not have authority to force another judge to testify as to how and why he reached his conclusions. This is a question of privilege which goes to judicial impartiality in decision-making and the role of the judiciary as an arbiter and protector of the Constitution. Similarly, a judge cannot force another judge to testify concerning the reasons why a particular judge heard a particular case. This question affects the administrative or institutional aspect of judicial independence. The analysis of chapter 21 of the QR&O must take into account the rules laid down by the Supreme Court on these questions and the language used is not sufficiently specific to override the fundamental principle that judges are exempted from the obligation to testify concerning the decision-making process or the reasons for the composition of the court in a particular case.

[77] The applicant very briefly raised the question that the grievance procedure applicable to the Canadian Forces infringes judicial independence. The Court thinks this question must reflect its own conclusion that military judges should be appointed to hold office during good behaviour until retirement. In such a context, the existence of such a mechanism applicable to the Canadian Forces as a whole, including the military judges, is not in itself problematic, although some may criticize it for not sufficiently sheltering military judges from the executive, as a military judge has to ask the executive to remedy a grievance while he is performing his judicial duties. Of course, this is not the ideal way in which to preserve judicial independence, but the Court is not satisfied that a reasonable and sensible person informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge appointed until the age of retirement would let himself be influenced in his decisions because the Chief of Defence Staff might act as an adjudicating authority on a grievance against him. The Canadian Forces grievance procedure under sections 29 to 29.28 of the *National Defence Act* has sufficient, significant and effective objective guarantees — such as the existence of the Canadian Forces Grievance Board and the judicial review provided by the *Federal Court Act* — to comply with the minimal standards of judicial independence and enable the military judge to try the cases that are put before him on the merits without intervention by any outside person in the way in which the judge conducts the case and delivers his decision. The Court is not satisfied, however, that such a mechanism would be adequate if it had accepted the validity of the fixed renewable terms of office.

Appropriate remedies — Declaration of invalidity, constitutional exemption and stay of proceedings

[78] The Court must now determine the appropriate and just relief in the circumstances of this case. The applicant is asking the Court, over and above the declaration(s) of invalidity, to order a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms*. He is also asking that he be granted a

constitutional exemption so that he is not prosecuted should the Court conclude that one or more of the impugned provisions is unconstitutional but decide to suspend the declaration(s) of invalidity although (according to the applicant) there is no reason to suspend a declaration of invalidity since there is nothing to prevent a civil court, i.e. a court of criminal jurisdiction in Canada, from trying a soldier for a purely military offence under the *National Defence Act*. The applicant argues that a reading of sections 71, 165.2 and 165.11 of the *National Defence Act*, sections 468 and 469 of the *Criminal Code* and section 34 of the *Interpretation Act* suggests that there is a concurrent jurisdiction to try all of the offences alleged to have been committed by those subject to the Code of Service Discipline, including offences that could be characterized as strictly military under the *National Defence Act*.

[79] The respondent argues that any declaration of invalidity in respect of one or more provisions of the *National Defence Act* or the regulations thereunder should be surgically formulated, and the effect suspended so that Parliament can make the necessary corrections and the Canadian Forces can continue to operate efficiently by maintaining discipline, among other things. Such a suspension would be necessary, it is argued, to ensure the rule of law within the Canadian Forces and to protect the public. The respondent submits that in the absence of a functional court martial system, the whole system of discipline in the Canadian Forces would be vulnerable to legal chaos, which would adversely affect the Canadian government's ability to implement its policies in foreign affairs, defence and security to the benefit of all Canadians. She adds that this Court should not order a stay of proceedings in light of the *Schachter* and *Demers* judgments of the Supreme Court. Finally, the respondent argues that this is not a case in which the Court could apply the doctrine of constitutional exemption. In the respondent's view, the applicant's request amounts to a stay of proceedings. Citing the Supreme Court's decision in *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519, the respondent submits that there is no special factor that would entitle the applicant to a constitutional exemption that differentiates him from other accused appearing before courts martial.

[80] It should be noted that in *Lauzon*, the Court Martial Appeal Court had held that it had to strike down section 177 of the *National Defence Act*, which provided for the establishment of Standing Court Martials whose president is "appointed by or under the authority of the Minister", and the QR&O articles which dealt expressly with the reappointment and removal of military trial judges and with determining their salaries. According to the Court Martial Appeal Court, this declaration of invalidity of section 177 meant that there was no longer a standing court martial and independent judges at that level to replace it and ensure military discipline. It decided, like the Supreme Court in the second Reference case, [1998] 1 S.C.R. 3, to apply the doctrine of necessity. Section 177 of the *National Defence Act* has of course been amended since the *Lauzon* judgment, and standing courts martial are no longer established by the executive and composed of an officer appointed by the Minister. The Standing Court

Martial now exists under the Act and it is constituted by a single military judge. Sections 173 and 174 read as follows:

> 173. 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.
>
> 174. Every military judge is authorized to preside at a Standing Court Martial, and a military judge who does so constitutes the Standing Court Martial.

In the opinion of this Court, the language of sections 173 and 174 indicates that the constitutional validity of the standing court martial could only be vitiated if the military judge who constitutes the court does not have the significant and sufficient guarantees to preserve his independence. The application of the doctrine of necessity to this case should therefore take into account the fundamental difference that exists between the existing Act and the former section 177 of the *National Defence Act*, and this Court is satisfied, after analyzing all of the interests at stake, that such a suspension is unnecessary in the circumstances. The relief granted by this Court will not deprive Canadians of a functional court martial system or make the entire disciplinary regime of the Canadian Forces vulnerable to legal chaos that would adversely affect the Canadian government's ability to implement its policies in foreign affairs, defence and security to the benefit of all Canadians. Accordingly, the applicant's request that he be granted a constitutional exemption is not applicable in this case since this Court has no intention of suspending any declaration of invalidity, were it applicable.

[81] The remedies based on subsection 52(1) of the *Constitution Act, 1982* differ from those that may be granted under section 24(1) of the *Charter*, because these proceedings rest on different foundations. Subsection 52(1) of the *Constitution Act, 1982* provides, and I quote:

> 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 or effect.

While section 24(1) of the *Charter* reads as follows:

> 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 principle of the paramountcy of the Constitution of Canada set out in section 52 of the *Constitution Act, 1982* binds the State in its legislative action. State action under a law that is unconstitutional breaches an individual's rights. Where such breach results instead from action by a state official, it is section 24(1) of the *Charter* that comes into play. Thus, a statutory provision may not be unconstitutional *per se*, but the action taken may contravene certain rights that are themselves protected by the *Charter*. A remedy

under section 24(1) of the *Charter* will seldom be required simultaneously with a measure taken under subsection 52(1) of the *Constitution Act, 1982*. Generally speaking, the provision declared unconstitutional and immediately rendered of no force or effect will put an end to the matter, the matter being the constitutional question. In these circumstances, it will rarely be necessary for retroactivity or a retrospective measure under section 24(1) of the *Charter*.

[82] In the context of *Charter* infringements, the courts have developed and used over the years a variety of tests and ways to respond adequately to the requirements of subsection 52(1) of the *Constitution Act, 1982*. The former Chief Justice Lamer discussed these abundantly in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pages 695 to 719. The basic rule laid down in *Schachter* is that the courts are guided by the purposes of the legislation and the *Charter*. The inoperability of statutory provisions that are incompatible with the *Charter* opens the door to a number of remedies such as the declaration of invalidity, the deferred declaration of invalidity, severance, inclusive interpretation (reading in), restrictive interpretation (reading down) and constitutional exemption. In Volume 2 of his *Constitutional Law in Canada* (Carswell, 1997, Looseleaf Edition), Professor Peter W. Hogg enumerates the choices available to the courts under subsection 52(1), at page 37-3, and I quote:

> 1. Nullification, that is, striking down (declaring invalid) the statute that is inconsistent with the *Constitution*;
>
> 2. Temporary validity, that is, striking down 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 to hold office during good behaviour for five years is in breach of section 11(*d*) of the *Charter*, in the context of military justice and the evolution of the law of judicial independence. As I said earlier, this Court is convinced that a reasonable and sensible

person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge, appointed to hold office during good behaviour for five years, and who is presiding at a standing court martial or any other court martial, does not have sufficient security of tenure to enable him to try the cases that come before him on the merits without intervention by anyone from outside in the manner in which the judge conducts the case and delivers his decision.

[84] It has also found that article 19.75 of the QR&O, which covers removal from military duties, is incompatible with section 165.23 of the *National Defence Act* and that the application of article 19.75 to military judges is incompatible with section 11(*d*) of the *Charter* because it has an adverse effect on the essential characteristics of judicial independence pertaining to security of tenure and administrative independence. The Court has applied the same reasoning in relation to article 101.08 of the QR&O. These provisions have not been justified under section 1 of the *Charter*.

[85] The Court must display deference in light of the *Charter* infringements in the context of this case. The evolution in duties and the increase in the role of the military judge in the military justice system are so clearly evident in the statutory and regulatory provisions that were adopted following the enactment of the *National Defence Act* through the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, that this Court is persuaded by the evidence as a whole that Parliament intended the system of military justice, and in particular its Code of Service Discipline, to reflect the importance of the role of independent and impartial courts martial presided over by military judges within this justice system as a whole. These courts martial presided over by military judges act, *inter alia*, as protectors of the rights of litigants under this Code, and this includes acting as protectors of the Constitution within the military justice system. The constitutional standard that is applicable in light of all the circumstances can be achieved only if the military judge is appointed to hold office during good behaviour until the age of retirement. Relying on the factors set out by former Chief Justice Lamer in *Schachter*, at pages 718 and 719, this Court is of the opinion that the application of severance to the portion of subsection 165.21(2) of the *National Defence Act* that reads "for a term of five years" would not infringe the objective of the statute. This Court is even of the opinion that it could not but serve that objective. Having found that only the appointment of a military judge to retirement age meets the minimal standard of security of tenure that is constitutionally
required for presiding at courts martial created under the *National Defence Act*, this Court considers that the means used by Parliament to achieve the objective of maintaining an independent and impartial court martial — that is, the appointment of military judges to hold office during good behaviour for a renewable term of five years — is not sufficiently unchallengeable that severance would constitute an unacceptable encroachment on Parliament's jurisdiction. Such severance does not entail such an important encroachment on Parliament's decisions to equip the military justice system

with independent and impartial courts martial in the context of the service tribunals — i.e. the summary trials and courts martial, including their respective roles — and the whole of the system applicable to courts martial presided over by military judges under the *National Defence Act*.

[86] For the same reasons, articles 19.75 and 101.08 of the QR&O must be broadly construed in order to shield the military judges and satisfy the *Charter* requirements in the area of judicial independence.

[87] Concerning the remedy requested by the applicant under section 24(1) of the *Charter*, the Court relies on the decisions of the Supreme Court in *Schachter*, *supra*, and *R. v. Demers*, [2004] 2 S.C.R. 489, in order to affirm that he is not entitled to retroactive relief based on section 24(1). Nor is this a situation that opens the way to prospective relief in accordance with the principles developed by the Supreme Court in *Demers*. The stay of proceedings, as requested by the applicant, is not available owing to this Court's conclusions and the relief that is granted under section 52(1) of the *Constitution Act, 1982*, which settles the question.

Disposition

For these reasons, the Court allows the motion in part and declares that under subsection 52(1) of the *Constitution Act, 1982*:

1. Subsection 165.21(2) of the *National Defence Act*, R.S.C. 1985, c. N-5, is in partial contravention of paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* The words "for a term of five years" violate paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. This violation has not been demonstrably justified in the context of a free and democratic society, pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*.

2. In view of the decision of this Court concerning the constitutional validity of subsection 165.21(2), subsection 165.21(3) of the *National Defence Act*, R.S.C. 1985, c. N-5, violates paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. This violation has not been demonstrably justified in the context of a free and democratic society, pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. Accordingly, the Court declares subsection 165.21(3) of the *National Defence Act* to be of no force or effect. This declaration is of sufficient effect that it is unnecessary to discuss the regulations made under the authority of that subsection.

3. Article 19.75 of the QR&O violates paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. This violation has not been demonstrably justified in the context of a free and democratic society, pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. To correct this situation and to remedy the unconstitutionality of article 19.75, the Court declares that the words "to military judges and" shall be read into paragraph 19.75(1) of the QR&O, to follow the words "This article does not apply".

4. Article 101.08 of the QR&O violates paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. This violation has not been demonstrably justified in the context of a free and democratic society, pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. To correct this situation and to remedy the unconstitutionality of article 101.08, the Court declares that the words "other than a military judge" shall be read into paragraph 101.08(1) of the QR&O, to be inserted between

commas after the word “officer” at the beginning of this paragraph.

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