Citation: *R. v. Ex-Leading Seaman J.R.J. Lasalle*,2005 CM 46

Docket: C200546

STANDING COURT MARTIAL
CANADA
BRITISH COLUMBIA
ACOUSTIC DATA ANALYSIS CENTRE (PACIFIC)

Date: 21 December 2005

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

HER MAJESTY THE QUEEN
v.
EX-LEADING SEAMAN J.R.J. LASALLE
(Accused)

DECISION RESPECTING AN APPLICATION UNDER PARAGRAPH 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered Orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] As I said, this is an application by the defence under paragraph 112.05 (5)(e) of the Queen's Regulations and Orders for the Canadian Forces on the ground that the Standing Court Martial is not an independent and impartial tribunal, contrary to section 11(*d*) of the *Canadian Charter of Rights and Freedoms*, because military judges presiding at these courts martial have insufficient guarantees of judicial independence. This application is one of three similar applications argued before this military judge at Standing Courts Martial. The other cases are the Standing Courts Martial concerning Corporate J.B. Joseph, which commenced in North Bay, Ontario, on 4 October 2005, and Corporal H.P. Nguyen, which commenced on 12 October 2005 in Sherbrooke, Quebec, the decision of the Standing Court Martial in Corporal Nguyen's case having been given earlier this week, on 19 December 19, 2005. Apart from a few minor differences, the evidence and argument submitted in this case are the same as the evidence and argument in Corporal Nguyen's case.

[2] These applications 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 judicial independence as it relates to courts martial under section 11(*d*) of the Charter since the enactment of the amendments to the *National Defence Act* and the regulations under that Act, in 1998. In the recent case *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, the Supreme Court reaffirmed at paragraph 4:

> The basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution; see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 70-73; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at paras. 18-23. Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard*, at p. 70), and has been said to exist "for the benefit of the judged, not the judges" (*Ell*, at para. 29). 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 strongly believes that these principles apply to courts martial in Canada. Despite their important duties, military judges presiding at courts martial have a more limited jurisdiction that of superior or provincial court judges. Military judges preside over penal and disciplinary matters dealing with persons subject to the Code of Service Discipline, military or civilian, in Canada or abroad. The court accepts that their role in upholding the Constitution is more limited than that their counterparts of superior and provincial courts. Therefore, it is likely that less stringent conditions are necessary to satisfy their judicial independence. However, the review of the court martial structure must not only take into account its historical and statutory context, but also acknowledge its overall relationship with other courts and tribunals in this country.

[3] The issue of judicial independence has been addressed in a number of important decisions since *Valente v. The Queen* [1985] 2 S.C.R. 673, in which Le Dain J. stated, at page 692:

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

[4] Nobody should take issue with the fact that judicial independence has evolved over time both in terms of its essential components, i.e. security of tenure, financial security and administrative independence, and with regard to its application to the broad spectrum of existing tribunals. Judicial independence has two dimensions, one individual, as it relates to the independence of a particular judge, and the other institutional, as it relates to the independence of the court the judge sits on. These dimensions

depend upon objective standards that protect the judiciary's role; *Valente*, at page 687; *Beauregard*, at page 70; and *Ell*, at paragraph 28. The Supreme Court reiterated the content and the conditions of judicial independence in *Ell v. Alberta* [2003] 1 S.C.R., 857, at paragraphs 28 to 31, in which Major J. stated, for the court:

> 28 As stated, judicial independence encompasses both an individual and institutional dimension. The former relates to the independence of a particular judge, and the latter to the independence of the court to which the judge is a member. Each of these dimensions depends on objective conditions or guarantees that ensure the judiciary's freedom from influence or any interference by others: see *Valente*, *supra*, at p. 685. The requisite guarantees are security of tenure, financial security and administrative independence: see *Provincial Court Judges Reference*, *supra*, at para. 115.
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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 he 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 pre-requisite to the judge's impartiality and it must be assessed objectively. This Court has to determine whether a reasonable person, who is informed of the relevant statutory provisions and of their historical background and the traditions surrounding them, and who has examined the matter realistically and practically, would conclude that this Standing Court Martial is independent. Moreover, the law requires that the emphasis be placed on the existence of the independent status of the court or tribunal and that this Standing Court Martial be seen to be independent. In *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New*

Brunswick, [2002]1 S.C.R. 405, Gonthier J., 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 <u>perception</u> of the court's independence. Moreover, these three characteristics must also be <u>seen</u> 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 done having regard to the nature of the Standing Court Martial and the interests in play, as the Supreme Court said at paragraph 30 of *Ell*, *supra*.

<u>THE EVIDENCE</u>

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

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

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

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

(4) the agreed statement of acts with before the court, Exhibit VD1-2.

THE POSITIONS OF THE PARTIES

The Applicant

[7] The applicant suggests that the provisions of the *National Defence Act* and of the QR&O do not provide the guarantees that are needed in order to ensure that this Standing Court Martial is an independent and impartial tribunal. More specifically, the applicant submits that a military judge, appointed under the current legislation, does not enjoy substantial and sufficient guarantees in the areas of security of tenure, financial security and institutional independence. The applicant begins by submitting that this Court should distinguish this case from the decisions 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.C. No. 10, and *R .v. Lauzon*, [1998] C.M.A.C. No. 5, all of which dealt with the issue of judicial independence and impartiality of courts martial before 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, chapter 35, which received Royal Assent on 10 December 1998 and came into force on 1 September 1999, because those decisions do not reflect the current state of the law in Canada as it relates to judicial independence. The applicant adds that the law in Canada has evolved, since the decision of the Supreme Court in *Ell v. Alberta*, [2003] 1 S.C.R. 857, to the point that even the new statutory and regulatory framework adopted when the amendments were made to the *National Defence Act* do not provide such substantial and significant guarantees. The applicant submits that conducting a trial in this context would violate the right of an accused to be tried by an independent and impartial tribunal, and that this violation could not be saved under section 1 of the Charter.

[8] The applicant therefore asks this Court to declare the following statutory and regulatory provisions, which relate to the procedure for appointing and removing

military judges, renewing their terms, determining their remuneration and the rates and terms on which they are paid, be declared invalid and of no force or effect:

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

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

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

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

(5) QR&O article 19.75.

Finally, in addition to the declaration of invalidity, the applicant is also asking that the Court grant a stay of the proceedings against the appellant, under section 24(1) of the *Canadian Charter of Rights and Freedoms*. Obviously, having regard to the length of my decision, before going any farther **I would ask counsel, if they wish, that they may remove their headdress. I will now continue.**

Security of Tenure

Five-year Term

[9] The applicant submits that military judges presiding at Standing Courts Martial do not enjoy sufficient guarantees with regard to both the individual and institutional aspects of their security of tenure. The applicant submits that a fixed term is not unconstitutional *per se*, as the Supreme Court stated in *Généreux*. The difficulty lies in the possibility that a former military judge might return to practice in the Canadian Forces, and thus become counsel for the executive or a member of the executive, notwithstanding the restrictions placed on the former judge by the rules of ethics adopted by the bar in a province which would apply to him or her. The applicant submits that military judges must enjoy security of tenure comparable to the judges of the superior courts of the provinces or of the provincial courts, that is, until the age of retirement. He relies primarily on the decision in *Ell v. Alberta*,[2003] 1 S.C.R. 857, and in particular on paragraphs 31-32:

> 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:
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> > 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.

Removal

[10] On the question of removal, the applicant submits to the Court that a question of this importance should be set out in the statute and not in regulations, and that the law should be as detailed as what is found in sections 64 and 65 of the *Judges Act*, R.S.C. 1985, c. J-1. In the applicant's submission, the Inquiry Committee is not protected from interference by the executive, at least in appearance, and military judges enjoy less protection than the judges of other courts.

Relief from Performance of Military Duty

[11] 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 from performance of his or

her military duty under article QR&O 19.75 (*Relief from Performance of Military Duty*).

Retirement Age

[12] The applicant's final submission with respect to security of tenure or financial security is that regardless of what the retirement age is for military judges, it should be set out in the *National Defence Act* rather than in the QR&O because the issue could then no longer be subject to influence by the executive.

Renewal

[13] The applicant further submits that if the Court concludes that a Standing Court Martial, presided over by a military judge appointed for a five-year term, meets the minimum standards of constitutionality, the same does not apply to the renewal process. First, all of the provisions relating to renewal should be set out in the Act alone. Second, he submits that the mere fact that a judge must seek renewal creates an appearance of dependency in the mind of a reasonable and well-informed person.

[14] He adds that the review committee established under section 101.15 (*Review Committee*) allows the executive to appoint a majority of the members. In addition, those people might be very close to the executive. The possibility of such a situation arising does not provide the necessary guarantees of the independence that is required of military judges, because the committee is not independent of the executive. The mere fact that the executive may appoint people who have no connection with the executive cannot, in the applicant's submissions, make an unconstitutional regulatory provision valid. The applicant relies on, *inter alia*, *Barreau de Montréal v. Québec (Procureure générale),* R.J.Q. 2058, a judgment of the Quebec Court of Appeal, in which that Court disposed of the issue of the renewal procedure for members of the Tribunal administratif du Québec (T.A.Q.) under section 23 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. It held that a right-minded and well-informed person who had thoroughly examined the situation would have a reasonable apprehension that the members of the TAQ, especially in the last year of their term, did do not have the independence of mind that is needed for forming entirely objective judgments. More specifically, such a person might reasonably believe that it would be more likely that the members' decisions would be influenced by the presence on the committee responsible for recommending renewal of their appointment of representatives of the government and the chairperson of the TAQ, who sat on the committee *ex officio*. The applicant submits that the minimum standards of constitutionality relating to the composition of the renewal committee responsible for recommending reappointment of military judges cannot be lower than the minimum constitutional standard that applies to an administrative tribunal.

[15] The applicant also questions the factors that must be considered by the review committee under QR&O article 101.17 (*Recommendation by Renewal Committee*). First, the applicant submits that the list of factors must be exhaustive. Second, he submits that the factors set out in article 101.17 are in general vague and imprecise or simply not relevant in the context of reappointment, except for subparagraph 101.17 (2)(*a*)(i). With respect to the factor relating to official language requirements, the applicant submits that it is relevant only at the time judges are appointed, and that this question is under the exclusive authority of the Chief Military Judge, and consideration of this factor by the committee would interfere in the administrative independence of the Chief Military Judge.

Financial Security

[16] On the question of financial security, an essential characteristic of judicial independence, the applicant submits that the military judges compensation committee established by QR&O article 204.23 under section 165.22 of the *National Defence Act* does not enjoy sufficient independence, at least in appearance. He acknowledges that the terms used in the QR&O are not problematic in themselves, because the essentially reiterate the provisions of the *Judges Act* on this question, except that they are set out in the Act. Rather, it is the fact that the provisions are subject to the regulatory power of the executive that, in the applicant's submission, creates an appearance of dependency. In comparison, the provisions that apply to federal judges in relation to the same matters are statutory, and are accordingly subject to the authority of the Parliament of Canada. The applicant submits that if we compare the procedures for making, amending, publishing and reviewing, regulations are more readily subject to executive ascendancy than a statute, and that judicial independence requires that these matters be governed by the primary legislation.

Institutional Independence

[17] The provisions for the institutional independence of the Standing Court Martial and of military judges are also inadequate, in the applicant's submission. His reasoning is based on the nature and substance of the instrument establishing the Office of the Chief Military Judge, Canadian Forces Organization Order (CFOO) 3763, made under the authority of the Chief of Defence Staff in February 2002, and the nature and substance 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 submits that the independence of military judges is threatened because the Act merely creates the positions of Court Martial Administrator, Military Judge and Chief Military Judge. There is no real judicial institution, that is, a court that is a real administrative entity, separate from the executive. The applicant submits that the fact that the Office of the

Chief Military Judge is established under a ministerial order and a CFOO made by the Chief of Defence Staff may affect military judges' security of tenure and institutional independence, because the only organization that military judges belong to is the Office of the Chief Military Judge, which is established by a representative of the executive, the Minister of National Defence, through the Chief of Defence Staff. He argues that the executive could change or nullify the way the Office of the Chief Military Judge is organized or functions simply by changing those instruments. An example of how the judges do not have institutional independence is the fact that the Chief of Defence Staff is the final authority in respect of a grievance filed by a judge. The applicant further argues that under QR&O chapter 21 (*Summary Investigations and Boards of Inquiry*), the Chief of Defence Staff or the Minister could use their powers to order a summary investigation or board of inquiry to have a military judge explain the reasons for a decision even though he or she is immune from prosecution. The fact that such situations have not occurred is not relevant, in the applicant's submission, to the question of whether a reasonable person who is informed about these matters might objectively infer that the power given to the executive creates an apprehension of dependency. Accordingly, the applicant submits that a reasonably informed person who is familiar with the establishment and structure of courts martial under the *National Defence Act* may conclude that the office of military judge does not have the security of tenure, financial security or institutional independence that is necessary in order for a Standing Court Martial to be considered to be an independent and impartial tribunal within the meaning of paragraph 11(*d*) of the Charter. The applicant also very briefly argued, in the alternative, that the grievance procedure that applies to the Canadian Forces infringes judicial independence, and I will address that question later in this decision.

Remedy Sought by the Applicant

[18] The applicant is therefore asking this Court, in addition to the declarations of invalidity sought, to grant a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms*. He also urged the Court not to grant a temporary suspension if it makes a declaration of invalidity. In his submission, a suspension is not necessary, since there is nothing to prevent a civilian court – a court of criminal jurisdiction in Canada – to try a member of the military for a purely military offence under the *National Defence Act.* The applicant argued that it can be concluded from 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* that an offence such as the one created by section 129 of the *National Defence Act* for an act to the prejudice of good order and discipline may be tried by a superior court. This summarizes the applicant's arguments in this application.

The Respondent

[19] The respondent submits, 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;

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

(3) a military judge presiding at a court martial enjoys administrative institutional independence.

The respondent also submits that if this Court finds that the Standing Court Martial is not an independent and impartial tribunal, any remedy ordered should consist of suspended declarations of invalidity or reading in additional guarantees to ensure that military judges and Standing Courts Martial are able to continue to exercise their jurisdiction while waiting for Parliament to enact appropriate measures to ensure that the applicant's rights and freedoms are safeguarded.

Security of Tenure

Fixed Five-year Term

[20] The respondent submits that the applicant has not established that after considering the question realistically and practically, and thoroughly examining it, a reasonable, right-minded person who is informed of the relevant statutory provisions and of their historical background and the traditions surrounding them would conclude that a military judge presiding at a court martial does not enjoy the security of tenure that he or she needs to try cases that come before him or her on their merits, without interference by any outsider in the way the judge conducts and decides the case.

[21] In the respondent's submission, paragraph 11(*d*) of the Charter does not guarantee some ideal standard of independence. Rather, the test to be applied in determining whether a particular court has the characteristics of independence must be applied flexibly and contextually, having regard to the particular circumstances in which the tribunal operates. The respondent submits that after considering the question realistically and practically, and thoroughly examining it, a reasonable and right-minded person who is informed of the relevant statutory provisions and of their historical background and the traditions surrounding them would conclude that a military judge presiding at a court martial enjoys the security of tenure that he or she needs to try cases that come before him or her on their merits, without interference by any outsider in the way the judge conducts and decides the case. Citing the decision of the Supreme Court in *R. v. Généreux* and the decision of the Court Martial Appeal Court in *R. v. Lauzon*,

the respondent argued that security of tenure does not require that a military judge be appointed until some pre-established retirement age. It is sufficient that a military judge be appointed for a fixed term during which he or she may be removed only for cause. The respondent argued that a military judge could return to practice, theoretically, in the Canadian Forces and that this would not present a problem, even though the judge's financial circumstances might be less than what he or she had while performing exclusively judicial functions. In the respondent's submission, a former judge who went back to being a lawyer would be governed by his or her code of ethics and the objective rules for promotion within the Canadian Forces are sufficient, in this respect, to ensure that anyone appearing before the military judge would need not fear that he or she would not act independently and impartially during his or her term. In addition, this would not affect the financial security that is required, because what is important, in the respondent's submission, is that military judges' salaries be established independently during their term.

Removal

[22] On the issue of removal, the respondent submits that the regulatory provision setting out the specific reasons for which the Inquiry Committee may find that there is ground for removal is virtually identical to the provision found in the *Judges Act*. The respondent acknowledges, however, that the Inquiry Committee's procedure is not as detailed as the procedure set out in section 64 of the *Judges Act*, in particular with respect to the holding of an oral hearing, but submits that an oral hearing would be mandatory at common law, and in particular under the administrative law rules relating to the duty of fairness.

Age of Retirement

[23] On the question of the age of retirement for military judges, the respondent submits that judicial independence requires that military judges be treated similarly. In other words, the retirement age for a military judge may be only the age that is shown in the table that appears in QR&O article 15.17 that applies to the military judge's rank. It would be contrary to the principles that apply in respect of security of tenure and financial security for the executive to be able to offer to apply table "H" in article 15.17 (*Release of Officers – Age and Length of Service*) to a military judge as a matter of discretion. The respondent submits that there is nothing to require that Parliament make express provision for the retirement age for military judges in the *National Defence Act.*

Renewal

[24] On the question of renewal, the respondent submits that if we agree that it is constitutionally acceptable for a military judge's term to be renewed, as is agreed in

theory, in the respondent's submission, by the Court Martial Appeal Court, this means that the requirements of constitutionality will be met if there are significant and sufficient guarantees. The respondent submits that the factors considered by a renewal committee may differ from the factors assessed by an Inquiry Committee whose task is to make a recommendation regarding removal. The respondent submits that in order for there to be significant and sufficient guarantees the renewal committee must be independent as between the judge in question and the Governor in Council and that the composition and procedures of the committee and the factors to be considered do not create a reasonable apprehension that the military judge will be influenced in the performance of his or her judicial functions. The respondent submits that the applicant's argument that the committee could be controlled by the executive because it appoints two of its members is without basis in law, because that situation could not arise, under the common law. In the respondent's submissions, the common law would prevent the Minister of Justice or the Minister of National Defence from appointing people who are so close to the executive that they would be able to control the renewal committee. On the question of procedure, the respondent submits that, again, the common law and the administrative law rules relating to the duty of fairness are incorporated into the renewal process, even though the regulations are silent on this point.

[25] The respondent answered a number of questions from the Court regarding the factors that must be considered by the renewal committee under QR&O article 101.17 (*Recommendation by Renewal Committee*). In the respondent's submission, they are sufficiently precise and the law does not require that the list be exhaustive, because the committee may have regard to any factor that may be relevant. Each of the factors that the committee must consider is sufficiently precise and objective and, in the respondent's submission, they relate to the need for a fair and military justice system within the Canadian Forces. The respondent submits that those requirements impose sufficient restrictions on the committee's discretion, particularly having regard to the fact that decisions made by a military judge may not be considered, to eliminate any reasonable apprehension that the committee might base its recommendations on factors that might cause a military judge to decide cases that come before him or her on the basis of any irrelevant consideration.

[26] In addressing specific factors, the respondent submits that the factor relating to official language requirements is appropriate and does not infringe the administrative independence of the Chief Military Judge. With respect to the continuity factor, the respondent argued that it must be interpreted positively, that is, as favouring renewal. In the respondent's submission, the compelling military requirements factor is an exception; it is very rarely applied, but the fact that it exists does not create a reasonable apprehension that military judges are not independent. The respondent's final submission is that the criterion relating to military judges' physical condition is appropriate. In the respondent's submission, the fact that it is tied to the physical

condition of military counsel poses no problem. Military judges must be capable of being deployed to the same places as the military counsel who appear before them at courts martial. The respondent submits that this is an enrolment standard, and not a medical standard that military counsel might be required to meet in a particular situation. The respondent adds that this criterion is different form the criterion that applies in the case of an Inquiry Committee that is responsible for removal. The respondent acknowledges that the statutory and regulatory provisions that govern renewal and removal are not ideal, but submits that a reasonable, right-minded and well-informed person would have no reason for any apprehension that a military judge will be influenced in the performance of his or her judicial functions.

Financial Security

[27] On the question of financial security, which is an essential characteristic of judicial independence, the respondent submits that a reasonable and right-minded person who is informed of the relevant statutory provisions and of their historical background and the traditions surrounding them and who has considered the question realistically and practically, and examined it thoroughly, would conclude that a military judge presiding at a court martial enjoys the financial security that he or she needs in order to decide the cases that come before him or her on their merits, without interference by any outsider in the way the judge conducts and decides the case.

[28] The respondent notes that the principle of financial security applies to military judges during the period when they are making judicial decisions. The fact that a former military judge might receive pay that is lower than he or she received while in holding the position of military judge is not relevant, in the respondent's submission, to the question of whether the a military judge enjoys financial security as a military judge. The essence of financial security is that the right to pay and pension be established by statute or regulations and not being subject to arbitrary interference by the executive in a way that could affect judicial independence. The respondent submits that the applicant has not established that a reasonable and right-minded person who was informed of the relevant statutory provisions and of their historical background and the traditions surrounding them, and who has considered the question realistically and practically, and examined it thoroughly, would conclude that a military judge presiding at a court martial does not enjoy the financial security that he or she needs in order to decide the cases that come before him or her on their merits, without interference by any outsider in the way the judge conducts or decides the case.

Institutional Independence

[29] On the question of the institutional independence of the Standing Court Martial and military judges, the respondent submits that the argument is based on an incorrect interpretation of the ministerial organization orders and Canadian Forces

Organization Orders, which [TRANSLATION] "are organizational orders [that] must not be used for any other purpose". Those orders provide for the Canadian Forces to make available, and the Chief Military Judge to supervise, the support staff and logistical infrastructure that military judges need in order to perform their judicial functions. The respondent submits that the Chief Military Judge – and the court martial administrator, who works under the general direction of the Chief Military Judge – take their administrative authority not from a Canadian Forces Organizational Order, but from the *National Defence Act* and the QR&O. The exercise of that administrative authority is facilitated by those orders. However, even if the orders were repealed, there would be no reasonable ground for any apprehension that a military judge might be influenced in the performance of his or her judicial functions, in the respondent's submission.

Remedy Sought by the Applicant

[30] On the question of the remedy sought, the respondent submits that no remedy is required because the applicant has not discharged his burden of proof, but adds that if the Court concludes that the application must be allowed, in whole or in part, and declares certain provisions of the *National Defence Act* or the Regulations to be invalid, the Court should not grant a stay of proceedings, having regard to the decisions of the Supreme Court in *Schachter* and *Demers*. The respondent submits that the applicant has not established an individual violation of his rights that would warrant such a remedy, and argues that if the Court finds that it is necessary to grant a remedy under subsection 52(1) of the *Constitution Act, 1982*, the additional individual remedy sought be the applicant is superfluous in the circumstances. The respondent submits, first, that the applicant has not established that his case is one of the extreme cases referred to by the Supreme Court in *O'Connor*, and second, that any remedy should be surgically tailored, and any declaration of invalidity should be suspended so that Parliament can make the necessary corrections and the Canadian Forces can continue to operate effectively, including by maintaining discipline. The respondent submits that suspension is necessary to ensure that the rule of law is respected within the Canadian Forces, and to protect the public. The respondent submits that absent a functional court martial system, the entire disciplinary scheme within the Canadian Forces would be vulnerable to legal chaos, which would have adverse repercussions of the ability of the Government of Canada to implement its foreign, defence and security policies for the benefit of all Canadians.

DECISION

Analysis of the Law as it Relates to the Facts

[31] I would first note that 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, made changes to the military justice system, modernized the Code of Service Discipline and enhanced the integrity and impartiality of the system. It is important to note that all of the leading decisions on the independence of courts martial under the Charter – *R. v. Généreux*, [1992] 1 S.C.R. 259 in the case of a general court martial; *R. v. Ingebrigtson* [1990] 5 C.M.A.C. 87 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 also in the case of a Standing Court Martial, the last four decisions being decisions of the Court Martial Appeal Court – those decisions were made on the basis of the legislation that applied before the 1998 military justice reform came into force. The Court will now do a brief review of these leading decisions.

[32] The Supreme Court had already said, in *R v. Généreux*, that the requirements in respect of judicial independence could be adjusted in special circumstances, as in the case of the military justice system. Obviously, the Court was considering the General Court Martial as it existed at the time. Former Chief Justice Lamer said, 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 Chief Justice Lamer quoted the following passage:

> 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.

The Chief Justice continued, at paragraph 64:

> 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:

and quoted paragraph 11(*f*) of the Charter, which says:

> 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?

At paragraph 86, Chief Justice Lamer added:

> 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 majority's reasoning in *R. v. Généreux*, based on the statutory and regulatory provisions that governed the establishment of the General Court Martial at the time, was meant to preserve military judges' opportunity for career promotion in the Office of the Judge Advocate General. If we consider judicial independence as the concept applies in 2005, it is fair to ask whether it is even possible for a military judge to be thinking about his or her opportunities for promotion within the Canadian Forces at the end of his or her term as a judge, while the military judge is still in that position, without this running profoundly counter to the most elemental rules of ethics and irremediably affecting the requirements of independence and impartiality.

[33] In *Edwards*, the Court Martial Appeal Court reviewed the composition of the Disciplinary Court Martial having regard to the requirements of paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Court first observed that the QR&O had been amended on December 20, 1990, to include certain provisions relating to the selection and tenure of judge advocates. The Supreme Court of Canada had considered those amendments in *R. v. Généreux* and said that they seemed to remedy the main deficiencies in relation to the security of tenure of judge advocates. The Court Martial Appeal Court concluded in *Edwards* that while that finding might, strictly speaking, have been *obiter*, the Court should not depart from it. Accordingly, the Court Martial Appeal Court concluded that the judge advocate in that case, who had had security of tenure under QR&O article 4.09, had security of tenure that, in the context of a court martial, complied with paragraph 11(*d*) of the Charter. On the question of a judge advocate's security of tenure, former Chief Justice Strayer of the Court Martial Appeal Court said, at paragraphs 15 to 17:

> 15 As noted above a judge advocate must be a military trial judge who, according to article 4.09 of the Q.R. & O. is appointed for a fixed term ranging from two to four years. The judge advocate for a particular hearing is designated by the Chief Military Trial Judge. At the time of the trial in *Généreux*, a judge advocate was appointed by the Judge Advocate General on a case by case basis and the Judge Advocate General was also responsible for appointing the prosecutor and supervising the prosecution. The Supreme Court of Canada, in finding that this arrangement did not provide for sufficient security of tenure stated:
>
> > ... The point is, however, that a reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. Any system of military tribunals which does not banish such apprehensions will be defective in terms of s. 11(*d*). At the very least, therefore, the essential condition of security of tenure, in this context, requires security from interference by the executive for a fixed period of time. An officer's position as

> military judge should not, during a certain period of time, depend on the discretion of the executive.

As a result the Court found that the system then in place, providing for the appointment of judge advocates on a case by case basis, with their return immediately afterward to non-judicial functions in the military, did not meet the requirements of paragraph 11(d).

16 Before the Supreme Court decision in *Généreux*, the Q.R. & O. had already been amended to incorporate the present article 4.09 quoted above, providing for judge advocates to be chosen from among military trial judges who are appointed, not on a case by case basis, but for a fixed term from two to four years. Chief Justice Lamer had examined this amendment and, writing on behalf of the majority, stated as follows:

> However, I would note that recent amendments to the Q.R. & O., which came into force on January 22, 1991, subsequent to the trial in this case, appear to correct the primary deficiencies of the judge advocate's security of tenure. Under new art. 4.09 Q.R. & O., any officer who may act as judge advocate at a General Court Martial is first appointed to the position of a military trial judge for a period of two to four years. In addition, art. 111.22 Q.R. & O. now provides that the Chief Military Trial Judge, and not the Judge Advocate General, has formal authority to appoint a judge advocate at a General Court Martial. These are not before us and I refer to them solely for the purpose of completeness.

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

17 I therefore conclude that the Judge Advocate in this case, having enjoyed the security of tenure prescribed by article 4.09, had such security of tenure as in the context of a court martial complies with paragraph 11(*d*) of the Charter.

[34] In *R. v. Lauzon*, the Court Martial Appeal Court considered the appellant's argument that the Standing Court Martial was not an independent tribunal within the meaning of section 11(*d*) of the *Canadian Charter of Rights and Freedoms*. After listing the essential components of judicial independence, Mr. Justice Létourneau, speaking for the Court, added, at paragraph 19:

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

Citing *Edwards*, the Court addressed the question of military judges' security of tenure and, for the first time, the renewal of their terms, at paragraphs 26 and 27:

> 26 As this Court of Appeal decided in *R. v. Edwards*, [1995] A.C. A.C. No. 10, the posting of members to military trial judge positions for a fixed term, even if this term is not for life, guarantees institutional independence. The same is true for the process by which judges are now assigned to hear cases by the Chief Military Trial Judge and no longer by the convening authority who also appointed the prosecutor (*R. v. Edwards*, *supra*). However, these were the only questions before the Court. In the case at bar, the appellant is challenging not the term of the appointments to military trial judge positions as in *Edwards*, but the fact that these appointments are renewable. In other words, the appellant submits that the possibility of reappointment interferes with the principle of the security of tenure of military trial judges.
>
> 27 In our view, the fact that the posting of an officer to a military trial judge position is renewable does not necessarily lead to the conclusion that institutional independence is lacking if the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military trial judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions. Unfortunately in the case at bar, the reposting is done simply at the ministerial level by the Minister himself or herself, who can decide not to renew the term of a military trial judge who has taken positions which are unpopular with the Department or more generally with the Executive. While the recommendation to renew the term of a military trial judge comes from the Chief Military Trial Judge, the Chief Military Trial Judge's own posting is also done by the Minister. And that is not all. This reposting is done on the recommendation of the Judge Advocate General who, with his or her staff, regularly argues cases for the Minister before the military trial judges and the Chief Military Trial Judge. Furthermore, while the military trial judge may only be removed for cause, a refusal to repost is entirely within the discretion of the Minister, without any protective standard or guideline which, for all practical purposes, is equivalent to removal from the performance of duties without cause. With respect to the appointment and reappointment of the Presidents of the Standing Court Martial itself, article 113.54 of the QR&O, and more precisely paragraphs 3 and 4, is to the same effect as article 4.09 and consequently suffers the same shortcomings. As the Presidents decide on military discipline cases where the interests of the Minister are directly in issue, the lack of standards for reappointment does not offer sufficient objective guarantees of independence.

[35] Shortly after that, in *R. v. Bergeron*, the Court Martial Appeal Court addressed the question of the independence of the Standing Court Martial; the Court said, at paragraphs 20-29:

20 The respondent noted that since *Lauzon* had been heard, but before the appellant's trial, the Ministerial order regarding organization signed by the Minister of National Defence on September 27, 1997 had reorganized the Office of the Chief Military Trial Judge as a separate unit of the Canadian Forces pursuant to s. 17(1) of the NDA. In the respondent's submission, therefore, the institutional and organizational links between the Minister, the Judge Advocate General and the military trial judges had been significantly altered: the latter were assigned as members of the Office of the Chief Military Trial Judge, a separate unit which was not part of the Office of the Judge Advocate General.

21 We recognize the scope of this change, but we are not persuaded that by itself it responds to the concerns expressed by the Court in Lauzon regarding the process of reappointing and removing military trial judges and the determination of their salaries, which as the respondent admitted have not changed since that judgment was rendered.

22 For this reason, we are not persuaded that we should disregard the reasoning in Lauzon on account of the Ministerial organization order of September 27, 1997.

23 The respondent further argued that the Court should apply the judgment rendered by Strayer C.J. in *Edwards*. If we understand her argument correctly, Lauzon is inconsistent with *Edwards*, in which the Chief Justice dismissed a constitutional argument dealing with a disciplinary court martial. It is important to note that in *Edwards* the point before the Court was whether, because of the regulations governing its composition, a disciplinary court martial was an independent tribunal. According to the argument made in that case, the Judge Advocate was not independent and the members of the disciplinary court martial, because of the method chosen for their appointment, were not sufficiently independent of the convening authority. The respondent relied in particular on the following passage from that judgment, at 5:

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

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

> In the present case the respondent relies on such statements as authority for the validity of the existing provisions for security of tenure of judge advocates. The appellant contends that such statements on the part of the Supreme Court were merely obiter dicta as the provisions of the amended section 4.09 were not in issue in *Généreux*. While the statement quoted above may, strictly speaking, be *obiter dicta* I believe we should not depart from it. The Court was

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

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

> [25] Pursuant to paragraphs 4.09(3) and (5) of the QR&O, the postings of members to military trial judge positions are for a fixed term of two to four years and these postings are renewable:
>
> > 4.09(3) The fixed term under paragraph (2) shall normally be four years and shall not be less than two years.
> >
> > 4.09(5) An officer is eligible to be posted again to a position referred to in paragraph (1) on the expiration of any first or subsequent fixed term:
> >
> > (a) in the case of the Chief Military Trial Judge upon the recommendation of the Judge Advocate General, and,
> >
> > (b) in any other case, on the recommendation of the Chief Military Trial Judge.
>
> [26] As this Court of Appeal decided in *R. v. Edwards*, [1995] A.C. A.C. No. 10, the posting of members to military trial judge positions for a fixed term, even if this term is not for life, guarantees institutional independence. The same is true for the process by which judges are now assigned to hear cases by the Chief Military Trial Judge and no longer by the convening authority who also appointed the prosecutor (*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.

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), 13.54(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.

[36] Although this Court is bound by the rule of *stare decisis*, it must determine whether the Standing Court Martial has the essential characteristics of an independent and impartial tribunal having regard to the particular context of this case and to the earlier decisions. The Court must not only examine the status of this institution objectively, as it is defined by the statutory and regulatory provisions that govern its establishment and procedures at the time of trial, but it must also examine the Standing Court Martial in the context of the concept of judicial independence, which continues to evolve over time.

The Court will now do a brief review of the history of what has happened since *Lauzon*.

BACKGROUND AND HISTORY SINCE *LAUZON*

The First Dickson Report

[37] In 1997, there were two special reports and a major Commission of Inquiry that addressed military justice issues, among other things. The Special

Advisory Group on Military Justice and Military Police Investigation Services was chaired by the Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada. The Special Advisory Group was given a mandate to assess the Code of Service Discipline in light of its underlying purpose and the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad. The report of the Special Advisory Group was submitted on March 14, 1997.

Somalia Commission of Inquiry

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

Dickson Special Advisory Group Second Report

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

[40] 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, chapter 35, in force on 1 September 1999:

(1) attempted to clarify the roles and responsibilities of the military

justice system's principal actors including the Minister of National Defence and the Judge Advocate General;

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

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

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

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

(6) created the position of Director of Defence Counsel Services who is appointed by the Minister to hold office during good behaviour for a renewable maximum term of four years to direct the provision of the legal services prescribed by the Governor in Council to persons subject to charges under the Code of Service Discipline. The Director of Defence Counsel Services works under the general direction of the Judge Advocate General, who may issue guidelines or give instructions, in writing, regarding defence counsel services. This refers to sections 249.18 to 249.21 of the *National Defence Act*;

(7) created the position of Director of Military Prosecutions, who is appointed by the Minister for a renewable maximum term of four years subject to removal for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. The Director of Military Prosecutions prefers charges against persons to be tried by court martial and conducts prosecutions before courts martial, and also represents the Minister in appeals when instructed to do so. This refers to sections 165.1 to 165.17 of the Act.

(8) created the position of Court Martial Administrator who convenes courts 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 the members. The Court Martial Administrator performs such

> other duties as are assigned by the Act or by regulations made by the Governor in Council. The Administrator works under the general direction of the Chief Military Judge. This brings us to sections 165.18 to 165.2.

[41] The amendments to the *National Defence Act* had a significant impact on the office of military judge. The role and functions of a military judge are now intrinsically the same as the role and functions of a superior or provincial court judge who hears exclusively criminal matters. The legislative framework of the office of military judge is set out in sections 165.21 to 165.23 of the *National Defence Act*. The core characteristics of the office of military judge under the Act cover appointment, tenure and removal, retirement age, remuneration and functions.

[42] The *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, made a number of changes to the office of military judge. The Governor in Council now appoints military judges who are barristers or advocates of at least ten years standing at the bar of a province; they are appointed during good behaviour for a term of five years but may be removed by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. A military judge is eligible to be re-appointed on the recommendation of a Renewal Committee also established under regulations made by the Governor in Council. A military judge ceases to hold office on reaching the retirement age prescribed by the Governor in Council. The remuneration of military judges is reviewed regularly by a Compensation Committee established under regulations made by the Governor in Council. Military Judges preside at all courts martial and they perform the other judicial duties assigned to them by the Act. They may perform any other duties that the Chief Military Judge may direct and that are not incompatible with their judicial duties. Finally, they may be appointed as a board of inquiry with the concurrence of the Chief Military Judge. This Court believes that this framework has created a truly modern military judiciary where the role and functions of a military judge are now very similar to those of judges who sit on the various courts in Canada. Given the nature of the duties of military judge and the fact that courts martial have jurisdiction to try persons charged under the Code of Service Discipline with the most serious of offences, it is impossible to compare those duties with the duties of a judge or the members of an administrative tribunal, regardless of what position the tribunal occupies on the broad spectrum of administrative tribunals.

After Lauzon – General Considerations

[43] I will now address a number of general considerations that relate to the period since the decision in *Lauzon*. If we compare the situation today with the situation as it was when *Généreux*, *Edwards*, *Lauzon* and *Bergeron* were decided, it is

plain that we can no longer apply the idea of posting an officer to the position of military judge for a fixed renewable term. The posting of a service person to a place or to a specific assignment is a decision of the executive that does not necessarily represent the individual's first choice. The idea of "posting", or "*affectation*", in the French version, existed under the regulatory scheme in place when *Edwards*, *Lauzon* and *Bergeron* were decided by the Court Martial Appeal Court. The previous regulations were based on the assumption that a person posted to a position of "military judge" was a legal officer employed in the Office of the Judge Advocate General prior to that posting, who might have chosen to pursue his or her legal career with the Office of the Judge Advocate General after completing the posting. Postings were for a fixed but renewable term, which might vary in length, and could be terminated only in accordance with paragraph (6) of QR&O article 4.09, 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.

The former regulations were consistent with what former Chief Justice Lamer said in *Généreux*, 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).

[44] Under the current legislative framework, any officer is eligible to be appointed as a military judge if he or she has been a member in good standing at the bar of a province for at least 10 years. To all intents and purposes, a person who is

practising law in the Canadian Forces, in the public sector or in private practice, or who is a prosecutor, is eligible to be appointed by the Governor in Council. It is difficult to imagine that the officer we are talking about could, today, be the same officer former Chief Justice Lamer described in *Généreux*. The pool of candidates eligible to be appointed as military judges has been expanded significantly.

[45] The selection process for suitable candidates to the military judiciary is now similar to the process followed for other federal judicial appointments. In his *Annual Report to the Minister of Defence on the administration of military justice in the Canadian Forces* for the period from April 1, 2004, to March 31, 2005, the Judge Advocate General said, at paragraphs 4.1 and 4.2 of this report:

> 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. 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] -- note 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. – 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.

[46] The functions of a military judge have also been significantly expanded. Obviously, they preside at courts martial and they perform other judicial duties assigned to them by the Act. They may also perform any other duties that are not incompatible with their judicial duties. And as I noted earlier, they may be appointed as a board of

inquiry with the concurrence of the Chief Military Judge. This terminology is in fact similar to the language used to describe the functions and duties of judges who sit on courts in general, irrespective of the jurisdiction and powers of the court.

[47] It is worth noting that the amendments made to the *National Defence Act* by Bill C-25 eliminated the actual concept of "judge advocate". It must be understood that prior to the enactment and coming into force of the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, an officer other than a judge advocate presided at General or Disciplinary Courts Martial. A judge advocate did not perform the full range of functions performed by a judge presiding at a criminal trial. For one thing, the judge advocate could determine questions of law or of mixed law and fact. This meant that the President of a General or Disciplinary Court Martial could refuse to follow the advice of the judge advocate. That situation was remedied so that it is now the military judge presiding at the General or Disciplinary Court Martial who determines questions of law or of mixed fact and law arising before or after the commencement of the trial (s. 191 of the *National Defence Act*). The effect of this change has been to reflect the situation that applies to jury trials in Canada. For another, the members of courts martial had the authority to sentence the offender, if that was the case. Under the current legislative framework, the military judge presiding at courts martial, alone, how determines sentence, just as does a judge of a superior court presiding at a trial before a jury or a judge sitting alone in a criminal case (s. 193 of the *National Defence Act*).

[48] In addition, section 177 of the *National Defence Act,* which was in force before the Court Martial Appeal Court decision in *Lauzon*, did not require that a military judge presiding at a Standing Court Martial be an officer who was or had been a member of the bar of more than three years standing. As explained earlier, military judges will now be appointed by the Governor in Council, to hold office during good behaviour, from among the barristers or advocates of at least 10 years standing at the bar of a province.

After Lauzon: Special Considerations and Changes in the Role of Military Judges

[49] I will now address a few special considerations and the changes that have occurred in the role of military judges since *Lauzon*. The role of military judges has changed since the enactment of the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35. A description of some examples of situations that demonstrate those changes will be useful. First, Division 3 (*Arrest and Pre-trial Custody*) in Part III of the *National Defence Act*, the Code of Service Discipline, has replaced the former Part VII (*Arrest*) of the Act. This new Division now provides a complete scheme covering the period when an individuals is arrested, pre-trial custody and release. Parliament modernized the Act by incorporating a judicial interim release mechanism into the Code of Service Discipline that is similar

to the scheme in sections 515 to 522 of the *Criminal Code*. Military judges must now hold a hearing to review the decision of a custody review officer to hold a person in pre-trial custody (sections 159 to 159.6 of the *National Defence Act*). The decision of a military judge may in turn be reviewed by a judge of the Court Martial Appeal Court. Although this scheme takes the military environment into account, it seems that the role of the military judge is more analogous to the function of a judge than of a justice under the *Criminal Code*.

[50] Second, section 173 of the *National Defence Act* provides that a military judge presiding at a Standing Court Martial – a trial before a judge alone – now has the authority 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 member may now be tried by a military judge presiding at a Standing Court Martial, and there are no restrictions relating to the accused's rank or position within the Canadian Forces. This is a significant difference from the situation as it existed before section 177 of the *National Defence Act* was struck down by the Court Martial Appeal Court in *Lauzon*. At the time, 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 that imprisonment for less than two years.

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

> (1) A Standing Court Martial shall not try a civilian.
>
> (2) A Standing Court Martial shall not try an officer of or above the rank of colonel.
>
> (3) The president of a Standing Court Martial shall be an officer of a rank higher than the rank of the accused.

Parliament has decided that any officer or non-commissioned member may now be tried by a military judge presiding at a Standing Court Martial, regardless of the rank of the accused or of the military judge. This is a significant difference from the role of the military judge under the presents Act. It is the Court's opinion that this situation calls for a particularly high degree of independence from the executive and the chain of command. It highlights the importance of recognizing that a person who holds the office of military judge must be free from any direct or indirect interference that might reasonably be brought to bear by the highest level of the military hierarchy, including general or flag officers, who are all subject to the Code of Service Discipline.

[51] Third, by enacting the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, Parliament has created a scheme similar to the one in sections 487.04 *et seq.* of the *Criminal Code* relating to forensic DNA analysis. Division 6.1 of the *National Defence Act*, entitled *Forensic DNA Analysis*, allows a military judge to issue a warrant or telewarrant authorizing the taking, for 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 military judge presiding at a court martial may also make a similar order when it finds a person guilty of a designated offence (s. 196.14 of the *National Defence Act)*.

[52] Fourth, a military judge presiding at a court martial may issue a warrant in the form prescribed by the Governor in Council for the arrest of an accused person who has been duly summoned or ordered to appear before a court martial and fails to appear (art. 249.23). This function is assigned to a justice under section 524 of the *Criminal Code*.

[53] Fifth, Parliament has significantly expanded the powers of military judges, both when they are presiding at courts martial and when they are performing any other judicial function assigned to them by the Act. Section 179 of the *National Defence Act* reads as follows:

> 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.

[54] As former Chief Justice Lamer said in 1992, in *Généreux*, the Constitution does not necessarily require that military judges enjoy security of tenure equivalent to the security enjoyed by the judges of the ordinary courts. It is also true that the appointment of military judges for a fixed renewable term is not unconstitutional *per se*, as the Court Martial Appeal Court has held. The same situation arises in the context of the appointment of retired judges for fixed terms as part-time judges, and again, that is not unconstitutional *per se*.

[55] Any examination of this issues, however, must be based on the status of the institution as determined from the statutory and regulatory provisions governing the creation and trial procedures of the tribunal. That examination must take into account the context, which is that the very concept of judicial independence is continuing to evolve over time.

[56] The nature of the functions and expanded role of military judges since *Lauzon* is the cornerstone of that statutory and regulatory evolution. This factor is not strictly a function of the modern context and history of military tribunals. It attests to Parliament's desire to bring the military justice system more into line with current Canadian values and legal standards, while trying to preserve the characteristics of the system that were thought necessary to respond to the unique needs of the military. What was said by former Chief Justice Lamer in *Généreux*, starting at the second sentence of paragraph 31, is as relevant today as then:

> 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.

[57] The Canadian military justice system is part of the Canadian system of justice. The members of the military judiciary are professional judges who are familiar with matters relating to the Canadian Forces. The way in which their independence from the executive and the chain of command is guaranteed can take various forms. The extent of the measures that are needed in order to preserve each of the essential

characteristics of the judicial independence of military judges presiding at courts martial – security of tenure, financial security and administrative independence – may also very. Thos measures must take into account the context in which these professional judges are performing their functions. Military judges perform their judicial functions within a military community that is the size of a small city with a population of less than 100,000 inhabitants. The ubiquity of the executive and the chain of command and the close association with former legal colleagues who are still practising in the Canadian Forces highlight the inherent difficulties in preserving the appropriate and necessary separation between the bench, the bar and prominent personages, as is often the case in small communities.

[58] The necessary separation between bench and bar certainly helps to preserve judicial independence, but that separation is not absolute. In the case of professional development, it is certainly desirable, for one thing, that all actors in the legal profession – law professors, judges and lawyers – come together to share their experience and skills for the benefit of the legal community as a whole. For another, the very nature of the judge's office involves its own demands and constraints in the area of professional development. It is essential that military judges be able to share their concerns in relation to their judicial functions with other judges, and that they be seen as judges, whether in training programs for federal, provincial or territorial judges or through informal discussion with other judicial colleagues. The end result of the desire to protect the independence of courts martial and military judges should not be to isolate them professionally, on the fringes of the broader judiciary. I would be equally unacceptable to isolate military lawyers from professional activities organized for their civilian colleagues who are members in good standing of their respective bars. The necessary corollary to the independence of military judges is that they have an opportunity to participate fully in the activities of the broader judiciary in the area of professional development, to maintain the same level of excellence as for federal, provincial or territorial judges.

[59] It does seem paradoxical that notwithstanding the creation of a genuine military judiciary and the expansion of the role and functions of military judges, Parliament has decided that a renewable fixed five-year term, just one year longer than under the former framework, was sufficient. We must recall what the Right Honourable Chief Justice Lamer said at paragraph 66 of *Généreux*, and again 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?

[60] That examination raises serious questions as to the extent of the guarantees of security of tenure given to military judges presiding at courts martial, and whether they are sufficient. The Court believes that the first question must be this: 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 paragraph 11(*d*) of the Charter? If so, is that violation justified under section 1 of the Charter?

[61] The Court's answer to the first question must be "yes". 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*, violates paragraph 11(*d*) of the Charter.

[62] Having thoroughly analyzed the evidence submitted to this Court, the context and history and all of the relevant statutory provisions, This Court is of the opinion that justification for this violation, in a free and democratic society, has not been demonstrated under section 1 of the *Canadian Charter of Rights and Freedoms*.

[63] The nature of the functions and the expanded role of military judges, as they may be clearly seen in the statutory and regulatory provisions in force, are such that a fixed term does not meet the minimum requirements of paragraph 11(*d*) of the Charter in the context of military justice and of developments in the law as it relates to judicial independence. This Court is satisfied that a reasonable and right-minded person, informed of the relevant statutory provisions and of their history and the traditions surrounding them, after considering the matter realistically and practically and examining it thoroughly, would conclude that a military judge appointed to hold office during good behaviour for a term of five years presiding at a Standing Court Martial, or at any other court martial, does not enjoy sufficient security of tenure as to be capable of trying the cases that come before him or her on the merits without interference by any outsider in the way the judge conducts and decides the case. The Court concludes, from the evidence presented to this Court as a whole, that this violation is not justified under the tests that apply in respect of section 1 of the Charter.

[64] Violations of paragraph 11(*d*) of the Charter that relate to judicial independence are difficult to justify. In fact, this issue has been forcefully addressed by the Supreme Court of Canada, in *Mackin v. New Brunswick (Minister of Finance);Rice v. New Brunswick*, [2002] 1 S.C.R. 405, in which Mr. Justice Gonthier said, at paragraphs 71-72:

> 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 *Mackin*, the respondent has presented no evidence to justify the violations of the constitution here. In oral argument, the respondent stated: [TRANSLATION] "Second, as is clear from written argument, the respondent is making no argument regarding section 1 of the Charter. I will of course be making argument on the pressing and substantial objectives of a military justice system, which were recognized by the Supreme Court in *Généreux*, in relation to remedy, if the Court were to reach that stage, and my submissions will be limited to that."

[65] The Court does not intend to quote paragraphs 60 to 65 of *Généreux* again, which dealt, first, with the unique nature of the military justice system, but also with the fact that the system was itself subject to Charter scrutiny. [Former Chief Justice Lamer] added that if the structure of the system violates the fundamental principles in paragraph 11(*d*), it could survive only if the infringements were justified under section 1. The Court is of the opinion that changes in the vital role played by judicial independence, a concept that to date has been in a state of constant evolution, applies to the system of military tribunals in Canada. If, as the respondent submits, courts martial play this vital role in order to protect rights guaranteed by the Charter, unlike the summary trial process, we must acknowledge that the vital role played by judicial independence in the court martial structure places a heavier burden on the government under section 1 today than was the case before *Mackin*.

[66] It must be acknowledged that preserving order and discipline in the Canadian Armed Forces is still an equally important objective. This is a social concern that meets the first test in section 1 scrutiny. Unfortunately, as I said earlier, a military judge who is appointed under subsection 165.21(2), presiding at a Standing Court Martial, is not an independent and impartial tribunal within the meaning of paragraph

11(*d*) of the Charter and the proportionality test is not met. This Court is of the opinion that the appointment of military judges to hold office during good behaviour for a renewable term of five years is not the minimum possible impairment of the Charter right to be tried by an independent and impartial tribunal in the context of the military justice system and the present legislation. While the Court agrees that military judges may be officers who perform strictly judicial functions or functions that are not incompatible with judicial functions, a system of service tribunals that consists of both summary trials and military judges presiding at courts martial who play a major constitutional role can be justified, today, only by requiring that the court martial meet the highest possible standards of judicial independence. Those standards are intrinsically connected with the actual role of the court and the judges who preside at it. They are also based on the developments that have occurred in relation to judicial independence, which transcend the military justice system. The appointment of a military judge to hold office during good behaviour for a renewable term of five years fails to take adequate account of the expanded status and powers assigned to military judges under the present legislation and in the context of modern Canadian society. Accordingly, subsection 165.21(2) of the *National Defence Act* cannot be justified under section 1 of the Charter.

[67] However, appointment need not be for life or until a retirement age comparable to the age provided for judges of the ordinary Canadian courts. The Court believes that the special requirements of a system of military tribunals in which the judges who preside at courts martial come from the Canadian Forces – whether from the regular force or the reserve force – justify a requirement that military judges cease to hold office when they reach a retirement age that is comparable to the age at which all officers in the Canadian Forces are required to retire, because of the demands of military service and the very reason for the existence of a military tribunal system, which must be portable and effective in all regions of the globe, to ensure the maintenance of discipline in the Canadian Forces but also to guarantee the rule of law, including the Charter, for the benefit of all Canadian service people and everyone who is subject to the Code of Service Discipline, no matter where they are, whether in a theatre of war or on humanitarian missions. The Court is not persuaded that the retirement age for military judges must be set out in the Act. However, it should be the same for all military judges, regardless of rank. In fact, under both the Act and the regulations, no regard is had to military judges' rank in the provisions relating to their appointment, remuneration or powers. The Court is of the opinion that this is not an issue under paragraph 11(*d*) of the Charter, and is rather an issue of equal treatment of military judges.

[68] In addition to the legislative objective described in *Généreux*, it must be acknowledged that the statutory framework for military tribunals, and in particularly courts martial, was significantly altered with 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. What is being challenged here is not the existence of military tribunals, however, nor is it the statutory and regulatory provisions that applied when *Généreux* was decided.

[69] That being said, the Court believes that it would be entirely possible for a military judge to be appointed during good behaviour for a fixed renewable time, if the military judiciary did enjoy that minimum guarantee of security of tenure until retirement age. That option would make it possible to meet sporadic needs when the demand for judicial resources called for an increase in the number of judges for a specific or variable period of time. The question of part-time military judges, however, carries its own problems, and in itself would require significant protections sufficient to preserve judicial independence. Those requirements should of course take into account the rules laid down in the decision of the Supreme Court of Canada in *Lippé*, but must also reflect the decisions of all courts that have had to consider the question of part-time judges since *Lippé* was decided. There are several ways in which Parliament could assign such judicial functions. For example, it could appoint military justices, to hold office during good behaviour for a fixed term, from among civilian judges who already enjoy judicial independence. It would also appoint retired former military judges. There is a host of possibilities, and it is not the role of this Court to involve itself in the legislative drafting process. Whatever approach is adopted, however, will have to meet the minimum criteria to ensure that the judges, whoever they are, have judicial independence. The Court also finds 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 the comments by Associate Chief Justice Robert Pidgeon of the Superior Court of Quebec in *Williamson v. Mercier*, [2004] J.Q. No. 4222, on the question of the exercise of part-time judicial functions or the use of retired judges for fixed periods, to be very much on point and highly instructive.

[70] The Court shares the opinion stated by counsel regarding the relief of a military judge from performance of military duty under QR&O article 19.75. That 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 an officer commanding a command, has the power to relieve a military judge from performance of military duty, for which section 165.23 makes exclusive provision. That is an infringement on the functions of the Inquiry Committee, and of the essential characteristics of judicial independence as they relate to security of tenure and institutional independence. Accordingly, article 19.75, as it now stands, violates paragraph 11(*d*) of the Charter and is not justified under section 1. However, this does not prevent the Chief Military Judge, acting in that capacity, from performing his or her functions and responsibilities in a manner consistent with the Chief Military Judge's own administrative independence, in relation to the discretion to assign judicial functions or functions that are not incompatible with judicial functions. The Court is also of the opinion that QR&O article 101.08 (*Relief from Performance of Military*

Duty – Pre and Post Trial) suffers from the same flaws as article 19.75. Any remedial measure that is applied to article 19.75 would also have to be applied to article 101.08.

[71] With respect to the statutory and regulatory framework that applies to the process for removing military judges, this Court is not persuaded that the entire scheme governing removal must be set out in the Act, as is done in the case of the *Judges Act*. I agree with the comment by prosecution counsel that this is an ideal that is not essential to ensure that military judges have security of tenure, despite the fact that the procedure is less detailed than the procedure set out in the *Judges Act*. Certainly the rules and principles laid down by the Supreme Court of Canada in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 apply to the procedure for removing a military judge. The nature of the removal proceedings imposes a stringent duty of fairness on an Inquiry Committee established by the Governor in Council under subsection 165.21(2) of the *National Defence Act*.

Renewal: Composition of the Renewal Committee and Factors to be Considered

[72] Having regard to the finding of this Court that a reasonable and right-minded person, informed of the relevant statutory provisions and of their historical background and the traditions surrounding them, having considered the question realistically and practically, and examined it thoroughly, would conclude that a military judge appointed under section 165.21 of the *National Defence Act* does not enjoy significant and sufficient guarantees of security of tenure, if those guarantees provide for less than appointment to hold office during good behaviour until the age of retirement so that the judge is able to try the cases that come before him or her on the merits without interference by any outsider in the way in which he or she conducts and decides the case, it is not necessary to examine the composition of the renewal committee as it relates to renewal of military judges' terms or the factors that the committee must consider in performing that function.

Administrative Independence: Organization of the Office of the Chief Military Judge and QR&O Chapter 21 (Summary Investigations and Boards of Inquiry)

[73] The applicant argued that the fact that the Office of the Chief Military Judge is organized under a Ministerial Order and a CFOO issued by the Chief of Defence Staff, that is, it is a unit established by a representative of the executive, that Minister of Defence, through the Chief of Defence Staff, may affect military judges' security of tenure and institutional independence because this is the only organization to which they belong. He submits that the executive could change or nullify the way the Office of the Chief Military Judge is organized or functions simply by changing those instruments. An example of how the judges do not have institutional independence is the fact that the Chief of Defence Staff is the final authority in respect of a grievance filed by a judge. First, the fact that the Office of the Chief Military Judge is organized

as a unit of the regular force does not, in itself, negate the administrative independence of military judges and the Chief Military Judge. Eliminating or amending purely organization documents and replacing them with something else has, in itself, no impact on the factors set out in the Act that guarantee the judges' security of tenure. Absent evidence, this Court would be relying on hypothesis and conjecture and entering the realm of speculation if it were to agree with the applicant's arguments on these questions.

[74] The applicant also submits that under Chapter 21 (*Summary Investigations and Boards of Inquiry*), the Chief of Defence Staff or the Minister of Defence could use their powers to order a summary investigation or board of inquiry to have a military judge explain the reasons for a decision even though he or she is immune from prosecution. That assertion is incorrect. The issue was settled by the Supreme Court in *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 which in fact held that the case law and the general principles of judicial independence clearly establish that even a judge of the Supreme Court hearing a civilian case does not have the power to compel another judge to testify regarding how and why that judge made his or her findings. This is a question of privilege relating to judicial impartiality in decision-making and the role of the judicial branch as the arbiter and guardian of the Constitution. As well, one judge cannot compel another judge to testify as to the reasons why a particular judge was on the bench in a particular case. That is a matter relating to the administrative or institutional aspect of judicial independence. When we examine QR&O Chapter 21 we must have regard to the rules laid down by the Supreme Court on these matters, and the language used is not sufficiently specific to override the fundamental principle that judges may not be compelled to testify about the decision-making process or the reasons for the composition of the court in any particular case..

[75] The applicant made very brief argument that the grievance procedure in the Canadian Forces violates judicial independence. The Court believes that on this question it must have regard to its own conclusion that military judges must be appointed to hold office during good behaviour until the age of retirement. Given the context, the fact that this mechanism exists and applies to the Canadian Forces as a whole, including military judges, is not problematic in itself, although some people might criticize it for failing to adequately protect military judges from the executive, because a military judge is required to ask the executive to remedy a grievance while he or she is performing judicial functions. This is certainly not the ideal way of preserving judicial independence, but the Court is not satisfied that a reasonable and right-minded person, in formed of the relevant legislative provisions and of their historical background and the traditions surrounding them, and who has considered the question realistically and practically, and examined it thoroughly, would conclude that a military judge appointed to hold office until the age of retirement would allow his or her decisions to be influenced because the Chief of the Defence Staff might be the grievance arbitrator in a grievance against him or her. The Canadian Forces grievance

procedure, as set out in sections 29 to 19.28 of the *National Defence Act*, contains sufficient, significant and effective objective guarantees, in the opinion of this Court, particularly the existence of the Canadian Forces Grievance Board and the availability of judicial review under the *Federal Court Act*, to comply with the minimum standards of judicial independence and allow military judges to try the cases that come before them on the merits without interference by any outsider in how they conduct and decide cases. However, the Court is not satisfied that this procedure would be adequate if the Court had found that fixed renewable terms were valid.

Appropriate Remedies: Declaration of Invalidity and Stay of Proceedings

[76] The Court must now decide what the appropriate and just remedy is in the circumstances of this case. The applicant is asking the Court, in addition to the declaration(s) of invalidity, for a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms*.

[77] The respondent submits that any declaration that any one or more provisions of the *National Defence Act* or the regulations are invalid should be surgically tailored and its effect suspended so that Parliament can make the necessary corrections and the Canadian Forces can continue to operate effectively, including by maintaining discipline. In the respondent's submission, suspension is necessary to ensure that the rule of law prevails within the Armed Forces and to protect the public. The respondent submits that if there is no functioning system of courts martial, the entire disciplinary framework within the Canadian Forces will be vulnerable to legal chaos, which would have a detrimental impact on the ability of the Government of Canada to carry out its foreign, defence and security policies for the benefit of all Canadians. The respondent adds that, having regard to the decisions of the Supreme Court in *Schachter* and *Demers*, this Court must not order a stay of proceedings.

[78] It is worth noting that in *Lauzon*, the Court Martial Appeal Court found that it had to strike down section 177 of the *National Defence Act*, which provided for the establishment of Standing Courts Martial at which judges "appointed by or under the authority of the Minister" presided, and the articles of the QR&O dealing expressly with the process for reappointing and removing military judges and establishing their remuneration. In the opinion of the Court Martial Appeal Court, the effect of declaring section 177 to be invalid was that there was no longer a Standing Court Martial and independent judges of that nature to replace it and ensure military discipline. The Court, like the Supreme Court in the second *Reference*, [1998] 1 S.C.R. 3, decided to apply the doctrine of necessity. Section 177 of the *National Defence Act* has of course been amended since *Lauzon* and so Standing Courts Martial are no longer established by the executive and composed of an officer appointed by the Minister. The Standing Court Martial is now a creature of the Act and is composed of 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, it is plain from the language of sections 173 and 174 that a Standing Court Martial will be unconstitutional only if the military judge who comprises the court does not have sufficient significant guarantees of independence. In applying the doctrine of necessity to this case, therefore, we must have regard to the fundamental difference in the wording of the Act now in force as compared to former section 177 of the *National Defence Act*, and after analyzing all of the interests in play, this Court is satisfied that suspension is not necessary in the circumstances. The remedy granted by this Court will not operate to deprive Canadians of a functioning court martial system or make the entire disciplinary framework within the Canadian Forces vulnerable to legal chaos that would have a detrimental impact on the ability of the Government of Canada to carry out its foreign, defence and security policies for the benefit of all Canadians.

[79] Remedies under subsection 52(1) of the *Constitution Act, 1982* are different from the remedies that may be granted under section 24(1) of the Charter, because the two are based on different things. Subsection 52(1) of the *Constitution Act, 1982* provides:

> 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 subsection 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 supremacy of the Constitution of Canada that is set out in section 52 of the *Constitution Act, 1982* is binding on the state in its legislative capacity. There will be a violation of an individual's right in such a case if the state has acted under an unconstitutional law. In cases where the violation results, rather, from something done by an agent of the state, subsection 24(1) will come into play. Thus a statutory provision itself may not be unconstitutional, but what is done will still violate rights that are themselves guaranteed by the Charter. A remedy will rarely be available under subsection 24(1) of the Charter at the same time as action taken under subsection 52(1) of the *Constitution Act, 1982*. Generally, where a provision is declared to be

unconstitutional and immediately becomes of no force or effect, this will be the end of the matter, the matter being the constitutional issue. In those circumstances, no retroactive or retrospective remedy under subsection 24(1) of the Charter will usually be available.

[80] In situations involving Charter violations, the courts have, over the years, developed and applied a range of tests and methods in order to respond appropriate to the requirements of subsection 52(1) of the *Constitution Act, 1982*. Former Chief Justice Lamer addressed this question at length in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pages 695 to 719. The basic rules laid down in *Schachter* is that the courts are guided by the purpose of the legislation and the Charter. Where statutory provisions are found to be inconsistent with the Charter, the door is opened to a number of remedies, including a declaration of invalidity, a suspended declaration of invalidity, severance, reading in, reading down, and constitutional exemption. In volume 2 of this textbook *Constitutional Law in Canada*, Carswell, 1997 (Looseleaf Edition), Professor Peter W. Hogg lists the choices available to the courts under subsection 52(1), at page 37-3:

> 1. Nullification, that is, striking down (declaring invalid) the statute that is inconsistent with the *Constitution*;
>
> 2. Temporary validity, that is, striking down the statute that is inconsistent with the *Constitution* but temporarily suspending the coming into force of the declaration of invalidity;
>
> 3. Severance, that is, holding that only part of the statute is inconsistent with the *Constitution*, striking down only that part and severing it from the valid remainder;
>
> 4. Reading in, that is, adding words to the statute that is inconsistent with the *Constitution* so as to make it consistent with the *Constitution* and valid;
>
> 5. Reading down, that is, interpreting a statute that could be interpreted as inconsistent with the *Constitution* so that it is consistent with the *Constitution*; and,
>
> 6. Constitutional exemption, that is, creating an exemption from a statute that is partly inconsistent with the *Constitution* so as to exclude from the statute the application that would be inconsistent with the Constitution.

[81] The Court has found that appointing a military judge to hold office during good behaviour for a five-year term violates paragraph 11(*d*) of the Charter, in the context of military justice and having regard to developments in the law relating to judicial independence. As I said earlier, this Court is satisfied that a reasonable and right-minded person, informed of the relevant statutory provisions and of their history and the traditions surrounding them, after considering the matter realistically and

practically and examining it thoroughly, would conclude that a military judge appointed to hold office during good behaviour for a term of five years presiding at a Standing Court Martial, or at any other court martial, does not enjoy sufficient security of tenure as to be capable of trying the cases that come before him or her on the merits without interference by any outsider in the way the judge conducts and decides the case.

[82] The Court has also concluded that QR&O article 19.75, dealing with relief from military duties, is incompatible with section 165.23 of the *National Defence Act* and that applying article 19.75 to military judges is incompatible with paragraph 11(*d*) of the Charter because it infringes the essential characteristics of judicial independence as they relate to security of tenure and administrative independence. The Court applied the same reasoning to QR&O article 101.08. Those provisions are not justified under section 1 of the Charter.

[83] The Court must act with restraint in dealing with the Charter violations in this case. The changes that have taken place in the functions of military judges, and the expansion of their role in the military justice system, are so readily apparent from the statutory and regulatory provisions that have been enacted since the enactment of the *National Defence Act*, as a result of the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, that this Court is satisfied, on the evidence as a whole, that Parliament intended that the military justice system, and in particular the Code of Service Discipline, reflect the important role played in that justice system as a whole by the military judges who preside at independent and impartial courts martial. One of the roles of those courts martial is to protect the rights of people who are subject to the Code of Service Discipline, and this includes acting as guardian of the Constitution within the military justice system. The constitutional standard that applies, having regard to all of the circumstances, can be met only if military judges are appointed to hold office during good behaviour until the age of retirement. Based on the factors laid down by former Chief Justice Lamer in *Schachter*, at pages 718 -719, the Court is of the opinion that applying the severance method to remove the portion of subsection 165.21(2) of the *National Defence Act*, "for a term of five years", would not adversely affect the objective of the legislation. The Court in fact believes that this can only help to achieve that objective. Having concluded that appointing a military judge appointed to hold office until the age of retirement is the way to meet the minimum standard for security of tenure that is constitutionally required for judges presiding at courts martial created under the *National Defence Act*, the Court finds that the method used by Parliament to achieve the objective of maintaining an independent and impartial court martial – that being to appoint military judges to hold office during good behaviour for a renewable term of five years – that objective, or rather the method used by Parliament, is not so immune to challenge that severance is an unacceptable encroachment into Parliament's sphere. Severance is not such a major encroachment on the decisions of Parliament to equip the military justice system with independent and impartial courts martial in the context of

service tribunals, that is, summary trials and courts martial, including their respect roles, and the entire framework of courts martial at which military judges preside under the *National Defence Act*.

[84] For the same reasons, QR&O articles 19.75 and 101.08 call for reading in, in order to eliminate their effect on military judges and meet the Charter requirements of judicial independence.

[85] On the question of the remedy sought by the applicant under subsection 24(1) of the Charter, the Court relies on the decisions of the Supreme Court of Canada in *Schachter*, *supra*, and *R. v. Demers*, [2004] 2 S.C.R. 489 and holds that he is not entitled to a retroactive remedy under that subsection. This is also not a situation in which a prospective remedy is available, under the principles laid down by the Supreme Court in *Demers*. The stay of proceedings sought by the applicant is not available because of the conclusions reached by this Court and the remedy granted under subsection 52(1) of the *Constitution Act, 1982*, which governs this question.

Disposition

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

1. Subsection 165.21(2) of the *National Defence Act*, R.S.C. 1985, c. N-5, in part, violates 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 infringement is not demonstrably justified in a free and democratic society, under section 1 of the *Canadian Charter of Rights and Freedoms*.

2. Having regard to the decision of this Court regarding the constitutionality of subsection 165.21(2), subsection 165.12(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 infringement is not demonstrably justified in a free and democratic society, under 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 invalid. This declaration of invalidity is sufficient and it is not necessary to deal with the regulations made under that subsection.

3. QR&O article 19.75 violates paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. This infringement is not demonstrably justified in a free and democratic society, under section 1 of the *Canadian Charter of Rights and Freedoms.* To correct this situation and remedy the constitutional invalidity of

article 19.75, the Court declares that the words “to military judges and” shall be read into QR&O subsection 19.75 (1) and inserted after the words “This article does not apply”.

4 QR&O article 101.08 violates paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. This infringement is not demonstrably justified in a free and democratic society, under section 1 of the *Canadian Charter of Rights and Freedoms.* To correct this situation and remedy the constitutional invalidity of article 101.08, the Court declares that the words “other than a military judge” shall be read into QR&O article 101.08 and inserted between commas after the word “officer” at the beginning of the paragraph.

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