SUPREME COURT OF CANADA

CITATION: R. *v.* Edwards, 2024 SCC 15

APPEALS HEARD: October 16, 2023
JUDGMENT RENDERED: April 26, 2024
DOCKETS: 39820, 39822, 40046, 40065, 40103

BETWEEN:

Leading Seaman C.D. Edwards, Captain C.M.C. Crépeau, Gunner K.J.J. Fontaine and Captain M.J. Iredale
Appellants

and

His Majesty The King
Respondent

AND BETWEEN:

Sergeant S.R. Proulx and Master Corporal J.R.S. Cloutier
Appellants

and

His Majesty The King
Respondent

AND BETWEEN:

Corporal K.L. Christmas
Appellant

and

His Majesty The King
Respondent

AND BETWEEN:

Lieutenant (Navy) C.A.I. Brown
Appellant

and

His Majesty The King
Respondent

AND BETWEEN:

Sergeant A.J.R. Thibault
Appellant

and

His Majesty The King
Respondent

- and -

Canadian Civil Liberties Association and British Columbia Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 149)	Kasirer J. (Wagner C.J. and Côté, Rowe, Jamal and O'Bonsawin JJ. concurring)
DISSENTING REASONS: (paras. 150 to 211)	Karakatsanis J.

Leading Seaman C.D. Edwards, Captain C.M.C. Crépeau, Gunner K.J.J. Fontaine and Captain M.J. Iredale *Appellants*

v.

His Majesty The King *Respondent*

- and -

Sergeant S.R. Proulx and Master Corporal J.R.S. Cloutier *Appellants*

v.

His Majesty The King *Respondent*

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Corporal K.L. Christmas *Appellant*

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Lieutenant (Navy) C.A.I. Brown *Appellant*

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2024 SCC 15

File Nos.: 39820, 39822, 40046, 40065, 40103.

2023: October 16; 2024: April 26.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA

Constitutional law — Charter of Rights — Independent and impartial tribunal — Courts martial — Military judges — Whether military status of military judges violates constitutional guarantee of judicial independence and impartiality to which persons tried before courts martial are entitled — Canadian Charter of Rights and Freedoms, s. 11(d) — National Defence Act, R.S.C. 1985, c. N-5, ss. 165.21, 165.24(2).

The nine accused are members of the Canadian Armed Forces who were charged with service offences under the Code of Service Discipline ("CSD"), which forms Part III of the *National Defence Act* ("*NDA*"), and were brought before courts martial. Under the CSD, members of the Canadian Armed Forces may be charged with service offences, which are serious and encompass offences specific to military personnel and offences under the *Criminal Code* or other acts of Parliament. Service offences are tried before a court martial, which is a military court that has the same powers, rights, and privileges as a superior court of criminal jurisdiction. Courts martial are presided over by military judges, who are required under s. 165.21 of the *NDA* to be barristers or advocates of at least 10 years' standing at the bar of a province and to be military officers and to have been so for at least 10 years. Section 165.24(2) of the *NDA* further provides that the Chief Military Judge must hold a rank of not less than

colonel. The *NDA* provides that military judges can only be removed for cause by the Governor in Council upon recommendation of the Military Judges Inquiry Committee ("MJIC"). As officers, military judges are part of the chain of command, and therefore are also subject to prosecution for service infractions and service offences under the CSD.

The nine accused challenged the statutory requirement that the military judges presiding over their courts martial be officers, alleging that it violates their right to a hearing by an independent and impartial tribunal under s. 11(d) of the *Charter*. In the courts martial, some of the military judges held that they lacked judicial independence by reason of their dual status of judge and officer, and therefore that the respective accused's s. 11(d) rights were infringed. The Court Martial Appeal Court ("CMAC") held that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that military judges meet the minimum constitutional norms of impartiality and independence, and therefore that the accused's s. 11(d) rights were not infringed.

Held (Karakatsanis J. dissenting): The appeals should be dismissed.

Per Wagner C.J. and Côté, Rowe, **Kasirer**, Jamal and O'Bonsawin JJ.: The status of military judges as officers under the *NDA* is not incompatible with their judicial functions for the purposes of s. 11(d) of the *Charter*. Accused members of the Canadian Armed Forces who appear before military judges are entitled to the same guarantee of judicial independence and impartiality under s. 11(d) as accused persons

who appear before civilian criminal courts, but this does not require that the two systems be identical in every respect. As presently configured in the *NDA*, Canada's system of military justice fully ensures judicial independence for military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining discipline, efficiency and morale in the Armed Forces and public trust in a disciplined military. Accordingly, the requirement that military judges be officers pursuant to ss. 165.21 and 165.24(2) of the *NDA* does not fall afoul of s. 11(d) of the *Charter*.

In *R. v. Généreux*, [1992] 1 S.C.R. 259, the Court held that the military status of military judges does not violate s. 11(d). While the Court may depart from precedent when a decision's rationale has been eroded by significant societal or legal change, it has not been shown that the rationale in *Généreux* has been eroded due to such changes, and therefore there is no compelling reason to abandon settled law. The Court in *Généreux* did acknowledge that the place of military judges in the military hierarchy detracts from absolute judicial independence, but it also confirmed that s. 11(d) does not require absolute judicial independence or a sort of truly independent military judiciary that could only be assured by civilian judges. "Absolute" independence is not the constitutional standard endorsed in the Court's jurisprudence.

Généreux establishes that whatever concerns might arise as a result of Parliament's choice to require that military judges be officers, that model is not inherently unconstitutional under s. 11(d). Other models, such as a military judiciary

composed of civilian judges, might also be constitutionally compliant, but *Généreux* does not stand for the proposition that an independent military judiciary requires civilian judges or that only one policy option would be constitutionally compliant. Law reform initiatives in other countries may assist in setting government policy but do not require Parliament to follow suit. Recommendations made in independent reports that were submitted in these cases may be of value as a matter of government policy, but they do not determine what is required by s. 11(d) of the *Charter*. The suitability of various policy options, within the bounds of the Constitution, is a matter of legislative choice. The Court's proper role is to decide whether ss. 165.21 and 165.24(2) of the *NDA* are constitutional. What is at issue is not whether the Canadian military justice system could practically function with civilian judges but whether the impugned requirement under the *NDA* violates the guarantee set by s. 11(d).

Généreux continues to provide useful guidance as precedent on the following matters: s. 11(d) applies to the military justice system; a parallel system staffed by judges with military status who are sensitive to the needs of military justice does not, in itself, offend s. 11(d); and there may well be different modalities for ensuring that military judges have a degree of independence that meets the constitutional minimum. Adapted to the military context, military justice is different in some respects from civilian criminal justice, but the guarantee of independence is no less *Charter*-compliant by reason of this difference.

In *Généreux*, the Court ultimately concluded that military judges did not enjoy a sufficient degree of independence; however, this was based on provisions of the *NDA* that have since been amended. Accordingly, a fresh analysis is required. To assess the independence of a tribunal, a reviewing court asks whether the tribunal may be reasonably perceived as independent. As explained in *Généreux*, the exercise for evaluating independence and impartiality under s. 11(d) is the same: the question is whether a reasonable and informed person would perceive the tribunal as independent and impartial. The reasonable and informed person has knowledge of all the relevant circumstances and views the matter realistically and practically. They are alive to the relevant contextual considerations, they are right minded, they think the matter through, they apply themselves to the question and obtain the required information.

In *Valente v. The Queen*, [1985] 2 S.C.R. 673, the Court identified three essential conditions of judicial independence: security of tenure, financial security and administrative independence. Security of tenure requires that the judge hold office whether until an age of retirement, for a fixed term, or for a specific adjudicative task so as to secure against interference by the executive. Financial security requires that the right to salary and pension be established by law and that judicial remuneration be fixed through a process that includes an independent commission. Administrative independence means judicial control over the administrative decisions that bear directly on the exercise of the judicial function. Additionally, even if the reasonable and informed person would conclude that a court is independent because the three essential conditions are met, they may still come to the conclusion that the court is not impartial

at either the individual or the institutional level. While independent courts benefit from a strong presumption of impartiality that is not easily displaced, if a reasonable and informed person would think it more likely than not that the court would not decide fairly because of individual or institutional concerns, the impartiality of the court may be challenged.

The three essential conditions of judicial independence for military judges are met through the provisions of the *NDA*. First, regarding security of tenure, the *NDA* now provides that military judges are appointed by the Governor in Council, and that unless they are removed for cause, they hold office until they are voluntarily released from the military or resign from the position of military judge, or until they reach the age of 60. Military judges can only be removed from office by the Governor in Council, for cause, upon a recommendation of their judicial peers properly convened as the MJIC. While it is true that military judges, as officers, can be convicted of offences under the CSD and sanctioned to sentences including dismissal from the Armed Forces, a reasonable and informed person, looking at matters practically, including a reading of the *NDA* as a whole, would not view the risk of there being an indirect means of removing military judges to be a realistic possibility. Second, the requirement of financial security is amply met as military judges have their own remuneration scheme and their compensation is fixed through a process that centres on an independent committee. Third, military judges, including the Chief Military Judge, are responsible for the decisions that must be left to judges in order for there to be sufficient administrative independence, such as assigning military judges to preside at courts

martial and establishing procedural rules. These matters are insulated from non-judicial interference by the chain of command.

The place of military judges in the executive branch and their exposure to prosecution for CSD offences do not ground a reasonable perception of a lack of impartiality. First, military judges, as members of the executive, are not in an irretrievable conflict of interest with their judicial role such that the constitutional principle of separation of powers is violated. The manner in which their role as judges is circumscribed makes it plain that they do not act as members of the executive when they perform their judicial duties. Only the Chief Military Judge can assign duties to military judges, and these duties must not be incompatible with their judicial duties, which are also assigned by the Chief Military Judge. Military judges have their own, separate grievance procedure and have protections against interference through performance evaluations by the executive. Like other judges, military judges take a solemn oath to act impartially. They are vested with the same powers, rights and privileges as judges of a superior court of criminal jurisdiction and enjoy the same immunity from liability. The reasonable and informed person would expect that military judges will abide by their oath of office and have confidence that, given their legal training and experience, they will set aside improper influences or recuse themselves if they ever feel that they cannot do so.

Second, a reasonable apprehension of bias is not created by the possible liability of military judges to discipline under the CSD. Military judges are not above

the law and can be held accountable when they act outside their judicial functions for their conduct as members of the Armed Forces. As officers, military judges are part of the chain of command and must comply with lawful orders issued by superior officers. If they fail to do so, they could be subject to discipline under the CSD. However, there are sufficient protections against a perception taking hold that the status of military judges as officers exposes them to interference by the executive in the exercise of their judicial functions. Before military judges can be prosecuted, the person laying the charge must receive legal advice concerning the appropriate charge, and the Director of Military Prosecutions, who has an obligation to act independently of partisan concerns, must decide to proceed with charges. Moreover, an order from a superior officer that has the purpose of interfering with a military judge's judicial work would be an unlawful order and an abusive or purely retaliatory prosecution would be an unlawful prosecution. Overall, the reasonable and informed person would not be concerned that the independence or impartiality of military judges can be undermined because of their status as officers that makes them subject to the CSD.

The requirements in ss. 165.21 and 165.24(2) of the *NDA* therefore meet the standards of judicial independence and impartiality under s. 11(d) of the *Charter*. A reasonable and informed person, looking at the matter realistically and practically and having thought the matter through, would not conclude that the officer status of military judges raises any apprehension of bias or that it amounts to a lack of sufficient independence such that there is a breach of s. 11(d).

Per **Karakatsanis** J. (dissenting): The appeals should be allowed and the legislative scheme under the *NDA* should be declared of no force or effect insofar as it subjects military judges to the disciplinary process administered by military authorities. Members of the Canadian Armed Forces charged with offences are not guaranteed a hearing by an impartial and independent tribunal under s. 11(d) of the *Charter* due to the pressure military judges face as part of the chain of command, particularly, their disciplinary accountability through a regime that can be launched and prosecuted by their hierarchical superiors. The liability of military judges to the executive under the CSD as currently structured undermines their judicial independence. The breach of s. 11(d) cannot be saved by s. 1.

There is agreement with the majority that the requirement that military judges presiding over courts martial also have the military status of officers does not necessarily contravene the s. 11(d) right of a member of the Armed Forces. Properly designed and protected, the executive and judicial roles of military judges can coexist. There is also acceptance that under the *NDA*, military judges can, as officers, be accountable for CSD offences. However, the ability of the military executive to impose discipline on military judges would cause a reasonable and informed person facing a court martial to apprehend that the military judge could be unduly influenced by a loyalty to rank and by the position or policies of the military hierarchy, to the detriment of the accused member's individual rights. There are insufficient safeguards in place to alleviate the potential risk of interference by the military chain of command. There is

not enough institutional separation — or independence — between the executive and the judicial role.

The separation of powers is fundamentally important in maintaining judicial independence, in particular separation from the executive branch. Judges must be able to render decisions based solely on the requirements of the law and justice according to their own conscience, without outside interference or pressure. Judicial independence and impartiality are distinct concepts but they often overlap. Independence is an underlying condition that contributes to the guarantee of an impartial hearing. The three hallmarks of judicial independence — security of tenure, financial security and administrative independence — do not provide a complete answer to the question of whether judges benefit from sufficient independence. A particular tribunal will still lack institutional independence if there is the appearance that it cannot perform its adjudicative role without interference.

Although judicial discipline and accountability, both important imperatives of broader social policy, can be in tension with judicial independence, civilian judges remain accountable for their conduct through ethical and professional rules of conduct via a judicial oversight committee. This encroachment on their independence is justified by the need to protect the integrity of the administration of justice. However, in matters of discipline, the separation between the judiciary and the other branches of government is necessary to avoid the appearance of any intervention based on public opinion and political expediency. Judicial independence requires that

discipline of the judiciary be reserved to an autonomous, apolitical and independent entity.

In the military context, judicial independence is analyzed under these same principles. The standard of independence for military judges is no less than for civilian judges. Military judges, much like civilian judges, are subject to the civilian criminal justice system and are accountable for their misconduct through a judicial oversight committee (the MJIC). However, unlike civilian judges, military judges are also answerable for their conduct to their superiors within the chain of command. By holding a military rank, military judges are subject to service infractions and to the many service offences that can be prosecuted under the CSD for the military objectives of good order and discipline, efficiency and morale. They belong to the same institution responsible for laying charges against them and against the members who appear before them. If convicted of service offences, military judges may face dismissal from the Armed Forces, a criminal record and life-time imprisonment. Moreover, under the *NDA*, military judges face military prosecution for offences already covered by the *Criminal Code* and any other act of Parliament, but the decision to proceed under the military justice system can have a significant impact on their rights. Thus, military judges face a unique disciplinary regime that is launched and prosecuted by the executive, which has no equivalent in the civilian world.

The military context matters in determining whether a reasonable and informed person would be concerned about the pressures military judges face given

their disciplinary accountability towards their superiors. Independent reports, which provide material insight on the concerns of a reasonable and informed member of the public, have long insisted that military judges, who currently keep the rank they held before their judicial appointment, should be awarded their own distinct rank, or civilianized. Because of a judge's given rank, it is reasonable that military personnel facing a court martial may fear a judge could prioritize allegiance to rank and to the chain of command over their respective individual rights. The possibility of the executive reviewing the military judge's conduct either by summary hearing or by court martial would be perceived by a reasonable and informed person as insufficient independence between the executive and judicial roles.

Because of this reasonable apprehension that military judges may not be institutionally impartial, any safeguards that may reduce those effects must be considered. Here, the safeguards said to alleviate the risk that military judges would feel pressure to be loyal towards the chain of command are insufficient. First, the requirement in the *NDA* that military judges must take an oath of office, while an important foundation for an individual judge's independence, does little to guard against an apprehension of institutional bias. Second, military judges do not have sufficient security of tenure simply because they may only ultimately be removed as a military judge for cause through the MJIC. On conviction of a disciplinary offence, the *NDA* allows for sanctions of demotion or dismissal from the Armed Forces, meaning military judges would lose their status as officers and therefore a key qualification for their tenure. In any event, because military judges remain liable for uniquely military

disciplinary charges initiated by their superiors, the rationale that animates the need for security of tenure — securing against interference by the executive — is not safeguarded. Third, the presumption that the Director of Military Prosecutions will carry out its functions independently of partisan concerns cannot be relied upon to safeguard judicial independence. The protection of the rule of law should not depend on a belief that institutions are immune from impropriety and, above all, the DMP does not act independently of the chain of command; rather, the DMP performs its functions under the supervision of the Judge Advocate General, who must be totally loyal and partisan to the interests of the military. A reasonable and informed observer would therefore be concerned about institutional bias because military judges could face discipline from their superiors.

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By Kasirer J.

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By Karakatsanis J. (dissenting)

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APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Rennie and Pardu JJ.A.), 2021 CMAC 3, [2021] C.M.A.J. No. 3 (Lexis), 2021 CarswellNat 2096 (WL), setting aside decisions of Pelletier M.J., 2020 CM 4012, 2020 CarswellNat 5129 (WL); and 2020 CM 4013, 2020 CarswellNat 6959 (WL). Appeal dismissed, Karakatsanis J. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Phelan and Green JJ.A.), 2022 CMAC 1, [2022] C.M.A.J. No. 1 (Lexis), 2021 CarswellNat 6625 (WL), setting aside a decision of d'Auteuil D.C.M.J., 2020 CM 3009, 2020 CarswellNat 5069 (WL). Appeal dismissed, Karakatsanis J. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Heneghan and Scanlan JJ.A.), 2022 CMAC 2, [2022] C.M.A.J. No. 2

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APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Rennie and Pardu JJ.A.), 2022 CMAC 3, [2022] C.M.A.J. No. 3 (Lexis), 2022 CarswellNat 1088 (WL), affirming a decision of Deschênes M.J., 2020 CM 5005, 2020 CarswellNat 5068 (WL). Appeal dismissed, Karakatsanis J. dissenting.

Mark Létourneau, *Patrice Desbiens* and *Francesca Ferguson*, for the appellants.

Dylan Kerr and *Karl Lacharité*, for the respondent.

Zain Naqi and *David Ionis*, for the intervener the Canadian Civil Liberties Association.

David McEwan, *Greg Allen* and *Chloe Trudel*, for the intervener the British Columbia Civil Liberties Association.

The judgment of Wagner C.J. and Côté, Rowe, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

KASIRER J. —

I. Overview

[1] People from all walks of life who face criminal prosecution under Canadian law can draw comfort from the fact that they have a constitutional right to a fair and public hearing by an independent and impartial tribunal. The jurisprudence of this Court has been unwavering in recognizing that the guarantee of judicial independence provided by s. 11(d) of the *Canadian Charter of Rights and Freedoms* applies to persons in the Canadian Armed Forces who are tried before military courts martial. Adapted to the military context, the guarantee applies with the same vigour before a court martial as it does before a civilian court of criminal jurisdiction.

[2] One longstanding source of disquiet, however, — disquiet alluded to by the Court prior to the advent of the *Charter* in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 — has been the military status of military judges and their place, as officers, within the Canadian Forces' chain of command.

[3] Much like for other federally appointed judges, only barristers or advocates of at least 10 years' standing at the bar of a province are eligible for appointment as military judges. But an additional qualification is required for appointment as a military judge who can preside over a court martial. Section 165.21 of the *National Defence Act*, R.S.C. 1985, c. N-5 ("*NDA*"), directs that the Governor in Council may only appoint appropriately qualified jurists who are also military officers and who have been so for at least 10 years. Section 165.24(2) further provides that the Chief Military Judge, designated by the Governor in Council, must hold a rank of not less than colonel.

[4] Charged with service offences under military law, the appellants allege that the statutory requirement that the judges presiding over their courts martial be officers violates s. 11(d). Their divided loyalties as judge and officer are said to deflect military judges from a proper exercise of their judicial duties and leaves them vulnerable to pressure from the chain of command. The appellants say that there is no practical rationale for the requirement that military judges be officers. They argue that the law as it stands is unconstitutional in that it deprives the accused of their right to a trial before a truly independent and impartial judge. Insofar as ss. 165.21 and 165.24(2) of the *NDA* require military judges to be military officers, the appellants call on the Court to declare those provisions of no force or effect under s. 52 the *Constitution Act, 1982*.

[5] In *R. v. Généreux*, [1992] 1 S.C.R. 259, Lamer C.J. saw plainly that the association between the military hierarchy and military judges could detract from the "absolute independence and impartiality of such tribunals" (p. 294). At the same time, he understood that the military training and rank of military judges as officers were a means of ensuring that military judges are "sensitive to the need for discipline, obedience and duty" and to military "efficiency" (p. 295). In the end, the Court decided that the military status of military judges was not, in itself, sufficient to give rise to a violation of s. 11(d) of the *Charter*.

[6] The appellants now challenge that conclusion, arguing that *Généreux* should not be followed to the letter because of social changes affecting military justice that have come to light since that judgment was rendered in 1992. While they accept

that a parallel system of military justice is constitutionally sound, the appellants say that requiring judges to be officers is not compatible with judicial independence. In their view, there are "no legislative safeguards [that] prevent the chain of command from exerting disciplinary pressure on military judges" (A.F., at para. 97). The appellants add that their constitutional challenge is part of a "public confidence crisis" in military justice, characterized by an "insular military culture" that is exacerbated by the statutory requirement that judges be officers (paras. 13, 22-25 and 129). The appellants say that, on a proper constitutional standard, truly independent military judges should be civilians, a model for military justice that has proved workable in the United Kingdom and New Zealand.

[7] In first instance, some of the military judges held that s. 11(d) was infringed as they lacked judicial independence by reason of their dual status of judge and officer. Stays of proceedings were entered for some of the appellants charged with service offences under the Code of Service Discipline ("CSD"), in Part III of the *NDA*, as a remedy for this *Charter* breach. On appeal, the Court Martial Appeal Court set aside the relevant stays. Citing *MacKay* and *Généreux*, the CMAC decided that the safeguards in the *NDA* adequately protect judicial independence and impartiality in light of the purposes of military justice in Canada.

[8] It is true, as the appellants say, that military justice has changed from the command-centric model that was still partially in place at the time of *Généreux*. I am nevertheless of the view that this Court's endorsement of the constitutionality of a

parallel military system of justice, staffed by military judges chosen from the ranks of officers, continues to rest on a proper constitutional footing. Despite changes spoken to by the appellants, the dual status of military judges does not offend s. 11(d).

[9] As this Court observed in *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144, "shortcomings" in judicial independence and impartiality in the applicable legislative schemes have meant, at different times in the history of Canadian military justice, that this constitutional imperative has not always been met (para. 45). The appellants have seized on this uneven history to argue that the current safeguards fail to ensure "truly independent" military judges who are free from actual or reasonably apprehended bias. They say the military status of military judges means that they are unable to meet the minimum standards for independence and impartiality guaranteed by the *Charter*. Military judges belong to the same Canadian Armed Forces institution that lays charges against the accused who appear before them. The appellants argue that military judges cannot, as members of the executive, exercise core judicial functions independently. They are subject to disciplinary pressures from their superior officers in the chain of command which could reasonably be perceived to weaken their ability to render justice impartially. In sum, the appellants say that accused persons tried before courts martial are deprived of their constitutional right to be tried by an independent and impartial judge for which there is no rationale, military or otherwise. A reasonable and informed person, viewing the matter realistically and practically, would inevitably conclude that the legislative requirement that military judges be military officers as a condition of appointment raises a reasonable apprehension of bias.

[10] I disagree. To be plain, the appellants are most certainly right to say that as a matter of constitutional law, accused members of the Canadian Armed Forces who appear before military judges are entitled to the same guarantee of judicial independence and impartiality under s. 11(d) as accused persons who appear before civilian criminal courts. But as Moldaver and Brown JJ. wrote in *Stillman*, "this does not require that the two systems be identical in every respect" (para. 44, citing *Généreux*). As presently configured in the *NDA*, Canada's system of military justice fully ensures judicial independence for military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining "discipline, efficiency and morale" in the Forces and "public trust in . . . a disciplined armed force" (ss. 55 and 203.1(2)(b)). Properly understood, the military context does not diminish judicial independence.

[11] In order to protect the constitutional imperative of judicial independence, military judges are not ordinary military officers. They are properly insulated, by law, from the chain of command in their work as judges so that the persons who come before them charged with service offences benefit from constitutionally guaranteed judicial independence. It is true that, like all judges in Canada, military judges are subject to the criminal law and, as military officers, they are subject to military law. Military judges, as officers, are members of the executive and themselves subject to the CSD. But the law protects them from interference from their superiors in the chain of command in their judicial work. While they continue to hold rank and remain part of

the military hierarchy, “they are first and foremost judges” (outline of argument in respondent’s condensed book, tab 1).

[12] Military judges cannot be subject to discipline for their work as judges. The *NDA* provides for a myriad of safeguards that protect military judges, notwithstanding their military status, as independent judges. By way of example, only the Chief Military Judge can assign duties to them, and these duties must not be incompatible with their judicial duties (ss. 165.23(2) and 165.25). Like other judges, military judges take a solemn oath to act impartially. They are vested with the same powers, rights and privileges as judges of a superior court of criminal jurisdiction and enjoy the same immunity from liability (ss. 165.231 and 179). Military judges enjoy meaningful security of tenure as judges that protects them from what might be feared as vulnerabilities in respect of mistreatment by superior officers. They have a separate regime for grievances (s. 29(2.1)) and they have protection against relief from performance of military duty (*Queen’s Regulations and Orders for the Canadian Forces* (“*QR & O*”), art. 19.75(1)). Military judges have a separate pay scheme from that of other officers that is not fixed by their superiors but by an independent Military Judges Compensation Committee (*NDA*, s. 165.33). They can only be removed for cause by the Governor in Council upon recommendation of the Military Judges Inquiry Committee (“MJIC”), consisting of three judges of the CMAC appointed by the Chief Justice of that court (ss. 165.21(3) and 165.31). Importantly, the law protects military judges from improper prosecution under the CSD. Before a military judge can be prosecuted, the person laying the charge must receive legal advice concerning the

appropriate charge (*QR & O*, art. 102.07(2)(*b*)) and the Director of Military Prosecutions, who has an obligation to act independently of partisan concerns, must decide to proceed with charges (*NDA*, ss. 161.1(1) and 165). Moreover, an order from a superior officer that had the purpose of interfering with their judicial work would be an unlawful order and an abusive or purely retaliatory prosecution would be an unlawful prosecution.

[13] The hallmarks of military judges' independence are plainly present notwithstanding their status as officers: the military justice system guarantees their security of tenure, financial security and administrative independence (see *Valente v. The Queen*, [1985] 2 S.C.R. 673). The military status of these judges would not lead a reasonable and informed person, viewing the matter realistically and practically, to conclude that there is an apprehension of bias or insufficient independence (see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394). Canada's system of military justice ensures its purpose of maintaining discipline, efficiency and morale in the Canadian Armed Forces while respecting the guarantee of judicial independence. The safeguards for judicial independence in the *NDA* help to sustain public trust in military justice as a statutory regime that, in the words of one scholar, is not a mere [TRANSLATION] "instrument of discipline" but a "tool of justice" (J.-B. Cloutier, "L'utilisation de l'article 129 de la *Loi sur la défense nationale* dans le système de justice militaire canadien" (2004), 35 *R.D.U.S.* 1, at p. 97).

[14] Within the bounds of the Constitution, Parliament is of course free to enact another system for military justice, but that policy choice does not fall to the courts. There may indeed be different or even better models for judging offences in the military than what is currently set forth in the *NDA* that also rest on a proper disciplinary rationale and also meet the strictures of s. 11(d). That is not the question before us and, it is fair to say, is not a question that this Court is institutionally designed to answer. Replacing Canada's system of military justice with a model used in other countries as the appellants propose would require close study to determine the extent to which foreign approaches could serve as a model for Canada. Courts are not equipped to do that work, nor is it their proper constitutional role. Instead, this Court is called upon to decide whether the regime that existed at the relevant times is constitutionally compliant. I conclude that it is.

[15] In sum, s. 11(d) of the *Charter* does not dictate a particular model of military justice nor does it require that only civilian judges preside over trials for service offences such as the offences relevant to these appeals. The Constitution allows Parliament a measure of choice in the design of justice before courts martial and does not require that military justice be exactly identical to its civilian counterpart. In my respectful view, the requirement that military judges be officers pursuant to ss. 165.21 and 165.24(2) of the *NDA* does not fall afoul of s. 11(d). I propose that the appeals be dismissed.

II. Background

[16] The nine appellants are members of the Canadian Armed Forces charged with service offences who were brought before courts martial for trial. Military personnel and certain other persons are subject to the CSD, which forms Part III of the *NDA*.

[17] Service offences are the most serious infringements of the CSD, encompassing offences specific to military personnel — such as disobeying the lawful commands of a superior officer — and offences under the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), or any other act of Parliament that are "committed by a person while subject to the Code of Service Discipline" (*NDA*, s. 2 "service offence"). They are tried before a court martial, which is a military court that has the same powers, rights, and privileges as a superior court of criminal jurisdiction (*NDA*, s. 179). Courts martial are presided over by military judges who are officers.

[18] Leading Seaman C.D. Edwards was charged with conduct to the prejudice of good order and discipline under s. 129 of the *NDA* for using cocaine, contrary to art. 20.04 of the *QR & O*.

[19] Captain C.M.C. Crépeau was charged with disobeying lawful commands of a superior officer under s. 83 of the *NDA*, behaving with contempt towards a superior officer under s. 85, and conduct to the prejudice of good order and discipline under s. 129.

[20] Gunner K.J.J. Fontaine was charged with offences punishable under s. 130 of the *NDA*, including trafficking of cocaine and possession of cocaine and methamphetamine with the intention of trafficking, contrary to s. 5(1) and (2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[21] Captain M.J. Iredale was charged with three counts of sexual assault contrary to s. 271 of the *Cr. C.*, punishable under s. 130 of the *NDA*, and three counts of conduct to the prejudice of good order and discipline under s. 129.

[22] Corporal K.L. Christmas was charged with sexual assault contrary to s. 271 of the *Cr. C.*, punishable under s. 130 of the *NDA*, with disgraceful conduct for touching another person's genitals without consent under s. 93, and for drunkenness under s. 97.

[23] Sergeant S.R. Proulx was charged with disobeying lawful commands of a superior officer, behaving with contempt towards a superior officer, and conduct to the prejudice of good order and discipline, under ss. 83, 85 and 129 of the *NDA*, respectively.

[24] Master Corporal J.R.S. Cloutier was charged with disgraceful conduct under s. 93 of the *NDA*, drunkenness under s. 97, and conduct to the prejudice of good order and discipline under s. 129.

[25] Lieutenant (Navy) C.A.I. Brown was charged with sexual assault (*Cr. C.*, s. 271) and forcible confinement (*Cr. C.*, s. 279(2)), punishable under s. 130 of the *NDA*.

[26] Sergeant A.J.R. Thibault was charged with sexual assault contrary to s. 271 of the *Cr. C.*, punishable under s. 130 of the *NDA*.

[27] With the exception of Sgt. Thibault, each of the accused challenged the independence and impartiality of the military judges before whom they were brought to trial. Sgt. Thibault raised the same question on appeal of his conviction.

[28] Key to understanding the constitutional challenges raised in these appeals are the cases of *R. v. Pett*, 2020 CM 4002, and *R. v. D'Amico*, 2020 CM 2002, judgments that themselves are not before this Court.

[29] In *Pett*, the court martial held that an Order from the Chief of the Defence Staff, dated October 2, 2019, violated Master Corporal Pett's right under s. 11(d) to a trial before an independent and impartial tribunal. That Order designated a single officer "to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge" (para. 9 (CanLII); R.R., tab 1). The court martial in *Pett* held that military judges are immune from the disciplinary process applicable to officers while they hold judicial office because discipline for military judges falls exclusively to the MJIC. The Order was thus unlawful in that it purported to grant authority to a

commanding officer to charge a military judge, as an officer, with an offence. By undermining this essential protection of military judges' independence under the *NDA*, the Order violated s. 11(d). The court martial declared the impugned part of the Order to be of no force and effect. Another court martial reached the same conclusion in *D'Amico*.

[30] With the exception of Sgt. Thibault, all of the appellants alleged in their court martial proceedings that, as in *Pett* and *D'Amico*, the fact that their trials were presided over by a military judge who was also an officer violated their right to be tried by an independent and impartial tribunal under s. 11(d) of the *Charter*.

III. Judicial History

A. *Courts Martial*

(1) *R. v. Edwards*, 2020 CM 3006; *R. v. Crépeau*, 2020 CM 3007; *R. v. Fontaine*, 2020 CM 3008; and *R. v. Iredale*, 2020 CM 4011

[31] In *Edwards*, the court martial agreed with *Pett* and *D'Amico* that the *NDA* protects military judges' independence by insulating them from liability for service offences under the CSD. Instead, military judges were answerable for disciplinary matters through the MJIC. The court martial held that the impugned Order dated October 2, 2019 violated this statutory safeguard by wrongly designating a commanding officer for the purposes of applying the CSD regime, including service

offences, to military judges. The Order therefore infringed the right of L.S. Edwards to a hearing by an independent and impartial tribunal pursuant to s. 11(d) of the *Charter* and the infringement was not justified by s. 1. The court entered a stay of proceedings for L.S. Edwards as a remedy under s. 24(1) of the *Charter*.

[32] In *Crépeau*, the military judge followed the reasoning in *Edwards*. The judge rejected a direct constitutional challenge to specific sections of the *NDA* but entered a stay because the impugned Order violated s. 11(d) by undermining judicial independence. In *Fontaine* and *Iredale*, stays were entered for the accused based on comparable reasoning. Referring to his conclusions in *Pett*, the presiding military judge wrote in *Iredale*, "[m]y position to the effect that a military judge should never be brought before a court martial while in office remains" (para. 37 (CanLII)).

(2) *R. v. Christmas*, 2020 CM 3009; and *R. v. Proulx*, 2020 CM 4012

[33] After the Chief of the Defence Staff suspended the October 2, 2019 Order, Canadian Forces Organization Order 3763, which includes a section pertaining to the disciplinary regime for military judges, remained in effect. The presiding military judges in *Christmas* and *Proulx* concluded that the deficiencies still resulted in a breach of s. 11(d), and thus entered stays of proceedings.

(3) *R. v. Cloutier*, 2020 CM 4013; and *R. v. Brown*, 2021 CM 4003

[34] In *Cloutier* and *Brown*, military judges held that despite changes to orders bearing on discipline of military judges, the requirements of s. 11(d) were still not met. While concluding that the s. 11(d) right of Master Corporal Cloutier was violated, the military judge directed that, as a remedy, the proceedings be terminated without adjudication pursuant to s. 24(1). In Lieut. Brown's case, the military judge followed the reasoning in *Cloutier*, and entered a stay of proceedings.

(4) *R. v. Thibault*, 2020 CM 5005

[35] Sgt. Thibault did not initially allege a violation of his right to be tried by an independent and impartial tribunal. He was found guilty of sexual assault.

B. *Court Martial Appeal Court of Canada*

(1) *R. v. Edwards; R. v. Crépeau; R. v. Fontaine; R. v. Iredale*, 2021 CMAC 2 ("*Edwards et al.*")

[36] The Crown appealed from the stays of proceedings in *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. In a unanimous judgment, the Court Martial Appeal Court allowed the appeals, set aside the stays and directed that the matters proceed to trial. It agreed with the Crown that the impugned Order did not raise a reasonable apprehension of bias such that the independence of the court martial was compromised. Capt. Crépeau had also filed a cross-appeal to challenge the constitutionality of sections of the *NDA* pursuant to s. 11(d), which provide that military judges, as officers, are subject

to the CSD and thus to pressure from military hierarchy in a manner that is incompatible with judicial independence. The cross-appeal was dismissed.

[37] The CMAC in *Edwards et al.* held that the military judges made two errors of law. First, it held that "[t]he premise upon which the decisions under appeal is based — that one cannot be both a military judge and an officer — is simply inconsistent with binding precedent, and if correct, defies the very purpose and rationale of the military justice system" (para. 7 (CanLII)). Second, it held that the military judges failed to apply the test for judicial independence that has been set out by this Court. Since "[t]he military judges did not consider the context or purpose of the military justice system", they failed to "look at the matter 'realistically and practically' as required by the Supreme Court and they failed to take into account the contextual considerations which safeguard the independence and impartiality of military judges" (para. 9).

[38] Contrary to the position taken up by most of the courts martial relying on *Pett*, the CMAC rejected the view that only the MJIC can hear complaints relating to disciplinary matters brought against military judges. Instead, the CMAC noted that the MJIC "plays a role similar to that of an Inquiry Committee established through the Canadian Judicial Council" for the removal of military judges (para. 80). As such, "the MJIC does not impose any penalties, does not establish civil liability nor does it make findings of criminal guilt or innocence" (para. 82). It has "no power to impose any discipline . . ., short of recommending removal" (para. 83).

[39] The CMAC explained that, like other members of the Canadian Forces, military judges may be prosecuted for offences under the CSD. The proper issue before the court was thus whether the military status of military judges violates the constitutional protection of judicial independence.

[40] Relying principally on *Généreux*, the CMAC explained the purpose of a separate system of military justice. The court wrote:

> Military justice, in whatever form, promotes the discipline, efficiency and morale of the Canadian military for the development of operationally ready and effective forces wherever deployed in the world. This mission concept and declaration of purpose is unknown to the civilian criminal justice system. [para. 45]

[41] The CMAC noted that, under s. 60(2) of the *NDA*, the CSD applies to all military personnel, including officers who are military judges. The court observed there are good reasons for this rule. A commander in a theatre of operations is responsible for the mission success and safety of those within their unit. All officers and non-commissioned members must perform all lawful duties. The court recalled that "[t]his, in the profession of arms, is considered unlimited liability" (para. 63). In this context, "[d]iscipline is essential to the military" (para. 64). All serving members are expected to undertake general defence duties in addition to their calling within the Canadian Armed Forces. "These requirements apply to all", the court concluded, "including officers who are also military judges" (para. 66).

[42] Moreover, the court observed that the independence of military judges is not undermined by their status as members of the executive. Holding otherwise would "not reflect the reality of our Westminster system of government" (para. 68) since judges, including civilian judges, often take up executive functions such as participating in commissions of inquiry.

[43] The CMAC held that the potential for military judges to be prosecuted under the CSD does not lead to a violation of s. 11(d). Military judges are subject to the CSD in much the same way as civilian judges are subject to the criminal law. There is no reason to think that military judges will be subject to malicious prosecutions since it is important to "expect behaviour consistent with the constitutional norm that prosecutors and commanders will exercise prosecutorial discretion in a quasi-judicial manner and independent of partisan concerns" (para. 90).

[44] The court concluded: "An informed person, viewing the matter realistically and practically — and having thought the matter through could, in our respectful view, reach no other conclusion than military judges meet the minimum constitutional norms of impartiality and independence . . ." (para. 114).

(2) *R. v. Proulx; R. v. Cloutier*, 2021 CMAC 3 ("*Proulx et al.*")

[45] In these appeals, the CMAC affirmed its decision in *Edwards et al*. It also considered whether the Canadian Forces Organization Order, the position of the Office of the Chief Military Judge within the military hierarchy, or the combined application

of ss. 12(1) and (2), 17, 18, and 60 of the *NDA* undermined the independence of military judges. The CMAC answered all three questions in the negative "[f]or substantially the same reasons set out in *Edwards [et al.]*" (para. 14 (CanLII)). It allowed the appeals and ordered that the trials of Sgt. Proulx and Master Corporal Cloutier proceed.

(3) *R. v. Christmas*, 2022 CMAC 1; *R. v. Brown*, 2022 CMAC 2; and *R. v. Thibault*, 2022 CMAC 3

[46] In the appeals concerning Cpl. Christmas and Lieut. Brown, the CMAC allowed the appeals, lifted the stays and ordered the trials to proceed for substantially the same reasons set out in *Edwards et al.* and *Proulx et al*. In Sgt. Thibault's appeal, he appealed his conviction for sexual assault and argued, among his grounds of appeal, that s. 165.21 of the *NDA* requiring military judges to be officers violates s. 11(d). This was rejected by the CMAC and the appeal against the conviction was dismissed.

IV. Issues and Submissions of the Parties

[47] The overarching issue in these appeals is whether the military status of military judges under the *NDA* violates the guarantee of judicial independence and impartiality set out in s. 11(d) of the *Charter*.

[48] The appellants say that the officer status of military judges raises a reasonable apprehension of bias in the mind of "an informed person, viewing the matter realistically and practically" (A.F., at para. 51 (emphasis deleted), citing *Committee for*

Justice and Liberty, at p. 394), such that there is a breach of s. 11(d). They say that since the Crown has conceded that an established breach of s. 11(d) cannot be saved by s. 1, ss. 165.21 and 165.24(2) of the *NDA*, which provide that military judges must be officers, must be declared of no force or effect under s. 52 of the *Constitution Act, 1982*. The parties have made further submissions concerning the appropriateness of an immediate or a suspended declaration of invalidity should the issue arise.

[49] The appellants offer submissions under two main headings.

[50] First, they say that the CMAC was wrong to say that precedent, in particular *Généreux*, resolves these appeals. The foundation of the Court's reasoning in *Généreux* no longer holds true: the military status of military judges is not a practical necessity to ensure discipline, morale and efficiency in the military. Drawing on comments made by Lamer C.J. in his majority reasons, the appellants propose a reading of *Généreux* that supports the view that the military status of military judges raises a reasonable apprehension of bias and that only civilian judges can be "truly independent". They contend that social change since *Généreux* shows that military judges can now be truly independent because the ends of military justice do not require them to be officers. The appellants point to other countries in which military judges are civilians, arguing that this proves that justice in a parallel system could realistically be assured for the Canadian Armed Forces without breaching the *Charter*.

[51] Second, the appellants point to a series of indicia in the *NDA* that demonstrate the requirement that military judges be officers is incompatible with the

constitutional right to be tried by an independent and impartial tribunal. Notably, military judges, as officers, belong to the very institution that lays charges against the accused in courts martial, which violates the constitutional imperative of the separation of powers. Further, as part of the chain of command, military judges are subject to discipline under the CSD, which exposes them to real and perceived pressure in the exercise of their judicial duties. The appellants argue that the *NDA* does not provide sufficient guarantees of judicial independence and that, in the eyes of a reasonable and informed person, the dual status of military judges would raise a reasonable apprehension of bias.

[52] The Crown answers that this Court's jurisprudence, in particular *Généreux*, confirms that the status of military judges as officers does not, in itself, violate s. 11(d). Pointing further to the hallmarks of judicial independence identified in *Valente*, the Crown contends that military judges have security of tenure, financial security and administrative independence under the *NDA*. While it is true that, as officers, they are subject to the CSD, military judges are like all judges in Canada in that they are not above the law. None of this offends s. 11(d).

[53] Following an overview of the statutory and constitutional setting for these appeals, I propose to address the appellants' two principal arguments attacking the constitutionality of ss. 165.21 and 165.24(2) of the *NDA*. First, I will examine whether the holding in *Généreux* that the military status of military judges does not violate s. 11(d) should be revisited in light of changed social circumstances. Second, I will turn

to whether the protection for judicial independence and impartiality of military judges meets the constitutional requirements of the guarantee in s. 11(d) of the *Charter*. Like the CMAC, I conclude that there is no breach; a reasonable and informed person, looking at the matter realistically and practically, would not conclude that there is any apprehension of bias or lack of sufficient independence. There is thus no need to consider the effect of s. 1 or whether a constitutional remedy of any sort, suspended or otherwise, is in order.

V. Relevant Constitutional and Statutory Provisions

[54] The legislative and constitutional setting for this dispute is complex.

[55] I start with s. 11(d) of the *Charter* that provides:

> **11** Any person charged with an offence has the right
>
> . . .
>
> **(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[56] The system of military justice is governed principally by the *NDA*, the *QR & O* made under the authority of s. 12 of the *NDA*, and the Canadian Forces Organization Orders.

[57] In *Stillman*, Moldaver and Brown JJ. described the legislative history of Canada's parallel system of military justice and "its evolution over time from a

command-centric model of discipline to a full partner in administering justice alongside the civilian justice system" (para. 20). *Stillman* did not bear on s. 11(d) of the *Charter* and left open the possibility of challenging the independence and impartiality of military judges (para. 86). But Moldaver and Brown JJ. situated the *Charter*-era legislative and regulatory reforms, as well as the relevant jurisprudence, in the development of a parallel military justice system that sought generally to provide more independence to actors in that system, including military judges (paras. 42 et seq.). In particular, they considered *Généreux* which, they wrote, confirms "that the military justice system, like its civilian counterpart, must comply with the *Charter*, although this does not require that the two systems be identical in every respect" (para. 44).

[58] The term "discipline" as used in the *NDA* reflects its particular sense in military parlance. Discipline in the military "has a far wider meaning than the simple enforcement of laws" (D. McNairn, "A Military Justice Primer, Part I" (2000), 43 *Crim. L.Q.* 243, at pp. 249-50). Discipline is the prerogative of military commanders to issue lawful orders that must be obeyed by members that are inferior to them in the chain of command (see *Stillman*, at para. 38). Discipline in the military sense should thus not be confused with the term as it is used in connection with the regulation of conduct of members of a self-governing body, such as a professional order, where issues going to the independence and impartiality of decision makers may also arise (see, e.g., *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 138, per Lamer C.J.). As noted in the *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (1997), chaired by the Right Honourable Brian Dickson, "[t]he maintenance of

effective discipline by the established chain of command continues to be a prime prerequisite for a competent and reliable military organization" (p. i). Notwithstanding the imperatives of military discipline, as former Chief Justice Dickson and his colleagues explained, the supremacy of the rule of law and, notably, the *Charter* "must be fully respected . . . within the military justice system" (p. ii).

[59] Canada's separate system of military justice is designed to "foster discipline, efficiency, and morale in the military" (*Stillman*, at para. 20; see also M. Gibson, "Military justice in operational settings, peacekeeping missions and situations of transitional justice", in A. Duxbury and M. Groves, eds., *Military Justice in the Modern Age* (2016), 381, at p. 382). Since amendments brought to the *NDA* in 2019, this purpose is codified in s. 55 as the guiding principle for the CSD.

[60] Accused members of the Forces may be disciplined in one of two ways. Members accused of service infractions, which are less serious than service offences, appear in summary hearings presided over by a commanding officer or their delegate (*NDA*, ss. 162.4 and 162.94). The constitutionality of those proceedings is not directly at issue in these appeals. The particular aspect of the CSD that is engaged by the charges brought against the appellants is "service offences", which are to be heard by a "standing" court martial, presided over by a military judge sitting alone, who will decide on criminal responsibility on a criminal law standard.

[61] Members who are found guilty of service offences may be subject to a range of sanctions ranging in severity from minor punishments to imprisonment for life

(*NDA*, s. 139). The available sentences include dismissal from service with disgrace and dismissal without disgrace (s. 139(1)(c) and (e)).

[62] The *NDA* also contains provisions that deal specifically with military judges who are, as previously noted, both judges and officers:

> **165.21 (1)** 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 and who has been an officer for at least 10 years to be a military judge.
>
> **(2)** Every military judge shall, before commencing the duties of office, take the following oath of office:
>
> I ..... solemnly and sincerely promise and swear (or affirm) that I will impartially, honestly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as a military judge. (*And in the case of an oath:* So help me God.)
>
> **(3)** A military judge holds office during good behaviour and may be removed by the Governor in Council for cause on the recommendation of the Military Judges Inquiry Committee.
>
> **(4)** A military judge ceases to hold office on being released at his or her request from the Canadian Forces or on attaining the age of 60 years.
>
> **(5)** A military judge may resign from office by giving notice in writing to the Minister. The resignation takes effect on the day on which the Minister receives the notice or on a later day that may be specified in the notice.
>
> . . .
>
> **165.23 (1)** Military judges shall preside at courts martial and shall perform other judicial duties under this Act that are required to be performed by military judges.
>
> **(2)** In addition to their judicial duties, military judges shall perform any other duties that the Chief Military Judge may direct, but those other duties may not be incompatible with their judicial duties.

> **(3)** Military judges may, with the concurrence of the Chief Military Judge, be appointed as a board of inquiry.
>
> **165.231** A military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction.
>
> **165.24 (1)** The Governor in Council may designate a military judge, other than a reserve force military judge, to be the Chief Military Judge.
>
> **(2)** The Chief Military Judge holds a rank that is not less than colonel.
>
> **165.25** The Chief Military Judge assigns military judges to preside at courts martial and to perform other judicial duties under this Act.

[63] The *NDA* also establishes the MJIC that may be charged with conducting an inquiry and making a recommendation to the Governor in Council as to whether a military judge should be removed from office:

> **165.31 (1)** There is established a Military Judges Inquiry Committee to which the Chief Justice of the Court Martial Appeal Court shall appoint three judges of the Court Martial Appeal Court.
>
> **(2)** The Chief Justice shall appoint one of the judges to act as Chairperson.
>
> **(3)** The inquiry committee has the same powers, rights and privileges — including the power to punish for contempt — 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.
>
> **165.32 (1)** The Military Judges Inquiry Committee shall, on receipt of a request in writing made by the Minister, commence an inquiry as to whether a military judge should be removed from office.

(2) The inquiry committee may, on receipt of any complaint or allegation in writing made in respect of a military judge, commence an inquiry as to whether the military judge should be removed from office.

(3) The Chairperson of the inquiry committee may designate a judge appointed to the committee to examine a complaint or allegation referred to in subsection (2) and to recommend whether an inquiry should be commenced.

(4) The military judge in respect of whom an inquiry is held shall be given reasonable notice of the inquiry's subject matter and of its time and place and shall be given an opportunity, in person or by counsel, to be heard at the inquiry, to cross-examine witnesses and to adduce evidence on his or her own behalf.

(5) The inquiry committee may hold an inquiry either in public or in private unless the Minister, having regard to the interests of the persons participating in the inquiry and the interests of the public, directs that the inquiry be held in public.

(6) The Chairperson of the inquiry committee may engage on a temporary basis the services of counsel to assist the committee and may, subject to any applicable Treasury Board directives, establish the terms and conditions of the counsel's engagement and fix their remuneration and expenses.

(7) The inquiry committee may recommend to the Governor in Council that the military judge be removed if, in its opinion,

(a) the military judge has become incapacitated or disabled from the due execution of his or her judicial duties by reason of

(i) infirmity,

(ii) having been guilty of misconduct,

(iii) having failed in the due execution of his or her judicial duties, or

(iv) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her judicial duties; or

(b) the military judge does not satisfy the physical and medical fitness standards applicable to officers.

> **(8)** The inquiry committee shall provide to the Minister a record of each inquiry and a report of its conclusions. If the inquiry was held in public, the inquiry committee shall make its report available to the public.

VI. Analysis

A. *Implications of Généreux*

[64] The appellants contest the view that *Généreux* decided that military judges can be military officers without offending s. 11(d) of the *Charter*. They seize on what they describe as Lamer C.J.'s acknowledgement that military judges who are part of the chain of command cannot be truly independent. They focus on Lamer C.J.'s comment that, for the law as it stood in 1992, "the necessary association between the military hierarchy and military tribunals — the fact that members of the military serve on the tribunals — detracts from the absolute independence and impartiality of such tribunals" (p. 294). The appellants say that it was only due to concerns of what they call "practical necessity" that *Généreux* held that the dual status of military judges was not, as a matter of principle, unconstitutional at the time. Even if the defects in the legislation at the time have been corrected since *Généreux*, they argue that Lamer C.J.'s broader affirmation that military judges can be officers and retain their judicial independence is no longer good law.

[65] For the appellants, new and uncontroversial social facts have "eroded" the authority of *Généreux*, which they argue is no longer binding precedent (citing *R. v.*

Kirkpatrick, 2022 SCC 33, at para. 221, per Côté, Brown and Rowe JJ., concurring). They say civilian judges, particularly those who are former members of the military, would today have the necessary understanding of military life to preside over courts martial. Experience from other countries shows that civilians can realistically act as military judges in Canada. The requirement that military judges be officers under the *NDA*, say the appellants, violates s. 11(d) because a truly independent military judiciary requires civilian judges, contrary to what the Court held in *Généreux*.

[66] In my view, the appellants have misread *Généreux* and, in doing so, have failed to identify a compelling reason to abandon settled law. While this Court may depart from precedent when a "decision's rationale has been eroded by significant societal or legal change" (*Kirkpatrick*, at para. 202; see also para. 219), the appellants have not shown that the rationale in *Généreux* has been eroded due to the changes that they purport to identify.

[67] Lamer C.J. did hold that military courts must comply with s. 11(d) of the *Charter* and he decided that the structure and constitution of the General Court Martial, as it existed at the time of trial in *Généreux*, did not satisfy the requirements of judicial independence. The appellants are right that Lamer C.J. acknowledged that the place of military judges in the military hierarchy detracts from "absolute" judicial independence (p. 294).

[68] Lamer C.J. confirmed, however, that s. 11(d) does not require "absolute" judicial independence or a sort of "truly independent military judiciary" that could only

be assured by civilian judges (p. 295). In *Généreux*, he echoed an understanding of s. 11(d) adopted by the Court in a non-military setting, according to which s. 11(d) does not guarantee the "ideal" in judicial independence (*Lippé*, at p. 142, citing *Valente*, at p. 692). He recognized that a reasonable and informed person might well consider that the military status of a military judge would affect the judge's approach to matters before the tribunal. However, wrote Lamer C.J., "[t]his, in itself, is not sufficient to constitute a violation of s. 11(d) of the *Charter*" (*Généreux*, at p. 295; see also J. Walker, "Military Justice: from Oxymoron to Aspiration" (1994), 32 *Osgoode Hall L.J.* 1, at p. 31; M. Madden, "Keeping up with the Common Law O'Sullivans? The Limits of Comparative Law in the Context of Military Justice Law Reforms" (2013), 51 *Alta. L. Rev.* 125, at p. 132).

[69] The appellants repeatedly call for civilian judges as a necessary means of ensuring the "truly independent" military judiciary required by s. 11(d) (see A.F., at paras. 60 et seq.). But "true" or "absolute" or "ideal" independence is not the constitutional standard endorsed in the jurisprudence of this Court.

[70] I disagree with the appellants that Lamer C.J.'s reasoning is no longer relevant because experience from other countries and recommendations from experts show that a truly independent military judiciary, composed of civilian judges, is realistic and practical. Lamer C.J. explained that the status of military judges as officers "is designed to insure that they are sensitive to the need for discipline, obedience and duty on the part of the members of the military and also to the requirement for military

efficiency" (*Généreux*, at p. 295). He did not say that the military status of military judges was the only way that the purpose of military justice could be achieved. What he evaluated was whether Parliament's chosen method of achieving its end of fostering discipline, morale and efficiency in the military complied with the standards of s. 11(d). He decided that Parliament's legislative choice was not, in itself, unconstitutional.

[71] In other words, *Généreux* establishes that whatever concerns might arise as a result of Parliament's choice to require that military judges be officers, that model is not inherently unconstitutional under s. 11(d). Other models — including the one of "civilianized" military judges proposed by the appellants — might also be constitutionally compliant. But *Généreux* does not stand for the proposition that, to quote the appellants' written argument, an independent military judiciary "requires civilian judges" (A.F., at para. 63). Moreover, in identifying the need to have military judges who understand military discipline, Lamer C.J. did not decide that only one policy option would be constitutionally compliant.

[72] Parliament may choose to adopt a regime in which military judges are not officers, but the fact that it appears to be realistic and practical elsewhere is not determinative of the issue of whether the current Canadian regime is constitutional under s. 11(d). Law reform initiatives in other countries may assist in setting government policy but do not require Parliament to follow suit, much less establish for Canadian courts that the present legislative scheme chosen by Parliament to have military officers in the judiciary is unconstitutional. Viewed in that light, and said

respectfully, the appellants have invited this Court to focus on the wrong question. What is at issue is not whether the Canadian military justice system could practically function with civilian judges. Rather, the issue is whether the impugned requirement under the *NDA* violates the guarantee set by s. 11(d) of the *Charter*.

[73] In service of their position that judicial independence requires civilian judges and their reading of *Généreux*, the appellants point to recommendations made in independent reports to the government that public perceptions of judicial independence in the military justice system would be enhanced if such measures were adopted here. They cite in particular the *Report of the Third Independent Review Authority to the Minister of National Defence* (2021), prepared by the Honourable Morris J. Fish ("Fish Report"), which proposed the "civilianization" of military judges to that end. The first recommendation of the Fish Report is that "[m]ilitary judges should cease to be members of the Canadian Armed Forces" and "civilianized" judges with past experience of military life should be appointed instead (para. 77). This would encourage perceptions of independence and impartiality of the military judiciary in Canada without any loss of understanding of military discipline (see *ibid.*).

[74] However compelling they might be as a matter of policy, these recommendations are, as Justice Fish himself made plain, "not concerned with the minimum constitutional requirements set out in *Généreux*, *Moriarity* and *Stillman*" (Fish Report, at p. iii). Justice Fish continued:

> I express no views on the constitutionality of the status of military judges. This issue is for the courts to decide. I have recounted the events that have unfolded since 2018 because they illustrate why the military status of judges may be *undesirable from a policy perspective*. [Emphasis in original; para. 65.]
>
> (See also para. 203.)

[75] I agree that the constitutionality of the impugned provisions is a matter for the courts to decide and that the suitability of various policy options, within the bounds of the Constitution, is a matter of legislative choice. Bell C.J. for the CMAC said this helpfully in *Thibault*: "It may be that civilian judges are fit to be judges in the military justice system at the first instance level, but this decision is one for Parliament, not the judiciary, to make" (para. 46 (CanLII)). As Rowe J. recalled recently in his concurring reasons in *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, courts cannot declare a statute unconstitutional simply because they disagree with legislative policy, or think a better policy may be available; courts are "not fitted" to undertake the inquiries that a proper policy review entails (para. 131, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 392, per Le Dain J.).

[76] In any event, the CMAC in *Edwards et al.* dismissed the appellants' motion to have the Fish Report admitted as fresh evidence. The report, given its announced policy orientation, could not have a decisive impact, as evidence, on the outcome of the constitutional question on appeal. Not only did Justice Fish expressly decline to address the constitutional issue now raised by the appellants in these appeals, his report was only designed to provide policy recommendations to the Minister of National

Defence. It is of undoubted scholarly value to that end and it may be considered should Parliament choose to review the *NDA*. The insights from this report, along with other policy papers cited in argument, provide helpful background to understanding the military setting, as they did in a similar way in *Stillman*.

[77] But the Fish Report was not tabled by the author to be used as evidence in a court of law, nor were its conclusions tested as such in this case. Indeed, the CMAC dismissed the appellants' motion seeking to adduce the Fish Report as fresh evidence to establish their allegations. The appellants cite observations made by Justice Fish that some members of the Canadian Armed Forces believe that military judges are more lenient to officers of higher ranks, for example, and find complainants from lower ranks to be less trustworthy, as perceptions that "confirm the reasonable apprehension of bias" (A.F., at paras. 79-80). Given that Justice Fish's report has not been admitted as evidence, it cannot be relied upon to make findings of fact or to support a conclusion that an aspect of the military justice system raises an apprehension of bias in the mind of a reasonable and informed person. With respect, when the appellants cite comments in the Fish Report which recommend civilian judges to the Minister as a finding of fact reflecting a "constitutional minimum" for judicial independence, they distort the report's express purpose and appear to defy the order dismissing their fresh evidence application (see, e.g., A.F., at paras. 31, 47, 79 and 104).

[78] The appellants also suggest that a crisis in public confidence undermines the present regime of military justice which, they say, confirms their view that

ss. 165.21 and 165.24(2) of the *NDA* should be declared unconstitutional. The appellants point to the *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces*, prepared by the Honourable Louise Arbour in May 2022, in support of their position. Justice Arbour recorded in her report that "the handling of sexual misconduct by military justice has eroded trust and morale" in the organization (p. 78). She noted, as one factor in this crisis, the slow development of principles of judicial independence for military judges and wrote that, in her review, she heard concerns relating to "both the independence and competence of the military justice system when it comes to sexual offences" (p. 79). She concluded that there should be exclusive civilian jurisdiction over some of these offences (see pp. 78-100).

[79] Jurisdiction over sexual assault in the military, as the report by Justice Arbour makes plain, raises fundamental policy issues as to how military justice should be administered in Canadian law. The matter raised by her is a grave one that was recognized as requiring a "[d]eep cultural change within the military" by Moldaver and Brown JJ. in *Stillman* (para. 52). It may well be that there is a public confidence crisis that invites a reconfiguration of the parallel system of military justice for sexual assault. That policy work cannot be properly done in an appeal before this Court, nor should it be. These reasons should not be understood as diminishing the importance of or otherwise commenting on these findings or the findings of the Fish Report.

[80] The question before this Court, bearing on the constitutional validity of ss. 165.21 and 165.24(2) of the *NDA*, is a different one from the important matters of government policy considered in these reports. This Court is not equipped to decide what might be the best policy choice for the administration of military justice. Nor is it the Court's proper role: it is only charged with the solemn duty of deciding whether the impugned provisions in the statutory regime are constitutional (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 496-97). I note that the task of reviewing policy for the military justice system is confided by statute to the Minister of National Defence who has a duty to "cause an independent review" of the operation of aspects of the *NDA*, including specifically the CSD, and report to Parliament (see s. 273.601 noted in *Stillman*, at para. 53).

[81] Lastly, *Généreux* confirms that military judges enjoy sufficient independence if the essential conditions identified by this Court in *Valente* — security of tenure, financial security and administrative independence — are met. Based on the relevant provisions of the *NDA* that were in force at the time that *Généreux* was decided, Lamer C.J. concluded that these hallmarks of judicial independence for military judges were lacking (see pp. 309-10). Since *Généreux*, the *NDA* has been amended to strengthen the independence of military judges, as Moldaver and Brown JJ. explained in *Stillman* (paras. 44 and 48).

[82] *Généreux* remains relevant for the principles that animate this evaluation: s. 11(d) applies to the military justice system; a parallel system staffed by judges with

military status who are sensitive to the needs of military justice does not, in itself, offend s. 11(d); and there could be different modalities for ensuring that military judges have a degree of independence that meets the constitutional minimum. Adapted to the military context, military justice is different in some respects from civilian criminal justice, but the guarantee of independence is no less *Charter*-compliant by reason of this difference. *Généreux* continues to provide useful guidance as precedent on these matters. The value of this guidance has not been "eroded" by the fact that some countries have civilian judges. This does not undermine the premise upon which *Généreux* rests: that military judges having military status does not in itself violate s. 11(d) of the *Charter*. *Généreux* does not stand for the principle that military judges *must* be officers in order to meet the purpose of a military justice system that fosters discipline, efficiency and morale in the military; it only says that Parliament's choice of this model is not, in itself, unconstitutional. The appellants have failed to show a basis for setting aside this principle or the precedent that gives it expression in Canadian law.

[83] Overall, I reject the appellants' reading of *Généreux* and their view that, in light of social changes, s. 11(d) requires civilian judges in the military justice system. That said, given that Lamer C.J.'s conclusion in *Généreux* that military judges did not enjoy a sufficient degree of independence was based on provisions of the *NDA* that have since been amended, a fresh analysis is required.

B. *Do the Requirements in Sections 165.21 and 165.24(2) Meet the Standards of Judicial Independence and Impartiality Under Section 11(d) of the Charter?*

(1) The Framework for Assessing the Independence of Military Judges

[84] To assess the independence of a tribunal, a reviewing court asks "whether the tribunal may be reasonably perceived as independent" (*Valente*, at p. 689; see also *Committee for Justice and Liberty*, at p. 394). In *Généreux*, at p. 286, Lamer C.J. explained that the exercise for evaluating independence and impartiality under s. 11(d) is the same ("[T]he test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent."). There is a strong presumption of judicial impartiality. As this Court has explained, "the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge" (*Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59).

[85] This Court has held that the reasonable and informed person has "knowledge of all the relevant circumstances" and "view[s] the matter realistically and practically" (*Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at para. 26, cited with approval in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 37; see also *Valente*, at pp. 684-85). The reasonable and informed person is "apprised of" and "tak[es] into account all relevant circumstances" (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at paras. 13, 28 and 36) given that they are "well-informed" (*Canada (Minister of Citizenship and Immigration) v.*

Tobiass, [1997] 3 S.C.R. 391, at para. 70). As the CMAC observed in *Edwards et al.*, they are alive to the relevant contextual considerations (para. 9). They are "right minded", they "th[ink] the matter through", and they "appl[y] themselves to the question and obtai[n] thereon the required information" (*Committee for Justice and Liberty*, at p. 394). Ultimately, this Court's jurisprudence "expect[s] a degree of mature judgment on the part of an informed public" (*Yukon Francophone School Board*, at para. 61).

[86] In *Valente*, this Court identified three essential conditions or hallmarks of judicial independence: security of tenure, financial security and administrative independence (pp. 694, 704 and 708; see also *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, at para. 31; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 33). Security of tenure requires that the judge hold office "whether until an age of retirement, for a fixed term, or for a specific adjudicative task" so as to "secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner" (*Valente*, at p. 698). Financial security requires that "the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence", which was later held to require that judicial remuneration be fixed through a process that includes an independent commission (p. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"); *Provincial*

Court Judges' Association of British Columbia). Administrative independence "may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Valente*, at p. 712).

(2) The Three Essential Conditions of Judicial Independence Are Met Through Provisions of the *NDA*

[87] The appellants argue that the military status of military judges raises a reasonable apprehension of bias and results in military judges having an insufficient degree of independence.

[88] While they do not systematically ground their grievances in the *Valente* framework, and while some of their arguments seem to straddle the distinction between independence and impartiality, the appellants focus their challenge on the constitutionality of the impugned sections of the *NDA* on two broad points.

[89] First, they say, the requirement that military judges be members of both the judicial and executive branches violates the constitutional imperative of the separation of powers. Specifically, s. 11(d) does not permit members of the executive branch — including military officers — to exercise "core judicial functions", but they do (A.F., at para. 81). This gives rise to a perception that military judges labour under a conflict of interest, or of allegiances, between their judicial and their officer roles that could infect the independent and impartial exercise of their judicial duties. The appellants add that deference to the hierarchy within the chain of command also contributes to

undermining the independence of military judges (para. 79). These considerations impugn the requirement of administrative independence, which would allow military judges to exercise their duties free from actual or perceived pressure or undue influence from others in the military hierarchy.

[90] The appellants' second argument pertains to the fact that, as officers, military judges are susceptible of being charged with service offences under the CSD. The appellants say that because military judges are themselves subject to prosecution before a court martial, the military hierarchy could bring pressure, or be perceived to be in a position to do so, on the judge as a threat or retaliatory measure for decisions made in the exercise of their judicial duties. This strikes in particular at the requirement that military judges must have security of tenure in order to judge matters with the confidence that they will not lose their positions as a result of the displeasure of others who are superior to them in the chain of command. It touches too on the requirement for administrative independence as that pressure may be reflected in smaller ways that interfere with their judicial work.

[91] Before examining the substance of these arguments, it is useful to dispel some uncertainty in respect of the manner in which the Court interpreted s. 11(d) in *Généreux*. One of the interveners joins the appellants in submitting that Lamer C.J. failed to follow the usual approach of giving a purposive interpretation to *Charter* guarantees in applying s. 11(d) to the military judiciary. Regarding the essential conditions for judicial independence established in *Valente*, Lamer C.J. wrote that "the

conditions are susceptible to flexible application in order to suit the needs of different tribunals" (*Généreux*, at p. 286). This reliance on flexibility, among other aspects of the case, is said to suggest that the Court was mistakenly prepared to interpret s. 11(d) as limited by the exigencies of military discipline, even though the text of the *Charter* indicates that there is no such limit and its purpose indicates that the guarantee should be given a wide berth.

[92] I disagree.

[93] Plainly, in circumstances like the present prosecutions where the jeopardy to the accused is comparable to that in the civilian criminal law setting, s. 11(d) cannot provide a "lesser" protection to a member of the Canadian Armed Forces. It would be wrong to read Lamer C.J.'s reference to a "flexible" application of the s. 11(d) guarantee for military tribunals as a justification for a lesser form of protection. When read as a whole, Lamer C.J.'s reasons show that he viewed prosecution for military offences before a court martial as broadly comparable, albeit not identical, to that of an ordinary criminal prosecution. His reasons rest on the premise that, like in civilian criminal courts, a trial before a court martial proceeds on a criminal standard, using the usual rules associated with a criminal trial. This mandates the same s. 11(d) standard for the presiding military judge.

[94] Importantly, to sustain his conclusion that s. 11(d) applied in the military context, Lamer C.J. relied on *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, in which Wilson J. stated that s. 11 must apply when there are true penal consequences involved (see

Généreux, at pp. 280-82). In *Wigglesworth*, Wilson J. said that the possible deprivation of liberty in a criminal prosecution means that the accused "should be entitled to the highest procedural protection known to our law" (p. 562). The s. 11(d) analysis in *Généreux* proceeds on the premise that, for the same reasons, an accused member of the Canadian Armed Forces should be afforded the highest protection of judicial independence. Nowhere in his reasons does Lamer C.J. endorse a lesser standard of independence for courts martial as might be the case, for example, in respect of independence before administrative tribunals (see *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 45; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. X.129).

[95] To my mind, the reference to "flexibility" in *Généreux* does not refer to a lesser standard of constitutional protection but to the importance of attentiveness to the military context in assessing the means used to meet that standard. Flexibility means sensitivity to the military setting but the resulting adaptation does not lessen the constitutional guarantee. The use of the word "*souplesse*" as the equivalent for "flexibility" in the French-language version of Lamer C.J.'s reasons confirms my sense that flexibility requires s. 11(d) to bend, without breaking, to accommodate the military context.

[96] Those prosecuted for service offences under the CSD are indeed entitled to be tried by a judge that has the same standard of judicial independence as that of civilian judges in criminal courts. But the military context may mean that the

requirements of s. 11(d) can be satisfied in ways that take into account that courts martial offer a parallel, but not identical, system of justice. The obvious example, rightly signaled by the CMAC in *Edwards et al.*, is that a military judge must be prepared to sit in a theatre of operations, even outside Canada, in circumstances where the non-judicial military orders from the chain of command will be relevant to all the actors involved. A military judge, like others in the theatre of operations, will be subject to the chain of command. But this need not — and must not — lessen the protection of judicial independence required by the court martial proceedings by interfering with the exercise of judicial duties. Ultimately, the constitutional standards for independence and impartiality are no less rigorous for military judges than they are for civilian judges, but s. 11(d)'s flexibility allows Parliament to adhere to those standards in a way that is alive to the particularities of the profession of arms.

[97] In that light, the proper question is whether, understood contextually, the mechanisms put in place by Parliament meet the constitutional standard, with an eye to the objectives of military discipline particular to this form of criminal justice. The relevant context is, as Lamer C.J. explained, that military judges are "sensitive to the need for discipline, obedience and duty on the part of the members of the military" (*Généreux*, at p. 295). This military rationale does not justify a lesser standard of independence, but explains why military justice is not identical in its modalities to the civilian criminal justice system.

[98] To return to the hallmarks of judicial independence, the *NDA* includes safeguards that ensure that each of the three essential conditions for judicial independence spoken to in *Valente* are met. The measure for both independence and impartiality explained in *Committee for Justice and Liberty*, and confirmed by the Court in both *Valente* and *Lippé*, is satisfied. The test is well known: what would a reasonable and informed person, viewing the matter realistically and practically — and having thought the matter through — conclude? For the reasons that follow, I conclude that the constitutional standard, adapted to the military context, is satisfied.

(a) *Security of Tenure*

[99] The rules on removal for cause of military judges in the *NDA* are sufficient to quell concerns regarding a lack of security of tenure. Contrary to the position advanced by the appellants, the fact that military judges are part of the chain of command and subject to the CSD does not undermine this aspect of their independence as judges.

[100] In *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, this Court confirmed that "[t]he essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office" (para. 32). In order to determine whether this requirement is met, "[t]he 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" (*ibid.*; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R.

248, at para. 90; *Conférence des juges de paix magistrats du Québec*, at para. 33). When assessing whether military judges have a sufficient degree of security of tenure, the relevant provisions of the *NDA* that direct that they may only be removed by the Governor in Council for cause following a recommendation of the MJIC are key.

(i) The Concerns Identified in *Généreux* Have Been Addressed

[101] The concerns identified in *Généreux* in 1992 regarding military judges' security of tenure have been answered by statutory amendment. The *NDA* now provides that military judges are appointed by the Governor in Council, not by their superiors in the chain of command (s. 165.21(1)), and that unless they are removed for cause, military judges hold office until they are voluntarily released from the military or resign from the position of military judge, or until they reach the age of 60 (s. 165.21(3) to (5)). While this length of tenure is not identical to that provided to federally appointed civilian judges, [TRANSLATION] "[t]he end of tenure, that is, the precise age of retirement, may vary to some extent from court to court" (Brun, Tremblay and Brouillet, at para. X.160). Importantly, military judges are not appointed for fixed, renewable terms, a model held to have violated s. 11(d) in *R. v. Leblanc*, 2011 CMAC 2, 7 C.M.A.R. 559.

[102] Taken together, s. 165.21(1), (4) and (5) of the *NDA* remedy the constitutional shortcomings identified in *Généreux*. Lamer C.J. had decided that military judges would have sufficient security of tenure if they were appointed for fixed terms by an authority other than the Judge Advocate General. Under the present

statutory regime, military judges are appointed for terms that end only upon their resignation, removal for cause or when they reach the age of 60. I share the view that providing military judges with tenure until the age of 60 "really fix[ed] things" (E. R. Fidell, *Military Justice: A Very Short Introduction* (2016), at p. 71; see also G. Létourneau, *Introduction to Military Justice: an Overview of the Military Penal Justice System and its Evolution in Canada* (2012), at p. 47).

(ii) Security Against Removal From Office Except for Cause

[103] Much like civilian judges, military judges can only be removed from office for cause (*NDA*, s. 165.21(3)). This Court has emphasized that, while judges may be removed for cause, this can only occur following a process conducted by a judicial discipline committee that "must be composed primarily of judges" (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 47; see also L. Huppé, *Histoire des institutions judiciaires du Canada* (2007), at p. 741, citing *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3: [TRANSLATION] ". . . judicial discipline must be dealt with in the first place by peers . . .").

[104] The *NDA* establishes such a process in a subsection of Part III, Division 6 ("Code of Service Discipline — Trial by Court Martial — Military Judges — Removal for Cause"). In s. 165.21(3), Parliament expressly set out a single path for the removal of a military judge from office. Removal can only be performed by the Governor in Council on recommendation by the MJIC. Respectfully, the appellants are mistaken to say that, notwithstanding this plain text that reflects a constitutional commitment to

judicial independence, removal can be achieved through the backdoor as a consequence of a sanction that imposes a sentence of dismissal from the Canadian Armed Forces. Military judges hold office on good behaviour and not at pleasure; they can only be removed by the Governor in Council, for cause, upon a recommendation of their judicial peers properly convened as the MJIC (see, generally, s. 165.32(2) to (7)). As the CMAC observed in *Edwards et al.*, "[t]he MJIC established under the *NDA* plays a role similar to that of an Inquiry Committee established through the Canadian Judicial Council" (para. 80). Members of the MJIC are three judges of the CMAC appointed by the Chief Justice of that court (s. 165.31(1)). A recommendation for removal may only be made based on specified grounds (s. 165.32(7)) following an inquiry (s. 165.32(1)), which provides the military judge the opportunity to be heard, to cross-examine witnesses and to adduce evidence (s. 165.32(4)).

[105] I agree with the CMAC in *Edwards et al.* that this is the sole basis for removing a military judge, as this Court also observed in *Stillman* (para. 48). I add that military judges cannot be subject to relief from performance of military duty (*QR & O*, art. 19.75(1)) or to performance evaluations by members of the executive (arts. 26.10 and 26.12). I agree too with its view that the MJIC does not deliver final judgment on liability under the CSD or impose any criminal or quasi-criminal penalties. Unlike a court martial for which it cannot be a substitute, the MJIC merely provides recommendations regarding the removal of military judges.

[106] I allow myself, however, to depart from the interpretation the CMAC provides of the expression "having been guilty of misconduct" in s. 165.32(7)(a)(ii) of the *NDA* as one basis for recommending removal for cause. The CMAC wrote in *Edwards et al.* that on a plain reading and contextual interpretation, this provision "contemplates a conviction" under the CSD, the *Criminal Code* or some other statute (para. 78). The equivalent French text of s. 165.32(7)(a)(ii) — "*manquement à l'honneur et à la dignité*" — suggests less plainly to me that a conviction is required. Given the fact that we received no submissions on this point, I would prefer to leave this narrow question to another day. But that does not change my sense that the CMAC was right in deciding that the requirement of removal by the Governor in Council, on recommendation by the MJIC, as the sole basis for dismissal of a judge, is a sufficient guarantee of security of tenure for the military judiciary.

[107] It is true that, unlike civilian judges, military judges, as officers, are subject to the CSD. If convicted of an offence under the CSD, a military judge can be sentenced to a range of sanctions, including dismissal from the Canadian Armed Forces (*NDA*, s. 139(1)(c) and (e)). This might be understood as creating a "backdoor" means of removing a military judge (see *Pett*, at para. 114). If a military judge is convicted of an offence and is sentenced to dismissal from His Majesty's service, that judge would lose their status as a military officer and — theoretically — lose a qualification for their judicial office pursuant to s. 165.21 of the *NDA*. In this sense, it might appear that a conviction under the CSD could create a risk that a military judge be removed from

office without a recommendation for removal from the MJIC and without action by the Governor in Council.

[108] In my respectful view, this is an untenable reading of the grounds for removal of a military judge under s. 165.21(3) of the *NDA*, which provides that military judges may only be removed for cause by the Governor in Council following a recommendation from the MJIC. A reasonable and informed person, looking at matters practically, including a reading of the *NDA* as a whole, would not view the risk of there being an indirect means of removing a military judge to be a realistic possibility.

[109] As the Crown explained at the hearing, if an officer who is also a military judge is sentenced to dismissal by a court martial, action by the executive branch is required for the officer to be released from the Canadian Armed Forces (transcript, at p. 69). I pause to note that the rules on sentencing in the *NDA* and the regulations on release from the Canadian Armed Forces by the Governor General in the *QR & O* contain a regime for the timing of the effective date of dismissal of an officer from His Majesty's service (see *NDA*, s. 141(1.1); *QR & O*, ch. 15; see also *Pett*, at para. 114). But what is ultimately important for present purposes is that s. 165.21(3) of the *NDA* provides that a military judge may only be removed by the Governor in Council following a recommendation of the MJIC. A military judge cannot be removed from office by a sentencing judge for dismissal or for any other reason. This reflects the requirement, shaped by s. 11(d) itself, that a judge can only be removed from office by

the Governor in Council following a process conducted by a committee that "must be composed primarily of judges" (*Moreau-Bérubé*, at para. 47).

[110] I note that a military judge, as an officer, could be sentenced to sanctions other than dismissal under the CSD (*NDA*, s. 139). These sanctions, however, would not themselves result in the removal of a military judge from office. For example, when an officer is sentenced to reduction of rank, they cannot be removed as an officer; at most, their rank can be reduced "to the lowest commissioned rank" (s. 140.2(a)). While military judges must be officers, there is no requirement that they hold a particular rank (s. 165.21), with the exception of the Chief Military Judge who "holds a rank that is not less than colonel" (s. 165.24(2)). A reduction of the Chief Military Judge's rank could result in their removal from their position as Chief Military Judge, but it would not result in their removal from office as a military judge.

[111] Further buttressing the security of tenure under the *NDA* is the rule that a military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction (s. 165.231; see CMAC reasons in *Edwards et al.*, at para. 13). More generally, the CMAC rightly recalled that s. 179 of the *NDA*, "clothes military judges, in part, with the '. . . powers, rights and privileges . . . as are vested in a superior court of criminal jurisdiction . . . necessary or proper for the due exercise of its jurisdiction'" (para. 14).

[112] There is no requirement that a military judge lose their status if charges are brought against them for service offences. The appellants note that in one instance, a

military judge did not preside after he was charged with service offences in 2018 (A.F., at para. 36; see *Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330, [2020] 3 F.C.R. 411). However, it is noteworthy that in that case, the military judge was not removed from office, directly or in a back-door fashion, and the decision to not assign him to preside at courts martial was made by a judicial peer (*Director of Military Prosecutions*, at paras. 71-72).

(b) *Financial Security*

[113] Although the appellants do not argue that military judges have an insufficient degree of financial security, I note that this requirement for judicial independence is amply met. The fact that the financial security of military judges is not contested strengthens the Crown's argument that, overall, the guarantee of judicial independence for military judges stands on strong footing.

[114] Military judges have their own remuneration scheme (*NDA*, s. 165.33; *QR & O*, ch. 204) and their compensation, including pay and other benefits, is fixed upon a recommendation of the Military Judges Compensation Committee provided every four years (CMAC reasons in *Edwards et al.*, at para. 13). Military judges are paid for their work as judges, which addresses one of this Court's concerns respecting independence in *Généreux*. Much like for civilian judges, their emolument is fixed through a process that centres on an independent committee (see *NDA*, ss. 165.33 to 165.37). This process reflects the requirements set out in this Court's jurisprudence (see *Provincial Judges Reference*; *Provincial Court Judges' Association of British*

Columbia; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21, [2020] 2 S.C.R. 556; *Conférence des juges de paix magistrats du Québec*). Further, as helpfully noted by the CMAC in *Edwards et al.*, "[n]o personal report, assessment or other document shall be completed for a military judge if such a document can be used in whole or in part to determine the training, posting or rate of pay of the officer, or whether the officer is qualified to be promoted (QR&O articles 26.10 and 26.12)" (para. 13).

(c) *Administrative Independence*

[115] The appellants argue that military judges lack the requisite administrative independence given their military status, which creates a conflict of allegiances.

[116] Administrative independence requires that there be "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (*Valente*, at p. 712; *2747-3174 Québec Inc.*, at para. 70). In *Valente*, administrative independence was "defined . . . in narrow terms" (*Provincial Judges Reference*, at para. 117) to include administrative functions such as "assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions" (*Valente*, at p. 709). Le Dain J. observed that while a greater degree of administrative independence "may well be highly desirable", it is not "regarded as essential for purposes of s. 11(*d*) of the *Charter*" (*Valente*, at p. 712).

[117] Unlike the system in place when *Généreux* was decided, under the present regime, military judges, including the Chief Military Judge, are responsible for the decisions that must be left to judges in order for there to be sufficient administrative independence, such as assigning military judges to preside at courts martial (s. 165.25) and establishing procedural rules (s. 165.3). These matters are insulated from non-judicial interference by the chain of command. As such, the requirements of administrative independence are met.

(3) Arguments Advanced by the Appellants That Impugn the Institutional Impartiality of Military Judges

[118] The appellants are unmoved by the Crown's assertion that the safeguards of judicial independence and impartiality in the *NDA* adequately protect against a violation of s. 11(d). They say the statutory safeguards of security of tenure, financial security, and the limits on assignment of duties are "meaningless" (A.F., at para. 91). They return to their two broad arguments to say that military judges' place in the executive branch and their exposure to prosecution for CSD offences ground a reasonable perception that they are not impartial.

[119] As mentioned above, the appellants have advanced arguments that straddle the line between judicial independence and impartiality. Judicial independence and impartiality are closely related but distinct concepts. Judicial independence is, as Le Dain J. explained, "a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial

functions" (*Valente*, at p. 689). When these objective guarantees are satisfied such that a court, in the eyes of a reasonable and informed person, can be perceived to be independent and is actually independent, they "ensure that, considering all of their characteristics, the structures of judicial and quasi-judicial bodies do not raise a reasonable apprehension of bias" (*2747-3174 Québec Inc.*, at para. 45).

[120] Even if the reasonable and informed person would conclude that a court is independent, they may come to the conclusion that the court is not impartial at either the individual or the institutional level (see *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, at para. 49). Independent courts benefit from "a strong presumption of judicial impartiality that is not easily displaced" (*Yukon Francophone School Board*, at para. 25). That said, if a reasonable and informed person would "think that it is more likely than not that [the court], whether consciously or unconsciously, would not decide fairly" (*Committee for Justice and Liberty*, at p. 394) because of individual or institutional concerns, the impartiality of the court may be challenged (*Lippé*, at pp. 144-45).

[121] The appellants' arguments that do not fall neatly within the three hallmarks of judicial independence identified in *Valente* are in essence challenges to the institutional impartiality of military judges. They argue that military judges are, because of the institutional concerns that they have identified, incapable of being perceived to be impartial. In my view, the appellants have failed to show that a

reasonable and informed person would have a reasonable apprehension of bias because military judges are both judges and officers.

[122] First, I disagree with the appellants that military judges, as members of the executive, are in an irretrievable conflict of interest with their judicial role and that this violates the constitutional principle of separation of powers.

[123] I reject the appellants' proposition that the requirement of s. 165.21 of the *NDA* violates the principle of separation of powers in that it directs members of the executive to exercise core judicial functions. While military judges must be officers, the manner in which their role as judges is circumscribed makes it plain that they do not act as members of the executive when they perform their judicial duties (s. 165.23(1)). These judicial duties, which extend beyond presiding at court martial to include all duties that are connected with their decision-making functions and the administration of the military justice system, are assigned by the Chief Military Judge (s. 165.25). When acting as judges, military judges can be assigned other duties by the Chief Military Judge in addition to their judicial tasks, "but those other duties may not be incompatible with their judicial duties" (s. 165.23(2)). Military judges do have the status of officer — they may well have, as was said at the hearing, two hats — but they do not wear their executive hat when they perform their judicial duties.

[124] In *Généreux*, Lamer C.J. expressed concern that the executive branch was directly involved in court martial administration in matters such as "assignment of judges, sittings of the court and court lists" (p. 286). While some relations between the

executive and the judiciary are institutionally necessary, he acknowledged, "such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution" (*ibid.*; see also p. 308). But military judges are protected from interference by the executive in their judicial duties. As the CMAC in *Edwards et al.* noted, military judges have their own, separate grievance procedure (*NDA*, s. 29(2.1)), and have protections when their work is evaluated (*QR & O*, art. 26.10).

[125] While I do not doubt that military culture is based on a respect for hierarchical authority, the appellants have brought no substantial proof that, as a matter of constitutional law, that culture undermines the independence or impartiality of military judges. To support their argument, they cite excerpts from the Fish Report in which members of the Canadian Armed Forces expressed a sense that military judges favoured officers of a higher rank (A.F., at para. 79). These accounts, which are not part of the evidentiary record, fall short of the evidentiary standard required to declare provisions of the *NDA* unconstitutional.

[126] The appellants argue that military judges can be reasonably perceived to be in a conflict. Strictly speaking, the problem raised by the appellants is not so much the conflict of interest where a judge must resist a personal interest that threatens, or might be perceived to threaten, the impartiality with which they must do their work. Instead, it is what one scholar has called a "conflict of duty and duty" that arises "in relation to the exercise of judgment" (L. Smith, *The Law of Loyalty* (2023), at p. 160).

The appellants say that, as officers, military judges must comply with orders from the military hierarchy. As judges, they must protect the accused's rights. This conflict of duty and duty pulls them in different directions. This, say the appellants, leads to a perception that they may favour their duty to the military hierarchy over that owed to the persons brought before them at court martial.

[127] I respectfully disagree. It is true that military judges have dual allegiance, but the *NDA* separates their judicial and non-judicial duties. To the extent that military judges engage in non-judicial duties, these duties are assigned by the Chief Military Judge and "may not be incompatible with their judicial duties" (s. 165.23(2)). Moreover, all judges have multiple loyalties and duties that can compete for their attention. In *MacKay*, this Court confronted a similar argument made under the *Canadian Bill of Rights*, S.C. 1960, c. 44, and answered it in words that remain compelling today. It was argued that, by reason of their sense of belonging to the military, officers were unsuited to exercise a judicial office. In his concurring reasons, McIntyre J. acknowledged candidly that "[i]t would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not" (p. 403). But he rejected the argument that this conflict of duties disqualified officers as judges:

> But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline — which

> includes the welfare of their men — are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others. [pp. 403-4]

[128] I agree with McIntyre J. that military judges can lay aside their duties and allegiances as officers when they exercise their judicial duties. This is the sense of the oath of office, set forth in s. 165.21(2) of the *NDA* that all military judges must take: to solemnly and sincerely promise that they will "impartially, honestly and faithfully, and to the best of [their] skill and knowledge, execute the powers and trusts reposed in [them] as a military judge". This gives voice to the commitment that they will endeavour to keep improper influences, including those relating to their status as officers, at bay. In a circumstance in which they feel that they cannot do so or be reasonably perceived to do so, military judges must recuse themselves. Military judges must, when they perform their judicial duties, set aside the culture of hierarchy that exists in the military in order to comply with their oath to act impartially. Although not designed specifically for military judges, the reasonable and informed person would expect that, to comply with their oath of office, military judges will act, with necessary adaptations for the military context, in accordance with the *Ethical Principles for Judges* (2021) published by the Canadian Judicial Council. The introduction regarding these principles provides that "[a] judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone" (p. 7). The oath and the relevant ethical principles guide how judging is undertaken across the judiciary, both in the individual conscience of a judge and institutionally. The reasonable and

informed person can rightly draw comfort that this sustains judicial independence for military judges.

[129] The oath is not a guarantee of actual impartiality, nor is it a fail proof protection against perceived bias. However, taking a judicial oath is a serious matter. Robert J. Sharpe, writing extrajudicially, has observed that "[w]hen they take their oath of office, all judges make a solemn commitment to decide cases according to the law", which is "the most fundamental and obvious constraint that judges must accept" (*Good Judgment: Making Judicial Decisions* (2018), at p. 126). A judicial oath is a solemn and public commitment to act impartially. Therefore, [TRANSLATION] "the judicial oath gives litigants a guarantee that conscientious judges personally accept the constraints of justice that is based on the law" (L. Huppé, "Les fondements de la déontologie judiciaire" (2004), 45 *C. de D.* 93, at p. 121). Given the seriousness of this commitment, there is a strong presumption that a judge will "ac[t] with integrity and in accordance with his or her oath of office" (*R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, at para. 28). When a judge's impartiality is challenged in a court of law, "[s]ignificant weight is placed on the oath of office and on professional integrity, pride, and training" (Sharpe, at p. 254, referring to the Constitutional Court of South Africa's decision in *President of the Republic of South Africa v. South African Rugby Football Union*, [1999] ZACC 9, 1999 (7) B.C.L.R. 725). The reasonable and informed person would expect that military judges will abide by their oath of office and have confidence that, given their legal training and experience, they will set aside improper influences or recuse themselves if they ever feel that they cannot do so.

[130] The second broad objection that the appellants raise concerns the possible liability of military judges to discipline under the CSD. They may be perceived to be subject to the threat of prosecution should they decide cases against the interests of the military establishment. The appellants say that this creates, at the very least, an "appearance of partiality" for military judges (A.F., at para. 96 (emphasis deleted), citing *Director of Military Prosecutions*, at para. 72).

[131] The CMAC in *Edwards et al.* was right to reject this argument. A reasonable and informed person would accept the fact that military judges are not "above the law" as the Crown says (R.F., at paras. 4, 29 and 49) and that when they act outside their judicial functions, they can be held accountable for their conduct as would other members of the Canadian Armed Forces. I agree with the view that there are sufficient protections against a perception taking hold that the status of military judges as officers exposes them to interference by the executive in the exercise of their judicial functions.

[132] First, a purely retaliatory prosecution of a military judge would be an unlawful prosecution. Likewise, an order against a military judge made on the basis of a threat of prosecution would likely be an unlawful order.

[133] It is true that, as officers, military judges are part of the chain of command, and must comply with lawful orders issued by superior officers. If they fail to comply with a lawful order, they could be subject to discipline under the CSD (*NDA*, s. 83). In the profession of arms, Parliament has determined that it is essential that all personnel,

including military judges, be subject to lawful orders. As the CMAC correctly noted in *Edwards et al.*, "[a]dherence to orders that could include standing orders related to responses in the event of an attack, might be the difference between life and death" (para. 62). Military judges must comply with lawful orders that are necessary to "assure the maintenance of discipline, efficiency and morale of the military" (*R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 46). All lawful orders must be "unquestioningly obeyed" (*R. v. Billard*, 2008 CMAC 4, 7 C.M.A.R. 238, at para. 8) "unless they are manifestly unlawful", which means that they "offen[d] the conscience of every reasonable, right-thinking person" because they are "obviously and flagrantly wrong" (*R. v. Finta*, [1994] 1 S.C.R. 701, at p. 834).

[134] Unlike civilian judges, military judges are subject to orders from superior officers that are necessary to advance legitimate military purposes. This is a particularity of life as a military judge since, unlike for civilian judges, there is "necessity for portability and flexibility . . . [especially] in deployed operations, particularly extraterritorial deployments outside the domestic territory of the sending state" (Gibson, at p. 386). Canadians expect, as the CMAC correctly observed in *Edwards et al.*, "an operationally ready and portable courts martial system" (para. 8). Discipline is essential in the military to protect those ordered into harm's way and to ensure the responsible use of Canada's military capabilities. As officers who are regularly present in military settings and may be deployed to theatres of operations at any time, military judges must, outside of their judicial work, comply with lawful orders from superior officers and behave in a manner that befits an officer to whom the

defence of Canada is entrusted. The reasonable and informed observer would understand this unique feature of military justice and, indeed, expect nothing less. But this cannot interfere with the exercise of military judges' judicial duties. Applicable outside of their judicial work, it does not lessen the protection of s. 11(d) of the *Charter* in military justice.

[135] The appellants say it is possible to envision scenarios in which a superior officer issues an order to a military judge that would influence their judicial work in a way that would undermine their independence or impartiality. But the reasonable and informed person would understand that such orders that compromise judicial independence would be issued unlawfully.

[136] While members of the chain of command have wide discretion to give lawful orders, that discretion does not extend to allow orders that have the purpose of impairing the work of military judges without a valid military purpose (see, generally, *R. v. Lalande*, 2011 CM 2005, at para. 35 (CanLII)). As de Montigny J.A. (as he then was) wrote, "[a]n order that is not related to military duty would obviously not meet the necessary threshold of lawfulness. In other words, a command that has no clear military purpose will be considered manifestly unlawful" (*R. v. Liwyj*, 2010 CMAC 6, 7 C.M.A.R. 481, at para. 24). Superior officers in the chain of command may not abuse their discretion to issue orders that interfere with the work of military judges without a valid military purpose.

[137] The reasonable and informed person would not be concerned that military judges' status as officers would subject them to arbitrary or unlawful orders from superior officers that could undermine their independence or impartiality as judges.

[138] The reasonable and informed person would be aware of the many safeguards in place to prevent a military judge from being prosecuted for violating an unlawful order.

[139] Before laying a charge under the CSD, the person must receive legal advice concerning the sufficiency of the evidence and the appropriateness of the charge in the circumstances (*QR & O*, art. 102.07(2)(*b*)). That person is required to have a reasonable belief that a service offence was committed (see *R. v. Edmunds*, 2018 CMAC 2, 8 C.M.A.R. 260).

[140] Another key safeguard to prevent improper prosecutions is the independence of the Director of Military Prosecutions ("DMP"). Although there are many officers that are superior in rank to military judges in the chain of command, under the October 2, 2019 Order issued by the Chief of the Defence Staff, a single commanding officer — the Deputy Vice Chief of Defence Staff — was, prior to the Order's suspension, designated "to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge" (R.R., tab 1; see also *Pett*, at para. 9). Should the Deputy Vice Chief of Defence Staff decide to raise a disciplinary matter against a military judge, charges cannot proceed to a court martial without the authorization of the DMP (*NDA*, ss. 161.1(1), 165, 165.11

and 165.15). In practice, this means that the DMP screens charges that are laid against members of the Canadian Armed Forces. In exercising prosecutorial discretion, which is quasi-judicial in nature, the DMP must act independently of partisan concerns, which means that the DMP must make decisions independently of the chain of command (see *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 31). Under the applicable DMP Policy Directive # 002/00, *Pre-Charge Screening*, updated September 1, 2018 (online), the DMP must "guard against a perception or view of the case simply adopted from the views or enthusiasm of others . . . and maintain the independence and integrity required to fairly reassess a case as it evolves" (para. 33). Ultimately, when exercising their discretion, military prosecutors, "play the same role as Crown attorneys in the civilian justice system" and "are not advocates for the chain of command" (Fish Report, at para. 122, citing *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24).

[141] It is true that the DMP performs some duties under the supervision of the Judge Advocate General ("JAG") and that the JAG may issue general guidelines or instructions on prosecutions (*NDA*, s. 165.17). However, if the JAG issues guidelines or instructions on a particular prosecution, this must generally be disclosed to the public (s. 165.17(4) and (5)), and the JAG's annual report on the administration of military justice must be tabled in Parliament (s. 9.3(3)). These serve as further measures of transparency and accountability in respect of prosecutions.

[142] The DMP is presumed to exercise prosecutorial discretion independently and to act in good faith (see *Cawthorne*, at paras. 31-32). If a member of the Canadian

Armed Forces — including a military judge — alleges that the DMP has acted improperly, "the remedies for malicious prosecution and abuse of process are sufficient to deal with that unlikely prospect", as the CMAC observed in *Edwards et al.* (para. 92). Overall, the reasonable and informed person would know that the DMP must exercise prosecutorial discretion independently from the chain of command and that, if the DMP fails to perform their duty to act in an independent quasi-judicial manner, a claim for malicious prosecution or abuse of process may be brought.

[143] It is true that this Court has rejected the idea that "otherwise unconstitutional laws" may be insulated "through the exercise of prosecutorial discretion as to when and to whom the laws apply" since "unconstitutional laws are null and void" (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 91). However, to the extent that one accepts that the chain of command may issue lawful orders and engage in lawful prosecutions, concerns regarding abuse of that authority target exercises of discretion, not the *NDA* itself. The possibility that a military judge will be prosecuted for violating an order from the chain of command that is unlawful raises concerns of an improper prosecution, not a concern that a provision of the *NDA* is unconstitutional.

[144] The appellants argue that executive pressure on military judges worsened with amendments to the *NDA* enacted in 2019. Under a revised regime, certain officers have jurisdiction to conduct a "summary hearing" in respect of a person charged with having committed a service infraction where the person charged is an officer who is at

least one rank below the rank of the superior commander, commanding officer or delegated officer, or is a non-commissioned member. The former rule (*NDA*, s. 164(1.3)) that exempted military judges from the summary hearing regime in s. 164(1.1) was repealed (*An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, S.C. 2019, c. 15, s. 25). A military judge can now be charged with commission of a service infraction and may be held liable for sanctions, the most severe of which is reduction of rank.

[145] While they acknowledge that the substance of these appeals bears on courts martial and service offences, the appellants say the fact that military judges are now vulnerable to prosecution for service infractions contributes to a real or perceived lack of independence. Summary hearings are for service infractions only, are command-centric, and are decided on a balance of probabilities. Service infractions are created by regulation made by the Governor in Council and extend to a wide range of misconduct, including infractions bearing on property, information, military service and drugs and alcohol (see *QR & O*, ch. 120). The regime allows for the imposition of meaningful sanctions (*NDA*, s. 162.7). The appellants say the exposure to such prosecution could have an improper influence on military judges' exercise of judicial duties.

[146] It is true that service infractions arising from conduct that is alleged to have occurred outside of a military judge's judicial duties could theoretically be misused by a superior officer to threaten or take retaliatory measures. But a reasonable and

informed person, considering the matter realistically and practically, would not see this as grounding an apprehension of bias.

[147] Service infractions were reconfigured by the 2019 amendments to remove their criminal nature. Service infractions are "not . . . offence[s]" under the *NDA* (s. 162.5; *QR & O*, art. 120.01). Importantly, they are not criminal or quasi-criminal in nature and are not prosecuted, as would a service offence, before a court martial pursuant to the usual rules and standards of criminal law. While there are sanctions in the case of violation, these are not "true penal consequences" as spoken to in *Wigglesworth* and *Généreux*. Summary hearings are designed to ensure discipline, in the military sense, on more minor matters in order to foster morale and efficiency. Military judges are subject to this discipline and where it does not interfere with the exercise of their judicial duties, it is an ordinary feature of military life that would not attract the concern of a reasonable and informed person. Moreover, any arbitrary use of summary hearings against a military judge would plainly be unlawful, a matter that a reasonable and informed person would understand. In sum, I disagree with the appellants' characterization that service infractions allow officers to "punish military judges" in a manner that, on a reasonable standard, might be perceived to interfere with judicial independence (A.F., at paras. 50 and 99).

[148] I recognize that, in these cases, the military judges themselves have asserted their sense that they lack independence. But I share the view of the CMAC in *Edwards et al.* that where the test of the reasonable and informed person is properly

applied — where the matter is looked at "realistically and practically" — the safeguards of the independence and impartiality of military judges are sufficient (para. 9). Overall, the appellants have failed to show that the reasonable and informed person would be concerned that the independence or impartiality of military judges can be undermined because of their status as officers that makes them subject to the CSD. No violation of s. 11(d) of the *Charter* has been shown.

VII. Conclusion

[149] In light of my conclusion that military judges' status as officers under the *NDA* is not incompatible with their judicial functions for the purposes of s. 11(d) of the *Charter*, I would reject the appellants' invitation to declare ss. 165.21 and 165.24(2) of the *NDA* of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. Accordingly, I would dismiss all the appeals.

The following are the reasons delivered by

KARAKATSANIS J. —

I. Introduction

[150] I agree with Kasirer J. that the requirement that military judges presiding over courts martial also have the military status of officers does not necessarily contravene a member of the Canadian Armed Forces' right, under s. 11(d) of the

Canadian Charter of Rights and Freedoms, to be tried by an independent and impartial tribunal. Properly designed and protected, the dual roles can, in principle, co-exist. But *R. v. Généreux*, [1992] 1 S.C.R. 259, also acknowledged that the status of military judges as officers within the military executive hierarchy raises challenges for judicial independence that do not arise with civilian judges and must be specifically alleviated by the legislative scheme.

[151] Many concerns identified in *Généreux* over 30 years ago have since been addressed. Military judges now benefit from security of tenure, financial security and administrative independence — three hallmarks of judicial independence set out in *Valente v. The Queen*, [1985] 2 S.C.R. 673. But they also continue to be liable to discipline by the military executive, now for a broader range of misconduct, which includes offences under the *Criminal Code*, R.S.C. 1985, c. C-46. This discipline can result in penal consequences, including imprisonment, discharge from the military, disqualification as an officer and, ultimately, as a military judge.

[152] Thus the question remains: are military personnel "charged with an offence" guaranteed a "hearing by an independent and impartial tribunal" under s. 11(d) of the *Charter*? Put differently, would a reasonable and informed person be concerned about the pressures military judges face as part of the executive, particularly given their disciplinary accountability towards their hierarchical superiors?

[153] In my view, the answer is yes. There are insufficient safeguards in place to alleviate the potential risk of interference by the military chain of command. Because

they are required to be officers, military judges form part of the chain of command and are subject to discipline by their superiors. Given the executive's ability to bring disciplinary charges against a military judge, a reasonable and informed person facing a court martial would apprehend that the military judge could be unduly influenced by a loyalty to rank and by the position or policies of the military hierarchy, to the detriment of their individual rights. There is not enough institutional separation — or independence — between the executive and the judicial role. In this conclusion, I respectfully disagree with the majority.

[154] Judicial independence is a constitutional imperative. It is the foundation of the rule of law, the separation of powers and our constitutional democracy. It cannot be sacrificed in pursuit of military objectives like "good order and discipline" or "discipline, efficiency and morale". Much like civilian judges, military judges are accountable for their misconduct through the civilian criminal system and a judicial oversight committee, the Military Judges Inquiry Committee (MJIC). But their added liability for military charges under a disciplinary regime that can be launched and prosecuted by the executive runs counter to s. 11(d) of the *Charter*. I would allow the appeals and declare the legislative scheme under the *NDA* of no force or effect insofar as it subjects military judges to the disciplinary process administered by military authorities.

II. Background

[155] In each of the cases before us, the military judge in the court martial interpreted the *National Defence Act*, R.S.C. 1985, c. N-5 (*NDA*)[1], and concluded that various administrative orders adopted by the chain of command specifically targeting military judges — and contemplating the imposition of discipline under the Code of Service Discipline (CSD) during their tenure — meant they were not immune from executive interference. Having found that the accused's *Charter* right to an independent and impartial tribunal had been violated, the court ordered a stay or a termination of proceedings for eight of the nine appellants (*R. v. Edwards*, 2020 CM 3006; *R. v. Crépeau*, 2020 CM 3007; *R. v. Fontaine*, 2020 CM 3008; *R. v. Iredale*, 2020 CM 4011; *R. v. Christmas*, 2020 CM 3009; *R. v. Proulx*, 2020 CM 4012; *R. v. Cloutier*, 2020 CM 4013; *R. v. Brown*, 2021 CM 4003). The exception was the appellant Sgt. Thibault (*R. v. Thibault*, 2020 CM 5005), who raised s. 11(d) only on appeal of his conviction.

[156] These appeals stem from a series of decisions, over the course of 15 reported cases affecting 17 members of the Armed Forces, in which courts martial invariably took the view that if discipline of military judges was imposed by the military hierarchy, a reasonable person would form the perception that military judges lack independence from government at an institutional level. (The cases not before us are *R. v. Pett*, 2020 CM 4002; *R. v. D'Amico*, 2020 CM 2002; *R. v. Bourque*, 2020 CM

[1] On March 21, 2024, the Minister of National Defence introduced Bill C-66, *An Act to amend the National Defence Act and other Acts*, 1st Sess., 44th Parl., in the House of Commons, which proposes to amend certain provisions in the *NDA* that are discussed in these appeals. This case deals with the legislation that is currently in force.

2008; *R. v. MacPherson and Chauhan and J.L.*, 2020 CM 2012; *R. v. Cogswell*, 2020 CM 2014; *R. v. Jacques*, 2020 CM 3010; *R. v. Pépin*, 2021 CM 3005.)

[157] In all of those decisions, the military judges proceeded on the understanding that under the *NDA*, they were exempt from disciplinary or administrative measures taken under the CSD, unless first administered by peers via the MJIC (see, e.g., *Pett*, at paras. 58-62 and 104-16 (CanLII)).

[158] This interpretation of the MJIC scheme was rejected both by the Court Martial Appeal Court (CMAC) and by the majority in this Court. Sitting military judges are not protected from liability for CSD offences during their tenure, and can be prosecuted by military authorities (*R. v. Edwards*, 2021 CMAC 2, at paras. 78 and 86 (CanLII); see, e.g., majority's reasons, at para. 107).

[159] In four separate decisions, the CMAC allowed the Crown's appeals, set aside the stays, and ordered the trials to proceed for eight of the nine appellants before this Court. In a fifth decision, the CMAC dismissed Sgt. Thibault's appeal and affirmed his conviction (*Edwards*; *R. v. Proulx*, 2021 CMAC 3; *R. v. Christmas*, 2022 CMAC 1; *R. v. Brown*, 2022 CMAC 2; *R. v. Thibault*, 2022 CMAC 3).

III. Analysis

[160] Before this Court, the appellants insist the legislative scheme under the *NDA* deprives them of their s. 11(d) *Charter* right to be tried by an independent and

impartial judge. In doing so, they mainly focus on the military judges' status as officers in the Armed Forces. However, they also challenged the vulnerability of military judges to discipline by the chain of command. This was the main focus of the courts martial decisions under appeal.

[161] I accept the majority's conclusion that properly designed and protected, the dual status of military judge and officer is not necessarily incompatible with the *Charter*. The executive and judicial roles can coexist. I also accept that under the *NDA*, military judges can, as officers, be accountable for CSD offences. The key issue on which we differ is whether the ability of the executive — commanding officers — to impose discipline on military judges gives rise to a reasonable apprehension that the executive can influence or interfere with the role of military judges.

A. *Legal Principles*

[162] Our jurisprudence has stressed the fundamental importance of the separation of powers in maintaining judicial independence, in particular from the executive branch (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at paras. 23-24; *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 61). Judges must be free to decide according to their own conscience, and no outside interference may compel or pressure a decision maker (*IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 332-33).

[163] Not only is institutional independence "inextricably bound up with the separation of powers", but the executive cannot even "appear t[o] exert . . . pressure" on the judiciary (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 138 and 140 (emphasis added); see also *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 285, per Côté J. dissenting, but not on this point).

[164] In *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, our Court said that judges must "remain as far as possible sheltered from pressure and interference from all sources", and that the role of the judge "requires that he or she be completely independent of any other entity in the performance of his or her judicial functions" (paras. 35-36). The nature of the relationship between a court and others "must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice" (para. 37).

[165] As the majority notes, independence and impartiality are distinct ideas. However, the two concepts often overlap. Most notably, independence is an underlying condition that contributes to the guarantee of an impartial hearing (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 826; *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139).

[166] In the military context, judicial independence is analyzed under those same principles. As the majority states, the standard of independence for military judges is no less than for civilian judges (paras. 93-96). Lamer C.J. emphasized in *Généreux* that, "[i]t is important that military tribunals be as free as possible from the interference of

the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces" (p. 308). Lamer C.J. recognized that "the necessary association between the military hierarchy and military tribunals — the fact that members of the military serve on the tribunals — detracts from the absolute independence and impartiality of such tribunals" (p. 294).

[167] The respondent Crown urges us to apply *Valente* and conclude that military judges benefit from sufficient independence. *Valente* does not, however, provide a complete answer. Even where the hallmarks of security of tenure, financial security and administrative independence are met, a particular tribunal will still lack institutional independence if there is the appearance that it cannot perform its adjudicative role without interference (*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 47; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at paras. 82-92).

[168] Here, the appellants' core complaint is that the threat of discipline through the chain of command may affect military judges in their judicial role thereby infringing their right under s. 11(d). They argue that, in this context, even if the minimum *Valente* hallmarks have been met, a risk remains that military judges may be unduly influenced by the policy, priorities and position of the executive.

[169] Clearly, judicial discipline and accountability are important imperatives of broader social policy. Our Court has acknowledged that although judicial accountability and independence can be in tension, judges remain accountable for their

conduct through ethical and professional rules of conduct. This encroachment on their independence finds justification in the need to protect the integrity of the administration of justice (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at paras. 58-59).

[170] However, as a matter of principle, the judiciary is not answerable to the executive or to elected officials within government (L. Huppé, *La déontologie de la magistrature: Droit canadien: perspective internationale* (2018), at para. 26). In matters of discipline, the separation between the judiciary and the other branches of government is necessary to avoid the appearance of any intervention based on public opinion and political expediency. This principle has also been recognized internationally (United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), at para. 16; see also the preamble to the *Bangalore Principles of Judicial Conduct*, U.N. Doc. E/RES/2006/23, July 27, 2006, which states that the requirement for high standards of judicial conduct "lies with the judiciary in each country").

[171] Outside the military context, the oversight of the misconduct of federally appointed judges is the responsibility of the Canadian Judicial Council (CJC). A key rationale for the CJC is to permit judicial accountability while ensuring judicial independence (see M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at. pp. 87-90). Complaints of misconduct are mainly reviewed by judges, but also lay persons and members of the bar (*Judges Act*, R.S.C.

1985, c. J-1, ss. 98(1) and 117(1)). Section 102 of the *Judges Act* contemplates alternative sanctions short of removal from office. To protect security of tenure, judges can only be removed from office on the recommendation of the CJC and with approval of both chambers of Parliament. Similar regimes apply to provincially appointed judges.

[172] The foundational importance of keeping judicial discipline free of direct government influence has found echo in our case law. In *Lippé*, this Court stated that even in the hypothetical scenario where legislation would permit for the discipline of municipal judges by the Barreau du Québec, such provisions would raise problems of judicial independence (p. 138). In *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 57, and further in *Moreau-Bérubé*, at para. 47, our Court emphasized that "in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers", and cited these remarks by Professor H. P. Glenn in his article "Indépendance et déontologie judiciaires" (1995), 55 *R. du B.* 295, at p. 308:

> [TRANSLATION] If we take as our starting point the principle of judicial independence — and I emphasize the need for this starting point in our historical, cultural and institutional context — I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

[173] In the present case, we are not tasked with determining the outer boundaries of judicial accountability. Military judges, like civilian judges, are accountable for any judicial misconduct, through an oversight committee. In principle, military judges can

also be accountable for military offences based on their status as officers. But the design of the disciplinary regime must respect judicial independence and the separation of powers. And our jurisprudence suggests that the disciplinary regime should be as free as possible from the executive. It is in this context that the legislative scheme in the *NDA* must be assessed to determine if it is incompatible with judicial independence.

B. *The Disciplinary Framework Applicable to Military Judges*

[174] Like their civilian counterparts, military judges are subject to the civilian criminal justice system; and to a judicial committee for misconduct incompatible with their judicial role. However, unlike civilian judges, military judges are also answerable for their conduct to their superiors within the chain of command.

[175] The military's "chain of command" refers to an authority and accountability chain, running from the head of state through the Chief of the Defence Staff, to all members of the Armed Forces (G. Létourneau and M. W. Drapeau, *Military Justice in Action: Annotated National Defence Legislation* (2nd ed. 2015), at p. 137). The custom of the service and the governing legislation compel superior officers to take corrective action whenever they believe their subordinates have acted contrary to good order and discipline (*NDA*, ss. 19 and 49; *Queen's Regulations and Orders for the Canadian Forces* (*QR & O*), arts. 1.13 and 3.20).

[176] By holding a military rank, military judges are subject to the Code of Service Discipline in Part III of the *NDA*, as administered and applied by the chain of

command. They belong to the same institution responsible for laying charges against them and against the members who appear before them. Military judges are liable to be disciplined by members above them in the military hierarchy. Notably, superior officers have the ability to order an investigation and decide when or not to lay a charge (*QR & O*, arts. 102.02 and 102.04). Above active military judges, there are four ranks (*NDA*, Sch.).

[177] One component of discipline in the military is the necessity to follow orders. But "[d]isobedience of lawful command" (*NDA*, s. 83) is only one of many service offences that can be prosecuted under the CSD.

[178] To give only a few examples of service offences (in the *NDA*):

- Section 85 targets "[i]nsubordinate behaviour", which is conduct that may compromise the respect and obedience required "towar[d] a superior officer".

- Section 90 creates the service offence of absence without leave.

- Sections 92 and 93 target disgraceful or scandalous conduct, including any behaviour considered "unbecoming an officer".

- Section 97 creates the service offence of "[d]runkenness".

- Section 129 covers "[a]ny act, conduct, disorder or neglect" considered to be "to the prejudice of good order and discipline". Other than absence without leave (*NDA*, s. 90(1)), it is by far the most commonly relied on disciplinary offence (M. J. Fish, *Report of the Third Independent Review Authority to the Minister of National Defence* (2021) (Fish Report), at para. 280).

[179] Military judges are subject to these disciplinary offences whether they are acting in a theatre of operations or not. They are subject to them even in their capacity as judges (*Pett*, at para. 45).

[180] Some of these offences are vague and imprecise, as they aim to punish a wide range of conduct (G. Létourneau, *Combattre l'injustice et réformer* (2015), at pp. 162-63; Fish Report, at paras. 277-80; L. Arbour, *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces* (2022) (Arbour Report), at p. 90). They allow for wide discretion and subjective interpretation by prosecuting authorities. Section 129, for example, applies if the conduct "tends to" or "is likely to" result in prejudice to good order and discipline (*R. v. Golzari*, 2017 CMAC 3, 8 C.M.A.R. 106, at paras. 74-81). Many of these offences capture the kind of misconduct typically reserved to judicial oversight committees, which our jurisprudence warns should not be administered by the

executive if we are to respect judicial independence (*Lippé*, at p. 138; *Moreau-Bérubé*, at para. 47; *Therrien (Re)*, at para. 57).

[181] The Crown argues that military judges are in no different position than civilian judges, who are also liable to be prosecuted by the state for criminal behaviour. Military discipline is like criminal law: exempting judges from criminal, penal and regulatory law would have a devastating effect on the public's confidence in the administration of justice (R.F., at para. 49).

[182] I agree that no judge is above the law. But the comparison with civilian judges within the criminal justice system merely highlights the *additional* disciplinary regime faced by military judges. On being convicted of conduct "unbecoming an officer" or conduct "to the prejudice of good order and discipline", or any other similar disciplinary charges unique to the military, members of the Armed Forces including military judges may face dismissal from the Forces, a criminal record, and life-time imprisonment (*NDA*, ss. 139(1)(a) and (e) and 249.27).

[183] Moreover, under s. 130(1) of the *NDA*, military judges can face military prosecution for offences already covered by the *Criminal Code* or any other Act of Parliament. But the decision to proceed under the military justice system can have a significant impact on the rights of military personnel including military judges. For example, military personnel facing charges before courts martial lose the right to a jury trial, to a preliminary inquiry, to the benefits of a hybrid offence, to a broader range of available sentences and to appeal with leave on certain questions of fact

(M. W. Drapeau and G. Létourneau, in collaboration with J. Juneau and S. Bédard, *Canada's Military Justice System is in a Meltdown: Will Government Act?* (2021), at pp. 14-18). Our parallel system of military justice now includes offences under the *Criminal Code* and other Acts of Parliament. While it has been constitutionally upheld, given the breadth of CSD service offences and the impacts on rights, at a minimum, the standard for the independence of the tribunal must be the same as in a criminal trial.

[184] In sum, military judges, in stark contrast to civilian judges, face *not only* prosecution before civilian courts, but *also* discipline through the chain of command. The role played by military discipline has no equivalent in the civilian world. While criminal offences and penal infractions before civilian courts seek to ensure respect for the rule of law and protection of the public, the purpose of the separate military justice system pertains to "discipline, efficiency and morale of the military" (*Généreux*, at p. 293; Létourneau, at p. 150). Thus, military judges face a unique disciplinary regime — for a much broader range of offences — that is launched and prosecuted by the executive.

C. *A Reasonable and Informed Person Would Apprehend Bias*

[185] Concerns relating to judicial independence in our system of military justice are not new. They arose before the introduction of the *Charter* (*MacKay v. The Queen*, [1980] 2 S.C.R. 370), and have persisted despite the changes brought in response to *Généreux*. Over the last two decades, many independent reviews have outlined additional and residual problems with the independence of military tribunals (A.

Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 35* (2003); Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair — Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia — Executive Summary* (1997), at p. 79; P. J. LeSage, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence* (2011) (LeSage Report); Fish Report; Arbour Report, at pp. 78-86).

[186] Judicial independence concerns in the military flow from the decision to have ranked officers preside over courts martial and from the relationship these officers have with the chain of command. The military status of these officers may not *necessarily* be unconstitutional, but our Court in both *MacKay* and *Généreux* acknowledged the inherent risks. Historically, the paramount desire to enforce discipline in the military has often been to the detriment of justice (*R. v. Stillman,* 2019 SCC 40, [2019] 3 S.C.R. 144, at para. 39). As the appellants submit (A.F., at para. 77), the prime object of a military organization is victory, not justice. When a justice system is grounded on the vital importance of "discipline, efficiency and morale", it creates a posture of deference towards hierarchy which can conflict with a judge's duty of independence and impartiality.

[187] In determining whether a reasonable and informed person would be concerned about the pressures military judges face given their disciplinary accountability towards their superiors, the military context matters. This context has been reviewed in several high profile independent reports. While I agree with the majority that these reports deal with matters of policy, placing them beyond the constitutional question before this Court (paras. 73-80), they nonetheless provide material insight on the perceptions and concerns of a reasonable and informed member of the public.

[188] Military judges keep the rank they held before their judicial appointment. Outside observers have long insisted that military judges should be awarded their own distinct rank, or civilianized, to alleviate the apprehension that they could be influenced by their position within that hierarchy (LeSage Report, at pp. 41-42; Fish Report, at paras. 52-80; Létourneau, at p. 154).

[189] Because of a judge's given rank, it is reasonable that military personnel may fear a judge could prioritize allegiance to rank and to the chain of command over their respective individual rights. In an independent review of the Armed Forces, the Fish Report observed these concerns (at paras. 56-57):

> . . . a good number of members of the CAF who attended my town hall meetings, most of them junior non-commissioned members, expressed the belief that military judges are generally more lenient towards accused officers of higher ranks.
>
> Other concerns were that military judges may be reluctant to see high-ranking witnesses as lacking in credibility. Or, conversely, that

> complainants from lower ranks may be found less trustworthy. Or, that members of a panel who outrank the military judge may show less deference to the military judge's instructions.

[190] An informed person would know of the military's insular hierarchical culture. In another independent review, the Arbour Report notes at p. 9:

> Operating as a totally self-regulated, self-administered organization, entirely reliant on deference to hierarchy, [the military] has failed to align with the ever-changing, progressive society we live in.

[191] As noted above, our jurisprudence requires the judiciary to be free from even the *appearance* of interference by the executive. To do so, it has emphasized the need to reserve disciplinary accountability to an autonomous, apolitical and independent entity (*Lippé*, at p. 138; *Moreau-Bérubé*, at para. 47; *Therrien (Re)*, at para. 57).

[192] Far from offering this guarantee, however, it is now clear that the *NDA* and *QR & O permit* interference. Further, recent amendments have removed a military judge's exemption from summary hearings, which deal with service infractions that are more minor than service offences, and are adjudicated by commanding officers instead of courts martial (*An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, S.C. 2019, c. 15, s. 25; see *NDA*, s. 163). Military personnel found guilty of having committed a service infraction do not benefit from a statutory right of appeal other than a review by military authorities, and the

presiding commanding officers need not have any legal experience or knowledge, other than basic procedural training (*NDA*, ss. 163.6 to 163.91; Létourneau, at pp. 159-61).

[193] The potential risk of interference by the military chain of command is clear. The possibility that judges may be unduly influenced by the position of the executive in this context would be perceived by a reasonable and informed person as insufficient separation — or independence — between the executive and judicial roles. When accused persons face criminal sanctions, the "smallest detail capable of casting doubt . . . will be cause for alarm" (*2747-3174 Québec Inc.*, at para. 45).

D. *The Existing Safeguards Are Insufficient*

[194] In *Lippé*, our Court found that once a situation raises an apprehension that a tribunal may not be institutionally impartial — despite the *prima facie* presumption of judicial impartiality — we must also consider the safeguards in place that may reduce those prejudicial effects and reassure a reasonable and informed person that the tribunal is, in fact and in appearance, impartial (pp. 144-45). The safeguards are those which protect against the *possibility* of manipulation of the judiciary by other branches of government, not merely against *actual* manipulation (L. Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008), 58 *U.N.B.L.J.* 11, at p. 37). Below, I consider each safeguard that is said to alleviate the risk of coercion or the risk that military judges would feel pressure to be loyal towards the chain of command.

(1) The Oath of Office

[195] Under s. 165.21(2) of the *NDA*, every military judge must take an oath of office affirming that they will "impartially, honestly and faithfully" execute their judicial duties.

[196] While the oath of office is an important foundation for the independence of every individual judge, the integrity of the individual military judges is not in question. The oath does little to guard against an apprehension of *institutional* bias.

[197] Section 11(d) of the *Charter* protects against an *appearance* of interference and guards against indirect interference that may be deeply engrained in the system. All judges have to swear an oath. Should that constitute a sufficient protection, no claim of institutional interference under s. 11(d) could ever succeed.

[198] Nor does the recusal of a judge on a case by case basis provide enough safeguard for the military justice system. In any event, recusal is an illusory guarantee because the *NDA* does not provide for the appointment of *ad hoc* military judges (*Canada (Director of Military Prosecutions) v. Canada (Office of the Chief Military Judge)*, 2020 FC 330, [2020] 3 F.C.R. 411, at paras. 180-83). Relying on military judges to recuse themselves on a case by case basis may result in a perception of no justice at all, rather than reassure a reasonable and informed person of the independence of the tribunal. There are currently only three military judges. They are part of a single

military unit and if one judge has concerns about impartiality, it is likely that the others will too, especially if the reason relates to policies or priorities of the executive.

(2) The Removal Process Through the MJIC

[199] Under ss. 165.21(3), 165.31 and 165.32 of the *NDA*, a military judge may be removed for cause only following an inquiry and recommendation made by the MJIC. The majority concludes this affords military judges with sufficient security of tenure (paras. 103-12).

[200] Respectfully, I find this less persuasive. The *NDA* allows for sanctions of demotion or dismissal from the Forces on conviction of a disciplinary offence (ss. 139(1)(e) and (g), 140.1 and 140.2). By losing their status as officers in the Armed Forces, military judges would lose a key qualification for their tenure.

[201] Further, laying charges against military judges would, as a practical matter, stop them from hearing any cases, even before conviction. For example, the former Chief Military Judge was prosecuted for conduct to the prejudice of "good order and discipline", for allegedly having a personal relationship with a court reporter under his command. Although the matter never went to trial — there was no available judge impartial enough to adjudicate the matter — he did not preside on any cases for the 2 years leading to his mandatory retirement at the age of 60 (A.F., at para. 40). The chain of command can exert a *de facto* removal from the bench by the simple laying of charges (*Director of Military Prosecutions*, at para. 45; A.F., at paras. 33-41).

[202] In any event, military judges remain liable for uniquely military disciplinary charges initiated by their superiors and which can result in a criminal record and imprisonment. Thus, the rationale that animates the need for security of tenure — securing against interference by the executive (*Valente*, at p. 698) — is not safeguarded.

(3) The Presumption of Independence by Prosecution

[203] In response to the allegations that military judges face pressure by the chain of command, the Crown invokes the "strong" presumption that the prosecution (here the Director of Military Prosecutions (DMP)) will carry out its functions independently of partisan concerns (R.F., at paras. 51-54). Before charges can be laid, legal advice must be obtained (*QR & O*, art. 102.07(2)(*b*)), and the DMP can proceed only where there is a reasonable belief that the charges brought could be sustained in court. The Crown adds that should any officer exercising the functions of the DMP act unlawfully or in bad faith, they would be liable to professional and criminal sanctions.

[204] Admittedly, the prosecution, as "protector of the public interest", has a constitutional obligation under s. 7 of the *Charter* to act independently of partisan concerns (*R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 28). However, our Court has often warned against relying on prosecutorial discretion to safeguard against statutory provisions that otherwise breach the *Charter*. As the intervener the Canadian Civil Liberties Association submits, "[t]he protection of the rule of law

should not depend on a belief — however well-intentioned — that our institutions are . . . immune from impropriety" (I.F., at para. 22).

[205] As our Court put it in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 95, "one cannot be certain that the discretion will always be exercised in a way that would avoid an unconstitutional result. Nor can the constitutionality of a statutory provision rest on an expectation that the Crown will act properly" (see also *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 17; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 74). In *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4 (cited in *Nur*, at para. 95), Cory J. stated:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.

[206] When it comes to judicial independence, the *Cawthorne* presumption is therefore no panacea. In the military context, the presumption cannot be relied on to safeguard judicial independence. For one, the DMP acts not as protector of the public interest but as enforcer of discipline, efficiency and morale in the army. But above all, the DMP does *not* act independently of the chain of command. The *NDA* expressly requires otherwise.

[207] Under the *NDA*, the DMP performs its functions under the supervision, instructions and guidelines of the Judge Advocate General (JAG) (*NDA*, ss. 9.2 and 165.17; *QR & O*, art. 4.081(1)). Contrary to what its title suggests, the JAG is not a judge. Rather, the JAG mainly acts as a legal adviser to the Department of National Defence and the Canadian Armed Forces. At present, the JAG holds the rank of Brigadier-General, above all military judges. The JAG must be "totally loyal and partisan to the interests of the military as an institution as well as to the chain of command" (Drapeau and Létourneau, at p. 34). Essentially, the JAG "is not independent of but is rather a part of the executive" (*Généreux*, at p. 302; see also p. 309).

IV. Conclusion

[208] Thus, in my view, none of the safeguards can alleviate the concerns raised by the spectre that military judges could face discipline from their superiors. I conclude that a reasonable and informed observer would be concerned about institutional bias. As the Fish Report observes (at para. 58):

> . . . the fact that military judges are subject to the CSD puts them in a position of subordination which is inconsistent with the exercise of judicial duties. This dynamic could lead to concerns that military judges may improperly take into account the disciplinary consequences to which they may be exposed if they adjudicate cases in a certain way. Some members of the CAF were concerned that military judges could be tempted to "toe the party line" in sensitive cases where the legally-correct decision may go against the solution preferred by the military hierarchy.

[209] I agree with the military judges in the courts martial decisions below and conclude their liability to the executive under the CSD, as currently structured, undermines their judicial independence. In sum, like civilian judges, military judges face accountability through the civilian criminal justice system and through a judicial conduct review committee. However, they are subject as officers to a much broader range of offences than civilian judges, for the military objectives of "good order" and "discipline, efficiency and morale". While I accept that judicial independence could be safeguarded if discipline was administered by judges through the MJIC, the disciplinary regime in the *NDA* is initiated and prosecuted by the executive. The possibility of reviewing the military judge's conduct either by summary hearing or by court martial irrevocably affects the public trust in the institution. A reasonable and informed person would apprehend that military judges could be influenced by their loyalty to rank and the interests of officers above them in the chain of command, to the detriment of the rights of accused members before them. I conclude the appellants' s. 11(d) right to a trial before an independent and impartial tribunal has been breached.

[210] The Crown concedes that, should the Court find an infringement of s. 11(d) of the *Charter*, it cannot be saved by s. 1 (R.F., at para. 32). The CMAC in *Edwards* justifies this disciplinary scheme for military judges on the basis that it is necessary to ensure their safety and the success of military missions during times of war, and necessary to maintain an operationally ready Armed Forces during times of peace (paras. 8 and 62). In my view, such justification would more properly be considered

under s. 1 of the *Charter*, pursuant to the *Oakes* test (see *Généreux*, at pp. 313-14, citing *R. v. Oakes*, [1986] 1 S.C.R. 103).

[211] I would allow the appeals, set aside the CMAC decisions, and quash the conviction of Sgt. Thibault. I would declare the legislative scheme under the *NDA* of no force or effect insofar as it subjects military judges to the disciplinary process administered by military authorities.

Appeals dismissed, KARAKATSANIS J. *dissenting.*

Solicitor for the appellants: Defence Counsel Services, Gatineau.

Solicitor for the respondent: Canadian Military Prosecution Service, Ottawa.

Solicitors for the intervener the Canadian Civil Liberties Association: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Allen/McMillan Litigation Counsel, Vancouver.