R V EDWARDS AND INDEPENDENCE OF CANADIAN MILITARY JUDICIARY: A JUDGMENT THAT LEAVES US WANTING MORE

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On 16 October 2023, the Supreme Court of Canada (SCC) heard argument regarding whether the independence of military judges, who also serve as officers in the Canadian Forces (CF), is compromised because of their status as officers. The SCC handed down its judgment on 26 April 2024. The central issue in R v Edwards[3] *was whether the potential for military judges to be influenced by the executive, through their standing as CF officers, compromises their institutional independence. This influence could arise from deficient separation of powers between the executive and judiciary or from the fact that military judges are subject to the Code of Service Discipline*[4]*, which is administered by the executive, namely, the CF "chain of command."*

A 6:1 majority of the SCC held that the safeguards under the National Defence Act[5]*, including amplification under the Queen's Regulations and Orders for the Canadian Forces—QR&O, were sufficient to meet the requirements of an independent and impartial tribunal under section 11(d) of the Canadian Charter of Rights and Freedoms*[6]*.*

For the reasons set out below, we offer a different perspective: As long as military judges are subject to the Code of Service Discipline, they remain subordinate to the executive in a manner which is inconsistent with the Charter. We also discuss a number of external factors affecting the independence and impartiality of Canadian military judges which do not seem to have been considered, or were not considered adequately, by the SCC in Edwards.

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3 *R v Edwards*, 2024 SCC 15 [*Edwards*].

4 *National Defence Act*, RSC 1985, c N-5, Part III—*Code of Service Discipline* [*CSD*].

5 *National Defence Act*, RSC 1985, c N-5 [*NDA*].

6 *Canadian Charter of Rights and Freedoms*, s 11(d), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

Le 16 octobre 2023, la Cour suprême du Canada (CSC) a entendu un argument portant sur la question de savoir si l'indépendance des juges militaires, qui sont également des officiers des Forces canadiennes (FC), est compromise en raison de leur statut d'officier. La CSC a rendu sa décision le 26 avril 2024. La principale question dans R c Edwards était celle de savoir si la possibilité que les juges militaires soient influencés par le pouvoir exécutif, en raison de leur statut d'officier des FC, compromet leur indépendance institutionnelle. Cette influence pourrait découler de la mauvaise séparation des pouvoirs entre l'exécutif et le judiciaire ou du fait que les juges militaires sont assujettis au Code de discipline militaire, lequel est administré par le pouvoir exécutif, à savoir la « chaîne de commandement » des FC.

À une majorité de six contre une, la CSC a conclu que les protections offertes par la Loi sur la défense nationale, dont la précision prévue aux Ordonnances et règlements royaux applicables aux Forces canadiennes (ORFC), suffisaient pour respecter les exigences d'un tribunal indépendant et impartial mentionnées à l'alinéa 11d) de la Charte canadienne des droits et libertés.

Pour les raisons indiquées ci-dessous, les auteurs offrent un point de vue différent : dans la mesure où les juges militaires sont assujettis au code de discipline militaire, ils demeurent soumis au pouvoir exécutif d'une manière incompatible avec la Charte. Les auteurs examinent également un certain nombre de facteurs externes qui influencent l'indépendance et l'impartialité des juges militaires canadiens, ce qui ne semble pas avoir été pris en compte, ou ne l'a pas été de façon adéquate, par la CSC dans la décision Edwards.

Contents

1. The Aftermath of *Généreux*

The question of independence of Canadian military judges was not a novel issue in Canada; over thirty years ago, the SCC examined this very issue in *R v Généreux* (*Généreux*)[7]. For three decades, *Généreux* has been relied upon by courts for the proposition that a separate system of military justice, similar to, and parallel with, the civilian criminal justice regime, is a constitutionally valid regime. The judgment in *Généreux* was revisited in *Edwards*; the Appellants, represented by Defence Counsel Services, called for the SCC to overturn, or at least depart from, the judgment. Not surprisingly, the majority of the SCC did not do so.

It was problematic for the Appellants to ask the SCC to overturn *Généreux*, not solely because apex courts are reluctant to overturn established precedent, but also because it was unnecessary to do so in order to resolve the central issues in *Edwards*. We contend that both the Appellants and the Respondent Crown, as well as the majority of the SCC, failed to appreciate that the judgment in *Généreux* does not resolve the issue of military judicial independence.

At the time that *Généreux* was heard, military judges who presided over courts martial were appointed from a list maintained by the Judge Advocate General (JAG), an officer in the CF and senior-most legal advisor to the Minister, the CF, and the Department of National Defence on matters of military law[8]. The majority of the SCC held that this afforded the executive branch of government too much control over military judges, and, therefore, impaired the accused's right to a "public hearing by an independent and impartial tribunal" guaranteed under section 11(*d*) of the *Charter*[9]. This judgment was a key factor leading to the reforms of the military justice system introduced in Bill C-25.[10]

An issue that was not adequately resolved in *Généreux* was whether the judicial branch in the military justice system is distinct from the executive.[11] In our Westminster Parliamentary democracy, the judicial branch is perceived as separate and distinct from the executive and the legislature. The separation of powers is of fundamental importance in

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7 *R v Généreux*, [1992] 1 SCR 259.

8 *NDA, supra note 5*, at s 9.1.

9 *Charter*, *supra* note 6, at s. 11.

10 Bill C-25, *An Act to Amend the National Defence Act*, SC 1998, c 35 [Bill C-25].

11 Rory Fowler & Afton Brooke David, "The Fork in the Road and the Path Not Taken" in Navdeep Singh & Franklin D. Rosenblatt, eds, *March to Justice: Global Military Law Landmarks*, (India: Thomson Press (India) Ltd., 2021) 75–95.

maintaining judicial independence and the rule of law in Canada.[12] Arguably, *Généreux* left in its wake 30 years of uncertainty and minor incremental evolutions in the law surrounding the independence and impartiality of Canada's military judiciary. And it offered insufficient explanation regarding how that issue should be resolved now.

2. The Perfect Storm Leading to *Edwards*

The context in which *Edwards* was decided began with the failed prosecution of the former Chief Military Judge, Colonel Dutil, in 2019 and 2020[13]. Initially, an 'ethics complaint' was raised against Colonel Dutil by the Office of the Judge Advocate General of the Canadian Forces (OJAG) in October 2015.[14] This was submitted to the Military Judges Inquiry Committee (MJIC)[15]. The Chief Justice of the Court Martial Appeal Court of Canada (CMAC), who is responsible for appointing judges to the MJIC[16], assigned a judge of the CMAC, Justice Gagné[17], as the Chairperson of the MJIC. Justice Gagné then conducted an initial examination of the complaint. In February 2016, Justice Gagné recommended that no further action be taken by the MJIC.[18]

The public eventually learned that the basis of the 'ethics complaint' was the same basis for subsequent *Code of Service Discipline* proceedings

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12 *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at paras 23-24; *The Queen v Beauregard*, 1986 CanLII 24 (SCC), <https://tinyurl.com/3ypkezf5>; *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, 1996 CanLII 153 (SCC), <https://tinyurl.com/4h3wckjn> at para 61; *Wells v Newfoundland*, [1999] 3 SCR 199, at para 52; see also: *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, 491; *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 469.

13 *R c Colonel Dutil*, 2019 CM 3003 [*Dutil*]; *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330 [*DMP v OCMJ*]. See also the following useful summaries: Rory Fowler, "*Le Directeur des Poursuites Militaires c Le Juge Militaire en Chef Adjoint*: DMP's Forlorn Hope" (11 October 2019) online (blog): <https://tinyurl.com/vdcrvv94> [perma.cc/ACV8-LXZV]; Rory Fowler, "Disciplining Military Judges" (20 February 2020) online (blog): <https://roryfowlerlaw.com/disciplining-military-judges/> [perma.cc/4PZK-LM8W] ; Rory Fowler, "'Bad Facts' and Awkward Law: *The Director of Military Prosecutions v Deputy Chief Military Judge, et al.*, 2020 FC 330" (4 March 2020) online (blog): <https://tinyurl.com/mub4hn5t> [perma.cc/MZ87-VTW5]; Rory Fowler, "Director of Military Prosecutions Withdraws Charges Against the Chief Military Judge of the Canadian Forces" (11 March 2020) online (blog): <https://tinyurl.com/mux44bux> [perma.cc/6MGH-NF9F].

14 *DMP v OCMJ*, *supra*, note 13 at para 54.

15 *NDA*, *supra* note 5 at s 165.31 & 165.32.

16 *NDA*, *supra* note 5 at s 165.31(1).

17 *DMP v OCMJ*, *supra* note 13 at para 59.

18 *DMP v OCMJ, supra* note 13 at paras 59 & 60.

against Colonel Dutil.[19] And the substance of the 'ethics complaint' appears to have been an investigation conducted by the military police.[20] The military police investigation did not initially lead to charges under the *Criminal Code* or the *Code of Service Discipline*[21]. Instead, it formed the basis of the complaint submitted to the MJIC. Following the decision of the Chief Justice of the CMAC not to proceed further, the military police investigation carried on.[22]

In effect, a criminal investigation was commenced by a representative of the executive branch under the *Code of Service Discipline*. That investigation did not lead to charges under the *Criminal Code* or the *Code of Service Discipline,* but to an 'ethics complaint' submitted to the MJIC—a statutory process administered by the judiciary, and which is separate from the *Code of Service Discipline*. The resulting decision by the head of that judicial committee was to not proceed under their mandate. The criminal investigation was then resumed, leading to charges under the *Code of Service Discipline*. Clearly, one or more decision-makers in the executive viewed the outcome under the MJIC regime as unsatisfactory, and the process under the *Code of Service Discipline* was renewed by the executive.

Charges were laid against Colonel Dutil under the *Code of Service Discipline* on 25 January 2018.[23] Charges were preferred for court martial by a 'Special Prosecutor' on 10 June 2018.[24] The appointment of a 'Special Prosecutor' was a superficial and largely inconsequential 'remedy' for the potential conflict of interest in the military prosecution. Although the 'Special Prosecutor' was a reserve force legal officer ordinarily not employed within the Canadian Military Prosecution Service, as a prosecutor he still fell under the authority of Director of Military Prosecutions (DMP) and acted under authority devolved from DMP.[25]

Shortly after the charges were preferred, Colonel Dutil recused himself from presiding over Code of Service Discipline proceedings, including courts martial, by delegating his functions as Chief Military Judge to

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19 *DMP v OCMJ*, supra note 13 at, para 54.

20 *Dutil*, *supra* note 13 at para 17.

21 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. NB: In addition to offences expressly defined under the *NDA*, almost all offences under the *Criminal Code* may be prosecuted in Canada as *Code of Service Discipline* offences: *NDA*, *supra* note 5 at s 130.

22 It is unclear whether the military police investigation was re-opened, or a new investigation into the same subject matter was commenced. *DMP v OCMJ*, *supra* note 13 at para 61.

23 *DMP v OCMJ, supra note* 13 at paras 2 & 61–64.

24 *DMP v OCMJ*, *supra* note 13 at para 68.

25 *DMP v OCMJ*, *supra* note 13 at para 66; *NDA*, *supra* note 5, at ss 165.11 & 165.12.

Lieutenant-Colonel L-V d'Auteuil.[26] Lieutenant-Colonel d'Auteil was also hastily appointed Deputy Chief Military Judge (DCMJ)[27] in order to address this potential judicial conflict of interest. LCol d'Auteuil would remain Acting Chief Military Judge (A/CMJ) for much of the time leading up to Colonel Dutil's retirement on 20 March 2020.[28] In fact, following Colonel Dutil's retirement, a new Chief Military Judge would not be designated for four years, during which period, Lieutenant-Colonel d'Auteuil would remain A/CMJ.[29] Coincidentally, the new Chief Military Judge was designated shortly before the judgment in *Edwards* was handed down.[30]

The charges against Colonel Dutil were never adjudicated. In August 2018, the A/CMJ received the charges from DMP.[31] In September 2018, counsel for Colonel Dutil indicated his intention to bring an application seeking recusal of all military judges from presiding over a court martial in which Colonel Dutil was the defendant.[32] In June 2019, approximately 21 months after the charges were laid, and 9 months after they were preferred, the A/CMJ presided over Colonel Dutil's application.[33] At the outset of the hearing, counsel for DMP withdrew four of the eight charges laid against Colonel Dutil.[34]

The application was successful, but the judgment was limited to the A/CMJ recusing himself from presiding over any court martial.[35] Technically, the A/CMJ adjourned the proceedings until another military judge could be appointed.[36] However, in a letter read by the A/CMJ immediately after his recusal decision, the A/CMJ indicated that he would not assign another military judge to preside over a court martial (the "non-assignment

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26 *DMP v OCMJ*, *supra* note 13 at para 72.

27 This designation by the Governor-in-Council was distinct from the Chief Military Judge's delegation of powers on 15 June 2018: *NDA*, *supra* note 5 at s 165.28. Absent any delegation, the DCMJ would be the *de jure* Acting Chief Military Judge in the event that the Chief Military Judge is absent or unable to act or the office of Chief Military Judge is vacant: *NDA*, *supra* note 5 at s 165.29.

28 Rory Fowler, "So … About that vacancy for Chief Military Judge" (24 September 2020) online (blog): <https://tinyurl.com/4mxbm2bz> [perma.cc/W8SZ-9QSR].

29 Rory Fowler, "New Chief Military Judge … and it only took four years …" (30 March 2024) online (blog): <https://tinyurl.com/4np3rwym> [perma.cc/2HE3-UQ3M].

30 National Defence, News Release "Defence Minister Bill Blair Announces Appointment of New Chief Military Judge" (27 March 2024), online: <https://tinyurl.com/4dtxvhe7> [perma.cc/QB9G-R65N] [National Defence, News Release].

31 *Dutil*, *supra* note 13 at para 1.

32 *Dutil*, *supra* note 13 at para 28.

33 *Ibid*.

34 *DMP v OCMJ*, *supra* note 13 at para 92.

35 *Dutil*, *supra* note 13 at para 109.

36 *Dutil*, *supra* note 13 at para 110.

decision").[37] His reasons for declining to do so were consistent with his analysis in his recusal decision.[38] On 16 July 2019, DMP brought an application before the Federal Court seeking the extraordinary remedies of *certiorari* and *mandamus*, respectively, to quash the non-assignment decision and to compel the A/CMJ to assign a military judge.[39]

DMP's application was unsuccessful, and Justice Maritneau of the Federal Court handed down his judgment on 3 March 2020.[40] Approximately a week later, on 11 March 2020, DMP withdrew the remaining charges.[41]

Following this failed prosecution, Defence Counsel Services raised repeated applications relying on the fact that, for discipline and grievances, the Chief Military Judge and the other military judges fell under the command of a non-judicial General Officer, the Deputy Vice Chief of the Defence Staff. Defence Counsel Services argued that this command relationship offended s. 11(*d*) of the *Charter*.

In a series of escalating judgments, military judges eventually held that a reasonable bystander, fully informed of the circumstances and the law, would conclude that military judges do not benefit from sufficient institutional independence. They ordered stays of prosecutions in multiple courts martial, notably *Valente v The Queen*.[42] Arguably, these stays were the result of a refusal by the Chief of the Defence Staff to rescind his order.[43] DMP appealed.

3. CMAC Decision

On appeal of multiple stays of prosecution, a unanimous CMAC concluded that military judges are sufficiently independent and impartial.

Several of the judgments under review by the CMAC were predicated upon the first judgment arising from the applications brought by Defence Counsel Services challenging judicial independence: *R v Master-Corporal*

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37 *DMP v OCMJ*, *supra* note 13 at para 99.

38 *DMP v OCMJ*, *supra* note 13 at paras 138–151.

39 *DMP v OCMJ*, *supra* note 13.

40 *Ibid*.

41 National Defence, News Release, *supra* note 30.

42 *Valente v The Queen*, [1985] 2 SCR 673, at para 13 [*Valente*]. For a useful summary, see: Rory Fowler, "Judgments as 'Remedial Measures'" (2 October 2020) online (blog): <https://tinyurl.com/yc4sxy47> [perma.cc/ZW5X-6KHU] [Rory Fowler].

43 *R v Major Bourque*, 2020 CM 2008 [*Bourque*]. Compare to *R v Edwards*, 2020 CM 3006; *R c Crepeau*, 2020 CM 3007; *R v Fontaine*, 2020 CM 3008; *R v Iredale*, 2020 CM 4011; *R v MacPherson and Chauhan and J.L.*, 2020 CM 2012 [*MacPherson*].

Pett (*Pett*)[44]. In *Pett*, military judge Commander M. Pelletier held that MJIC process established under the *National Defence Act* (*NDA)* supplanted the role of the *Code of Service Discipline* for military judges. This was a problematic analysis in light of the limited role and scope of powers of the MJIC.[45] The CMAC rejected that proposition.[46] The CMAC relied heavily on *Généreux*, holding that the constitutional validity of a separate system of military justice had been upheld repeatedly, and, as military officers, military judges must be subject to that code.[47]

In its review of lower court judgments, the SCC indicated that the CMAC held that subjecting military judges to the *Code of Service Discipline* was analogous to subjecting civilian judges to criminal law.[48] In the face of argument from Defence Counsel Services that improper prosecutions might be employed to influence judicial decision-making, the CMAC held that there was no reason to think that military judges would be subject to malicious prosecutions in light of the constitutional norm that prosecutors and commanders will exercise prosecutorial discretion in a quasi-judicial manner and independent of partisan concerns.[49]

Finally, the CMAC asserted that there is an overlap between the judicial and executive branches within the Westminster system of government. In support of this conclusion, they stated that military judges may perform functions of the executive in Boards of Inquiry, much as civilian judges may serve as commissioners of inquiry under the *Inquiries Act*.[50]

Conceptually, we did not find the CMAC's reasons compelling. We agree that the line of reasoning in *Pett*, which held that the MJIC process was a substitute for the *Code of Service Discipline,* was flawed. Although that was a key component of the analysis in *Pett*, it was largely a tangential issue by the time the appeals reached the CMAC.

A more significant issue was, and still is, that *Généreux* does not offer an adequate explanation for military judicial independence. The principal conclusion of the reasoning in *Généreux* is the justification for a separate system of military justice, operating as a derogation from the civilian criminal justice regime. This derogation does not preclude the

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44 *R v Master-Corporal Pett*, 2020 CM 4002 [*Pett*].

45 Rory Fowler, "Disciplining Military Judges" (20 February 2020) online (blog): <https://tinyurl.com/2a3z5dae> [perma.cc/P8P4-24FL].

46 *R v Edwards et al*, 2021 CMAC 2, at paras 16–18, & 76–84 [*Edwards* (CMAC)]; *Edwards*, *supra* note 3 at para 38.

47 *Edwards*, *supra* note 3 at para 41.

48 *Edwards*, *supra* note 3 at para 43.

49 *Edwards, supra* note 3; *Edwards* (CMAC), *supra* note 46 at para 92.

50 *Edwards* (CMAC), *supra* note 46 at para 69; *Inquiries Act*, RSC, 1985, c I-11.

universal application of the civilian criminal justice system. Relying on *Valente*[51], the judgment in *Généreux* described why the system in place in 1992 was inadequate to maintain judicial institutional independence and impartiality. It does little to explain why the current regime is sufficient.

The CMAC did not offer compelling justification in the face of the contextual issues that had arisen throughout 2019 and 2020. Neither was the explanation of the division of powers within a Westminster democracy particularly convincing. The court's rationale appeared to put the cart before the horse: Judges may occasionally be assigned as commissioners of inquiry because of their perceived independence—but this is neither a source of their independence, nor does that make them permanent members of the executive.

Military judges, as commissioned officers of the CF, are permanent members of the executive. They are therefore markedly different from civilian judges occasionally performing functions for the executive. Civilian judges are also not subject to the same tensions and potential interference as military judges. In addition, these tensions, which were on marked display in 2019 and 2020, were inadequately addressed by the CMAC.

Following the judgement of the CMAC in *Edwards* (CMAC), Defence Counsel Services sought leave to appeal to the SCC. As subsequent decisions on appeal here handed down by the CMAC, they were added to the list of matters being appealed to the SCC.

4. The SCC Decision

In *Edwards,* the Appellants raised argument grounded both in law and policy. Regarding the latter, they argued that military judges should follow the models of the UK and New Zealand and "civilianize" the military judiciary in order to solve the issue.[52] This policy argument did not gain much traction with the SCC.

This policy argument was considered in the *Third Independent Review Authority to the Minister of National Defence* ("Fish Report")[53], in which former Supreme Court Justice Morris Fish examined the issue of independence and impartiality of the military judiciary. He observed

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51 *Valente*, *supra* note 42.

52 *Edwards*, *supra* note 3 at para 6.

53 The Honourable Morris J. Fish, C.C., Q.C., *Report of the Third Independent Review Authority to the Minister of National Defence, Pursuant to subsection 273.601(1) of the National Defence Act, RSC 1985, c N-5*, (Ottawa: Minister of National Defence, 2021), <https://tinyurl.com/peksvt56> [perma.cc/4L7F-GBYR] [Fish Report].

that, although military judges hold military rank, there are a number of safeguards in place to protect their independence from the executive. One of these is the fact that military judges "… are not subject to personal reports or assessments if such documents are 'to 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,' and their personnel evaluation report files cannot be placed before a promotion board".[54]

However, the Appellants also relied upon the 2003 landmark case from the European Court of Human Rights (ECtHR), *Grieves v the United Kingdom* (*Grieves*)[55], which considered the same question of independence and impartiality of the UK military judiciary at the time. In *Grieves*, the Applicant appealed a judgment rendered by a Royal Navy Judge Advocate, a position comparable to a Canadian military judge wearing a Royal Canadian Navy uniform and rank of Commander. The Appellant argued that "… the structure of his court-martial was such that it violated the independence and impartiality requirements, and consequently the fairness requirement, of [Article 6 § 1 of the *European Convention on Human Rights*]."[56]

At the time, the Royal Navy Judge Advocate served as a judge on an *ad-hoc* basis; the officer would otherwise serve as a naval officer performing regular naval duties. This arrangement was comparable—though not identical—to that which existed in Canada at the time of *Généreux*. At the material time, military judges in both the Royal Air Force (RAF) and Army in the UK were civilian judges, working in these positions on a full-time basis. They were subject to the direction of the Judge Advocate General of the UK, also a civilian judge.[57]

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54 Fish Report, *supra* note 53 at 14, footnote 47 ("In accordance with section 165.25 of the *NDA*, the CMJ holds a rank that is not less than colonel. This rule does not apply to the other military judges. The four military judges currently appointed hold the rank of lieutenant-colonel or its naval equivalent of commander. Pursuant to sections 26.10 and 26.12 of the QR&O, military judges are not subject to personal reports or assessments if such documents are "to 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," and their personnel evaluation report files cannot be placed before a promotion board.")

55 *Grieves v United Kingdom*, No 57067/00, [2003] ECtHR 688 [*Grieves*].

56 *Grieves*, *supra* note 55 at para 3. Also see, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5, at Article 6, which covers the right to a fair trial: <https://tinyurl.com/3vssxs2b>; *Charter, supra* note 6 at s. 11.

57 *Grieves, supra* note 55 at para 82, ("[Th]e Judge Advocate in a naval court martial is a serving naval officer who, when not sitting in a court-martial, carries out regular naval duties. In contrast, the Judge Advocate in the air force is a civilian working full-time on the staff of the Judge Advocate General, himself a civilian".)

The ECtHR held that "… the lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' [army and air-force] courts-martial …"[58]

In the wake of *Grieves*, the United Kingdom completely "civilianized" the military judiciary. Although this is an option that Justice Fish recommended in his report, and which seems to have the support of senior ranks of the CF[59], Justice Fish also acknowledged that this recommendation is not necessarily obligatory under Canadian law. In his report, as in prior Independent Reviews of the *Code of Service Discipline* [60], Justice Fish distinguished between policy changes that would be beneficial and those that are obligatory under the supreme law of Canada.[61]

Grieves was not mentioned in the *Edwards* decision, even though the Appellants expressly cited it in their argument. Neither was *Grieves* mentioned in the Fish Report. Writing for the majority in *Edwards*, Justice Kasirer rejected the policy-based arguments raised by Defence Counsel Services.[62]

Regarding the arguments based on law, Justice Kasirer asserted that the arguments offered by the Appellants were not systematically grounded in the *Valente* framework and tended to straddle the factors of judicial "independence" and judicial "impartiality".[63] According to the majority of the SCC, the Appellants raised two principal objections grounded in law: (1) a failure to respect constitutional division of powers; and (2) a lack of institutional independence that can potentially undermine their impartiality.[64]

Justice Kasirer summarized these arguments as follows: First, military judges' standing as both members of the executive (as CF officers) and members of the judiciary placed them in irretrievable conflict of interest. Second, subjecting military judges to the *Code of Service Discipline*, administered by the executive, undermined their independence and impartiality. He demonstrated a preference for the status quo, concluding that military judges do not face an insurmountable conflict of interest and that a reasonable apprehension of bias is not created by the possible liability of military judges to discipline under the *Code of Service Discipline*.

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58 *Grieves, supra* note 55 at para 89.

59 Fish Report, *supra* note 53 at paras 75–76.

60 *CSD, supra* note 4.

61 Fish Report, *supra* note 53.

62 *Edwards*, *supra* note 3 at paras 72–83.

63 *Edwards, supra* note 3 at para 88.

64 *Edwards, supra* note 3 at paras 89–90.

The majority characterized the Appellants' arguments as challenging the proposition that the 30-year-old judgment in *Généreux* resolves these appeals. Certainly, in oral argument, counsel for the Appellants expressly asked the SCC to depart from *Généreux*. Arguably, this request was both unnecessary and was the source of much resistance from the court.

Justice Kasirer observed that:

> "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."[65]

Justice Kasirer disagreed with the contention that, as officers and, therefore, members of the executive, military judges are "… in an irretrievable conflict of interest with their judicial role and that this violates the constitutional principle of separation of powers".[66] The majority did not consider there to be a conflict of interest that would jeopardize institutional independence and impartiality. While they acknowledged that an oath of office is not a guarantee of actual impartiality, nor a fail-proof protection against perceived bias, a "… 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."[67]

The majority also rejected the Appellants' concerns regarding the vulnerability of military judges under the *Code of Service Discipline*, asserting that there were sufficient safeguards under the *National Defence Act*. Justice Kasirer wrote:

> "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

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65 *Edwards, supra* note 3 at para 121.

66 *Edwards, supra* note 3 at para 122.

67 *Edwards, supra* note 3 at para 129.

> judges as officers exposes them to interference by the executive in the exercise of their judicial functions."[68]

Justice Kasirer and the majority held that "… 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."[69] Respectfully, this confident assertion may have been tone deaf to the context that gave rise to the appeals in question.

Justice Kasirer explained that "[u]nlike civilian judges, military judges are subject to orders from superior officers that are necessary to advance legitimate military purposes …" and that 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."[70]

The majority indicated that military judges are "properly insulated"[71] from the chain of command, and the fact that they are subject to the *Code of Service Discipline* does not mean they could be charged under the *Code of Service Discipline* arising from the performance of their judicial duties.

Justice Kasirer asserted that the Appellants' concerns that "… 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 …" was not sufficient to undermine judicial independence since a "… reasonable and informed person would understand that … orders that compromise judicial independence would be issued unlawfully."[72]

What went unexplained were circumstances in which it would be necessary for the executive to issue orders to a military judge in the performance of their duties since a military judge's duties are almost always related to their judicial function.

The majority appeared to ignore the fact that the appeals arose in circumstances in which there was an apprehension of improper use of the *Code of Service Discipline* after the Chief Justice of the CMAC chose not

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68 *Edwards, supra* note 3 at para 131.
69 *Edwards, supra* note 3 at para 132.
70 *Edwards, supra* note 3 at para 134.
71 *Edwards, supra* note 3 at para 11.
72 *Edwards, supra* note 3 at para 135.

to proceed with a complaint raised against the Chief Military Judge by the Office of the JAG.

In her dissent, Justice Karakatsanis agreed with the majority that the mere status of military judges as officers did not *necessarily* contravene a CF member's right to be tried by an independent and impartial tribunal under section 11(*d*) of the *Charter*.[73] However, citing *Généreux*, she concluded 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."[74]

Similar to the majority, she recognized that the Appellants' submissions addressed both judicial independence and impartiality and she acknowledged that those factors are distinct. However, she observed that "… the two concepts often overlap. Most notably, independence is an underlying condition that contributes to the guarantee of an impartial hearing."[75]

For Justice Karakatsanis, the operative question was: "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?"[76] As with the majority, she focused on impact of principles from *Valente* and *Lippé*.[77] Unlike the majority, Justice Karakatsanis held that the hallmarks of judicial independence set out in *Valente* did not provide a complete answer.[78]

She identified three key issues that informed her conclusions. First, and foremost:

> "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"."[79]

Second, institutional independence is not only inextricably bound up with the separation of powers between the executive and the judiciary,

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73 *Edwards, supra* note 3 at para 150.

74 *Ibid.*

75 *Edwards, supra* note 3 at para 165.

76 *Edwards, supra* note 3 at para 152.

77 *R v Lippé*, [1991] 2 SCR 114 [*Lippé*]; *Valente, supra* note 42.

78 *Edwards, supra* note 3 at para 167.

79 *Edwards, supra* note 3 at para 154.

but the executive must not even appear to exert pressure on the judiciary if a reasonable person is to have confidence in the independence and impartiality of the judiciary.[80] Judges must be free to decide according to their own conscience, and no outside interference may compel or pressure a decision maker.[81]

Third, the status and nature of military judges represents a derogation from the norm. They have, superimposed over them, additional obligations and constraints to which civilian judges are not subject.[82] Nevertheless, the standard of independence for military judges is no less than for civilian judges.[83] And, because of the additional factors that apply to military judges, *Valente* does not provide a complete answer.[84]

As a matter of principle, the judiciary is not—and must not be—answerable to the executive or to elected officials within government. Consequently, 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.[85] They are accountable to judicial oversight.[86]

Justice Karakatsanis recognized that the disciplinary framework applicable to military judges included the framework relating to the MJIC.[87] Like the CMAC and the majority of the SCC, she recognized the limited scope of the MJIC regime.[88] However, unlike the majority, she expressed concern about the impact of disciplinary processes outside of the MJIC regime.

While Justice Karakatsanis recognized that "no judge is above the law", she rejected the argument from DMP that military judges are in no different position than civilian judges, who are also liable to be prosecuted by the state for criminal behaviour.[89] She held that this comparison ignored the additional disciplinary regime faced by military judges. Notwithstanding that the *Code of Service Discipline* has been upheld as constitutionally valid, whether subjecting military judges to this broad,

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80 *Edwards, supra* note 3 at paras 162–63.

81 *IWA v Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 SCR 282, at 332-333.

82 *Edwards, supra* note 3 at paras 182–184.

83 *Edwards, supra* note 3 at para 166.

84 *Edwards, supra* note 3 at para 167.

85 *Edwards, supra* note 3 at para 170.

86 *Edwards, supra* note 3 at para 169.

87 *Edwards, supra* note 3 at paras 157–158, 174, & 199–202.

88 *Edwards, supra* note 3 at paras 199–202.

89 *Edwards, supra* note 3 at para 182.

and at times, vague, disciplinary scheme undermines their independence and impartiality is a separate issue.[90]

Justice Karakatsanis observed that the "reasonable and informed person" described in *Valente* and *Lippé* would necessarily be informed about the military context, military priorities (including the prioritization of "victory" over "justice"), complex allegiances, and the military's insular hierarchical culture. Even if these priorities justify the maintenance of a separate system of military justice, Canadian "… 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."[91]

Justice Karakatsanis then examined three specific 'safeguards' to the independence of military judges: (1) the oath of office; (2) removal under the MJIC; and, (3) the presumption of independence by the prosecution.[92]

She concluded that 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." Ultimately, it "… does little to guard against an apprehension of *institutional* [emphasis in original] bias."[93]

Similarly, although the process attributed to the MJIC represents a means of submitting complaints against military judges, which could, potentially lead to their removal through judicial supervision, she concluded that the MJIC does nothing to protect the security of tenure of military judges from impact under the *Code of Service Discipline*.[94]

She concluded that the safeguards under the *NDA* were insufficient to prevent the chain of command—the executive—from potentially using disciplinary power to influence military judges. Arguably, her examination of this particular issue was more thorough than that of the majority.

5. Critique of the Judgment

Justice Karakatsanis concurred with the majority that the mere fact that military judges hold military rank does not undermine their independence such that it is inconsistent with the minimum threshold for independence

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90 *Edwards, supra* note 3 at paras 182–184.
91 *Edwards, supra* note 3 at paras 187–191.
92 *Edwards, supra* note 3 at paras 194–207.
93 *Edwards, supra* note 3 at para 196.
94 *Edwards, supra* note 3 at paras 199–202.

and impartiality required by the Canadian Constitution.[95] We agree. We do not think that the 'civilianization' of military judiciary is absolutely necessary, though it is a worthwhile policy consideration.

Regardless of a military judge's rank, or lack thereof, we would also suggest that military judges should have a minimum amount of experience in the CF in order to become a military judge. Currently military judges must have at least 10 years' service as *officers* though not necessarily legal officers.[96] From a policy perspective, the requirement for experience as an officer is debatable. However, the unique experience and service gained while serving in the CF provides military judges with a perspective that is important in the adjudication of military justice.

However, the principal factor upon which the independence of the military judiciary turns is the factor upon which Justice Karakatsanis dissented. Military judicial independence will continue to be undermined as long as military judges are subject to the *Code of Service Discipline* in its current configuration.[97]

The majority asserted that "… a purely retaliatory prosecution of a military judge would be an unlawful prosecution …" and, similarly, "… an order against a military judge made on the basis of a threat of prosecution would likely be an unlawful order."[98]

However, this position is short-sighted. The vulnerability arising from the jurisdiction of the *Code of Service Discipline* is not related solely to the potential that military judges could be charged in relation to their judicial functions or a specific decision. Rather, it is that they are vulnerable to manipulation by the executive through the exercise of the broad discretion by the executive under the *Code of Service Discipline* as well as other potential statutory decisions that directly affect military judges, such as the resolution of grievances or other 'administrative' statutory decisions.

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95 *Edwards, supra* note 3 at para 15 ("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*)".).

96 *NDA*, *supra* note 5 ss 165.21 & 165.22.

97 *Edwards, supra* note 3; Fish Report, *supra* note 53 at para 58 (In his Report, Justice Fish also seems to take this position. He stated: "… 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".)

98 *Edwards, supra* note 3 at para 132.

The focus of the majority appeared to be on the risk or potential that military judges would be charged and prosecuted in relation to their judicial decision-making. However, their independence is not undermined solely by such clumsy attempts at coercion. Arguably, such a course of action would represent an aberration. A transparent attempt at such coercion would be easily challenged. The exercise of disciplinary authority, or command authority, can be more subtle, but no less intrusive. The problematic prosecution of the Chief Military Judge in 2020 presented an object example of this chilling effect.

The majority of the SCC downplayed this specific factual context. When Colonel Dutil, the former Chief Military Judge, faced prosecution under the *Code of Service Discipline*, he was effectively precluded from presiding over disciplinary matters for over 18 months. The sequence of events in relation to the military police investigation that gave rise to both the 'ethics complaint' and the subsequent *Code of Service Discipline* prosecution raises concerns about the sequence of events and why the criminal/disciplinary prosecution appeared to be the 'alternative' course of action.

The subsequent overt assertion of authority demonstrated through orders issued by the Chief of the Defence Staff in 2020 emphasized this concern. Even when faced by judgments at courts martial holding that the Chief of the Defence Staff was undermining judicial independence, CF decision-makers consistently refused to act on these judicial concerns until military judges started staying prosecutions.[99]

And these concerns were sufficient that at least two military judges held that their independence was unreasonably fettered.[100] A third military judge, Commander Sukstorf, differed regarding outcome, but reiterated judicial concerns regarding the "… silence and indifference from within the CAF …", which "… fuelled the applicants' arguments and stalled the military justice system …" and undermined confidence in the military judiciary's independence.[101]

The majority of the SCC concluded that the existence of rules and the requirement to obtain legal advice in select circumstances serve as a safeguards against unlawful orders or improper conduct by the executive.

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99 *Bourque supra* note 43; Rory Fowler, *supra* note 42.

100 For example: *R v Edwards C.D. (Leading Seaman)*, 2020 CM 3006, per Lieutenant-Colonel L.-V. d'Auteuil DCMJ; *R c Crépeau C.M.C. (Capitaine)*, 2020 CM 3007, per Lieutenant-Colonel L.-V. d'Auteuil DCMJ; *R v Iredale M.J. (Captain)*, 2020 CM 4011, per Commander J.B.M. Pelletier, MJ; *R c Fontaine K.J.J. (Artilleur)*, 2020 CM 3008, per Lieutenant-Colonel L.-V. d'Auteuil DCMJ.

101 *MacPherson, supra* note 43 at paras 103–108.

However, we suggest this has not stopped superior officers from making unlawful orders in the past. Past practice has demonstrated that the existence of a rule does not mean everyone will follow it. The mere fact that a statutory actor must obtain legal advice before acting does not guarantee that the legal advice will be correct, reasonable, or that it won't be influenced by irrelevant factors.[102]

Nor is it a certainty that the legal advice will be followed. However, if the legal advice is not followed, it is a near certainly that the contradictory legal advice will not be disclosed.

Indeed, the conclusion advanced by the Majority is problematic not only for the reasons set out above, but also because the SCC has already warned us about the issues surrounding blind confidence in the integrity of statutory actors. The Majority's reasons ignore a compelling factor raised by Justice Cory in *R v Bain* in 1992, which was relied upon by a majority of the SCC in *R v Nur* in 2015[103]:

> "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 [emphasis added]."[104]

This prudent caution was expressly cited by Justice Karakatsanis in her dissent.[105]

6. Other Factors Arising at the Material Time

Before the SCC heard the appeal in *Edwards*, the *Code of Service Discipline* had been further amended in a manner that directly affected judicial independence. On 20 June 2022, several provisions under Bill C-77 came into force, essentially bifurcating the *Code of Service Discipline*[106]. These amendments introduced "service infractions", which are distinguishable from "service offences." Service infractions are non-criminal disciplinary infractions, tried exclusively by "summary hearings" on a balance of probabilities, with no right to elect trial by court martial. This new form

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102 *Noonan v Canada (Attorney General)*, 2023 FC 618.

103 *R v Bain,* [1992] 1 SCR 91 [*Bain*]; *R v Nur*, 2015 SCC 15 [*Nur*].

104 *Bain*, *supr*a note 103 at paras 103–104; *Nur*, *supra* note 103 at para 95.

105 *Edwards, supra* note 3 at para 205.

106 Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 <https://tinyurl.com/56mjjk6j> [perma.cc/QC9C-HUDM].

of summary justice under the *Code of Service Discipline* is referred to as the "Military Justice at the Unit Level" or "MJUL" [107]. Meanwhile, service offences can now only be tried by court martial.

Prior to Bill C-77, the *Code of Service Discipline* defined only service offences triable by "service tribunals."[108] These service tribunals were comprised of either "summary trials", presided over by a "presiding officer" from the accused's chain of command, or courts martial, presided over by military judges.[109] Presiding officers were non-judicial actors, lacking any reasonable safeguards for independence.[110] Summary trials had no jurisdiction over senior officers at the rank of colonel or above, or over military judges.[111] The reason for the exclusion of military judges from the summary trial process ought to be obvious in light of the factors described in *Valente*.

Now, however, any member of the CF, including military judges, may be tried for a service infraction by summary hearing. While this may be viewed as a "great equalizer", demonstrating that no one is above the law, it also means that military judges who preside over courts martial, and who must therefore be sufficiently independent and impartial to provide decisions free of apprehension of reprisal or undue influence, can now be charged and punished by their non-judicial chain of command (i.e., senior officers who are representatives of the executive branch). For example, senior officers who are representatives of the executive branch. These same representatives of the executive have a direct interest in the decisions made by military judges at court martial and could even find themselves appearing before the same.

This was, and remains, an issue that was not adequately addressed in the *Edwards* decision. Although Bill C-77 was enacted prior to the Fish Report, the bifurcation of the *Code of Service Discipline* came into force a little over a year after Justice Fish completed his review. However, it was certainly in force when *Edwards* was heard by the SCC.

The fact that military judges can be tried under the MJUL was recently the subject of proposed legislative amendments included in Bill C-66, *An*

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107 Military Justice at the Unit Level Policy 2.0, vol. 2.0 (Ottawa: DND, 2024) <https://tinyurl.com/s2jaurv5>.

108 *National Defence Act*, RSC 1985, c N-5, as at 19 June 2020, s 2, definition "service tribunal" [*NDA*, pre Bill C-77].

109 NDA, pre Bill C-77, *supra* note 108 at ss 163–164.

110 *Ibid.*

111 *NDA, pre Bill C-77, supra* note 108 at s 164(1.3).

Act to amend the National Defence Act and other Acts.[112] Bill C-66 had only completed the first reading before the House of Commons before the Prime Minister prorogued Parliament. This Bill died on the Order Paper.

Nevertheless, we believe a number of lessons could be learned from this Bill which could improve the future iteration, one of which we will mention here. Bill C-66 is likely best-known for the legislative intent of purportedly removing the prosecution and investigation of offences described as "sexual offences" from the jurisdiction of the military justice system and placing such investigations and prosecutions within the purview of the civilian criminal justice system, with some exceptions, including where allegations arise outside Canada. However, Bill C-66 also includes a number of other "incidental" amendments which appear to be intended to improve the independence of select actors in the military justice system including the military police and DMP. One of those "incidental" amendments would exempt military judges from the jurisdiction of service infractions.[113] If enacted and brought into force, this should solve this specific issue.

However, Bill C-66 is not law, and future law-makers will likely have to start their process from the beginning in order to re-introduce a new bill in the future. Now that a federal general election has been called for 28 April 2025, any such legislation will have to wait. Furthermore, it took three years to bring Bill C-77 into force once it was enacted, so it might be presumptuous to assume that any such amendments will become law in any version of near future.

Unfortunately, in *Edwards*, the majority of the SCC did not give enough consideration to this vulnerability to the independence of military judges, notwithstanding that counsel for the Appellants included that specific factor in their argument. The fact that this issue was expressly addressed in Bill C-66 demonstrates that lawmakers, and their legal counsel, are acutely aware of this frailty, and the threat that it poses to the military justice system. Why else seek the amendment of the jurisdiction of the MJUL?

There is a convincing basis to suggest that amendments to the *Code of Service Discipline* arise principally because the legislator is influenced by one or both of the following catalysts: (i) binding appellate judgments; or, (ii) public pressure. The former type of catalyst is manifest in judgments such as *Généreux*, *R v Trépanier* and *R v Leblanc*, each of which prompted

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112 Bill C-66, *An Act to amend the National Defence Act and other Acts*, 1st Sess, 44th Parl, 2024 [Bill C-66].

113 Bill C-66, *supra* note 112 at s. 11, adding *NDA* s 162.51.

legislative changes to the *Code of Service Discipline* after appellate courts rejected arguments advanced by the executive[114]. *Généreux* triggered many of the significant reforms to the *Code of Service Discipline* in Bill C-25, including measures intended to create more robust safeguards for the independence of courts martial[115].

Trépanier forced the executive to amend the *NDA* to permit the accused, and not the DMP, to elect the type of court martial that would preside over a prosecution. Prior to the judgment in *Trépanier* and the subsequent and hasty enactment of Bill C-60[116], where there was a choice between trial by General or Disciplinary Court Martial (i.e., trial before a military judge and a jury-like Panel) or a Standing Court Martial (i.e., trial before a military judge alone), DMP exercised this discretion. This was the inverse of what was and is permitted in the civil criminal justice system. In the latter, the accused was permitted to elect whether trial would be between a judge sitting alone or a judge and jury, (where such discretion was permitted).[117]

And the appellate judgment in *Leblanc* pushed the executive to seek further amendment of the *NDA* to ameliorate the security of tenure of military judges thereby taking another step towards improving independence and impartiality of the military judiciary.[118]

The second type of catalyst—public pressure—is what we suggest is the driving force behind much of Bill C-66. However, the removal of military judges from the jurisdiction of the MJUL is not a product of public pressure. It has not been the subject of much discussion in public fora. Consequently, we suggest that the executive has sought to include this amendment because it recognizes a vital and undeniable fact, placing military judges under the thumb of the executive through the exercise of jurisdiction under the MJUL clearly undermines their independence to the point where it would contravene s. 11(*d*) of the *Charter*. This is an important piece of the puzzle that was not adequately considered in *Edwards*.

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114 *R v Trépanier*, 2008 CMAC 3. [*Trépanier*]; *R v Leblanc*, 2011 CMAC 2. [*Leblanc*].

115 Bill C-25, *supra* note 10.

116 Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, SC 2008, c 29, <https://tinyurl.com/4btznfr8> [perma.cc/H3K6-BWNZ]. Bill C-60 also eliminated Disciplinary Courts Martial and Special General Courts Martial as types of court martial.

117 *Trépanier*, *supra* note 114 at paras 55 & 92–102.

118 Bill C-16, *Security of Tenure of Military Judges Act*, SC 2011, c 22: <https://tinyurl.com/bdf2sapw> [perma.cc/D8ZU-MR83].

And that is a specific example of why we believe the jurisdiction of the *Code of Service Discipline* over military judges, generally, is inconsistent with a sufficiently independent and impartial military judiciary.

7. A Possible Solution

There is, in our opinion, a simple and elegant solution, and one which lay within the scope of the SCC's review.

If military judges were removed from the jurisdiction of the *Code of Service Discipline*, they would remain subject to criminal law, just as civilian judges are. They would remain subject to the supervision of the MJIC regarding the competent and ethical performance of their functions as military judges. Their eligibility requirements would remain the same, which is, as at this date, to have at least 10 years' service in the military as an officer and at least 10 years' membership of a Bar of a Canadian Province in good standing.[119] They would continue to bring their military experience to their duties, which provides important perspective of the CF culture and adjudication of the military justice system. Most importantly, the reasonable bystander, fully informed of the circumstances and the law, would be satisfied that military judges are not vulnerable to undue influence from the executive.

This should have been done by the SCC. It was not the sort of policy choice which Justice Kasirer declined to pursue. It would have been a choice to uphold the fundamental importance of the separation of powers in maintaining judicial independence and to ensure public trust in the institution of military justice. It would not have barred Parliament from devising policy options that would achieve the same objectives.

This option remains for Parliament, and it can be done immediately through legislative amendment as opposed to hoping for another appellate judgment which makes it all the way up to the SCC.

Such an outcome would clarify issues arising 30 years ago in *Généreux* and would be consistent with its reasoning. It would recognize a clear distinction between the judiciary and the executive within the military

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[119] *NDA*, *supra* note 5 at 165.21(1) for regular force (full-time) military judges, and 165.22(1) for reserve force (part-time) military judges. On this, Bill C-66 is proposing to widen the talent pool by removing the requirement for candidates to have been officers. We agree with this proposed amendment, and we would suggest it go further and not necessarily require candidates to be currently serving. In other words, as long as the candidate has 10 years' of service, past or present, and at least 10 years' membership to a Provincial Bar in good standing, we suggest they have all the necessary "ingredients" to be considered for a military judgeship.

justice system, it would safeguard judicial independence, and it would ensure that courts martial may proceed unimpaired by these issues.

This is why we maintain that, despite the *Edwards* decision and the proposed amendments in Bill C-66, as long as military judges remain subject to the *Code of Service Discipline*, a "… reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically …"[120] would conclude that military judges are free of influence from the executive. Time will tell how the legislator responds.

120 *Valente*, *supra* note 42 at para 10.