Supreme Court rules military judges free of reasonable apprehension of bias

May 13, 2024

In *R v. Edwards*, 2024 SCC 15,the Supreme Court of Canada (SCC) confirmed that the status of Canadian military judges as officers within the Canadian Armed Forces' chain of command does not violate the right to a fair and public hearing by an independent and impartial tribunal protected by s. 11(d) of the *Canadian Charter of Rights and Freedoms (Charter)*.

The issue on appeal was that military judges must – in addition to meeting the ten-year membership at the bar requirement applicable to all federally-appointed judges – be military officers. Service members charged with offences under military law challenged the officer requirement, arguing that it divided the military judges' loyalty and left them vulnerable to pressure from the chain of command, depriving an accused before a military judge of the right to a fair trial before an independent and impartial tribunal. A majority of the SCC rejected this contention, finding that Canada's system of military justice under the *National Defence Act* (NDA) maintains the constitutionally required degree of judicial independence for military judges while taking the military context into account, including the need to maintain "discipline, efficiency and morale" and "public trust in ... a disciplined armed force". The SCC found that notwithstanding their status as military officers, military judges meet the "hallmarks" of judicial independence: security of tenure, financial security and administrative independence. The SCC thus concluded that "the military context does not diminish judicial independence" below a constitutionally-protected level.

Karakatsanis J., dissenting, agreed that the requirement that military judges are also officers does not necessarily infringe s. 11(d) of the *Charter*. However, she found that the current NDA scheme was insufficient to relieve military judges from the risk of interference or pressure by the military chain of command, and military judges' vulnerability to charges brought by military authorities under the disciplinary regime of the NDA violated s. 11(d).

Background

This appeal was brought by nine accused members of the Canadian Armed Forces charged with offences under Code of Service Discipline (CSD) established by Part III of

the NDA. Offences under the CSD include offences under the *Criminal Code* (and other acts of Parliament) and offences specific to military personnel.

Offences under the CSD are tried in court martial proceedings presided over by military judges. The NDA sets out the qualifications for military judges: 10 years' membership at the bar a province (the same requirement for federally appointed judges) and ten years of services as an officer in the Canadian Armed Forces.

The appellants argued that the dual role of military judges as impartial adjudicators and members of the military chain of command, which forms part of the executive branch of government, impedes their judicial independence. The Canadian Civil Liberties Association (CCLA) and the British Columbia Civil Liberties Association (BCLA) received leave to intervene on this appeal. The CCLA argued that the Court Martial Appeal Court of Canada's (CMAC) attention on the overlap of judicial and executive functions in the civilian judiciary was a problematic orientation that decontextualized the overlap of powers rather than affirming the separation of powers. The BCLA's submissions focused on why the SCC's decision in R. v. Généreux ought to be revisited in light of trends in *Charter* interpretation that have occurred since the Généreux decision.

The SCC had previously considered whether the status of military judges violated s. 11(d) of the *Charter* in R v. Généreux. That caseheld that military status of military judges did not itself violate s. 11(d) of the *Charter*, but that certain provisions of the then-NDA did not afford sufficient judicial independence to military judges. The offending provisions of the NDA were subsequently amended, and the SCC was called upon to consider whether military judges are sufficiently independent under the current NDA. The appellants also argued that social changes impacting military justice since the Généreux decision warranted a departure from the precedent in Généreux that the officer status of military judges did not itself impermissibly breach the requirement of judicial independence.

The decision also came in the wake of the *Report of the Third Independent Review* Authority to the Minister of National Defence (2021), prepared by the Honourable Morris J. Fish (Fish Report) that called for a civilianization of military judges. The following year the *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces* (2022) prepared by the Honourable Louise Arbour (Arbour Report) was also published. The Arbour Report stated concerns with the military justice system and the potential liability of military judges for NDA offences in their capacity as officers. The appellants cite both the Fish Report and the Arbour Report in support of their position.

Majority (Kasirer J.) – Military judges bear the necessary hallmarks of judicial independence

Writing for the majority, Kasirer J. confirmed that while accused persons appearing before military judges are entitled to the same guarantee of judicial independence as those appearing before civilian judges, it does not follow that courts martial and civilian criminal courts must be identical. Section 11(d) of the *Charter* does not necessitate any particular form of military justice system, nor does it require that only civilian judges preside over courts martial.

Généreux remains good law

Since Généreux had already determined the issue of whether military judges' dual status as judges and officers was a violation of s. 11(d), the Court had to consider the appellants' position that this should be revisited as a result of intervening changes in social circumstances. Kasirer J. held that there was no reason to abandon settled law and that the appellants' contention that the military justice system could function with civilian judges was directed to the wrong question. The question before the Court was whether military judges can meet the minimum standard of judicial independence required by s. 11(d). This is a different question than whether military judges met an absolute, ideal, of judicial independence. Whether civilian judges – advocated for by the appellants – may come closer to this ideal than military judges who are officers is a question of policy left for Parliament. The Court's task was not to decide among the best policy outcomes but to determine whether the policy choice enacted in the NDA was constitutional – leading the majority in this case to reject the appellants' argument that only civilian judges would satisfy the constitutional minimum.

The principles of judicial independence from *Valente* apply to military judges

As Généreux held that military judges are sufficiently independent if they meet the conditions identified by the SCC in *Valente v The Queen* [1985] 2 S.C.R. 673 and the appellants argued that the military status of military judges raises a reasonable apprehension of bias, Kasirer J. went on to consider whether military judges possess the essential conditions of judicial independence set out *Valente*: security of tenure, financial security, and administrative independence.

1. Security of tenure

Kasirer J. found that the security of tenure required was satisfied for military judges. He emphasized that even though they are also officers in the chain of command, military judges cannot be subject to discipline for their work as judges. As with civilian judges, military judges can only be removed for cause pursuant to the method prescribed by Parliament. Importantly, military judges have some carve outs from the usual treatment of officers within the chain of command. Because a military judge may only be removed for cause by the Governor in Council following a recommendation of the Military Judge's Inquiry Committee (akin to the Canadian Judicial Council process applicable to civilian judges), the portions of the CSD that provide for dismissal of officer as a sanction does not apply to military judges despite the officer status.

2. Financial security

The appellants did not challenge this element of military judge's independence. Kasirer J. found that financial security was amply present. Military judges have their own remuneration scheme fixed on recommendation by the Military Judges Compensation Committee.

3. Administrative independence

Kasirer J. did not accept the appellants' submission that because the military judges are also members of the executive, they are in a conflict of interest with their judicial function

and by extension lack administrative independence. Military judges, like all judges, are required by the judicial oath to lay aside their allegiances in performing their judicial function. Although military judges have a dual allegiance, their non-judicial duties cannot be permitted to conflict with their judicial duties.

With respect military judges' risk of discipline by officers senior to them for service offences resulting from their role as officers, there are legal safeguards in place to ensure that military judges are not improperly disciplined or prosecuted under the CSD. While military judges remain subject to the chain of command and must obey lawful orders, orders that compromise judicial independence would be unlawful. Furthermore, before laying charges against a military judge pursuant to the CSD relating to an unlawful order, an officer seeking to lay charges must receive advice regarding the appropriateness of the charge and the sufficiency of the evidence. Military judges are further safeguarded from improper prosecution through the independence of the Director of Military Prosecutions, who must screen any charges laid against a military judge before they proceed to a court martial, and in doing so must exercise prosecutorial discretion independently of the chain of command.

Having found the three elements of judicial independence as set out in *Valente* present, Kasirer J. held that the appellants' s. 11(d) rights were not violated.

Dissent (Karakatsanis J.) – The threat of disciplinary measures creates a reasonable apprehension of bias

Karakatsanis J. agreed with the majority in principle that military judges do not necessarily violate an accused's s. 11(d) *Charter* rights. However, Karakatsanis J. departed from the majority with respect to whether the ability to bring disciplinary charges against a military judge in his or her capacity as an officer in the chain of command gives rise to a reasonable apprehension of bias. Karakatsanis J. found that such a reasonable apprehension of bias was indeed present.

Karakatsanis J. went on to state that while the principles of judicial independence outlined in *Valente* are important, these principles failed to provide a complete answer to the appellants' contention that military judges lack institutional independence. Judicial independence can still be lacking even where security of tenure, financial security, and administrative independence are present. In this case, in Karakatsanis J's view, a lack of institutional independence was sufficient to create an appearance that the military judges cannot perform their function without interference sufficient to call into question whether the military judges are judicially independent. Military judges face prosecution by civilian courts and discipline through the military chain of command, and the roles of these systems are not equivalent. As a result, Karakatsanis J. states that the NDA should be of no force and effect insofar as it subjects military judges to disciplinary processes administered by military authorities.

Key takeaways

The SCC's decision is a reminder that constitutionally guaranteed minimum protections do not necessarily equate with optimal policy outcomes, no matter that better outcomes may be feasible. This reflects a longstanding thread in the SCC's constitutional

jurisprudence that when evaluating constitutional compliance, the Court is not concerned with the wisdom or appropriateness of legislative choices, only with the compliance of a specific choice with what the constitution requires. While the Fish Report and the Arbour Report that shortly preceded this decision made a potent case that a policy review of military judges may be warranted, the majority declined to take up this mantle. Specifically, the majority refused to evaluate the current scheme for military justice in the NDA against the possibility a system staffed by civilian judges who were argued to be more independent because the Court was "'not fitted' to undertake the inquiries that a proper policy review entails". The findings of the Fish Report and the Arbour Report require policy adaptions that must be implemented by the legislature and not the judiciary.

Notably here, the availability of alternatives was held to be irrelevant to whether the appellants had established a breach of s. 11(d), or to the content of that right. Had the breach been established, the possibility of alternative systems may have been relevant to the analysis under s. 1 of the *Charter*, particularly to whether the breach was minimally impairing. The Court's treatment of policy alternatives in this case therefore offers useful guidance to litigants to consider what type of arguments and evidence may be relevant to the various steps of the constitutional analysis and to calibrate their case accordingly.

By

Nadia Effendi, Pierre N. Gemson, Alicia Krausewitz

Expertise

Disputes, Public Law Litigation

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749