

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant / **RESPONDENT**

- and -

ORDINARY SEAMAN W.K. CAWTHORNE

Respondent / **APPLICANT**

MOTION TO QUASH THE NOTICE OF APPEAL OF THE MINISTER OF NATIONAL DEFENCE

(Article 44 of the *Supreme Court Act* and
Rule 63 of the *Rules of the Supreme Court of Canada*)

Lieutenant-Commander Mark Létourneau
Lieutenant-Colonel Jean-Bruno Cloutier
Defence Counsel Services
Asticou Centre, Block 300
241 Cité des Jeunes Blvd.
Gatineau, Québec
J8Y 6L2

Tel.: 819 934-3334
Fax: 819 997-6322
mark.letourneau@forces.gc.ca
jean-bruno.cloutier@forces.gc.ca

Counsel for Applicant

Colonel Bruce W. MacGregor
Counsel instructed by the
Minister of National Defence
Constitution Building, 9th Floor
305 Rideau Street
Ottawa, Ontario
K1A 0K2

Tel.: 613 996-5723
Fax: 613 995-1840
bruce.macgregor@forces.gc.ca

Counsel for Respondent

Notice of Motion to Quash, June 18, 2015

File No. 36466

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant / **RESPONDENT**

- and -

ORDINARY SEAMAN W.K. CAWTHORNE

Respondent / **APPLICANT**

**NOTICE OF MOTION TO QUASH THE NOTICE OF APPEAL
OF THE MINISTER OF NATIONAL DEFENCE**

**(Article 44 of the *Supreme Court Act* and
Rule 63 of the *Rules of the Supreme Court of Canada*)**

TAKE NOTICE that Ordinary Seaman W.K. Cawthorne applies to the Court, under s. 44 of the *Supreme Court Act* and art. 63 of the *Rules of the Supreme Court of Canada*, for an order to declare s. 245(2) of the *National Defence Act (NDA)* of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982* and requests that this Court quash the Minister's notice of appeal and dismiss the appeal;

Notice of Motion to Quash, June 18, 2015

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. The Minister of National Defence (Minister) has exercised his right of appeal under s. 245(2) of the *NDA*. The Applicant seeks an order declaring unconstitutional this legislative provision and does so by preliminary motion to quash the Minister's notice of appeal and to dismiss the appeal. If this Court declares this provision unconstitutional, no appeal lies.
2. Section 245(2) violates the right to an independent prosecutor guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*¹ (*Charter*). Prosecutorial independence is a principle of fundamental justice. Section 245(2) of the *NDA* is unconstitutional because it confers the right of appeal on a prosecutor who is not independent: the Minister, a political figure subject to collective ministerial responsibility.
3. Section 245(2) further violates the right to be tried by an independent tribunal guaranteed under s. 11(d) of the *Charter*. Section 245(2) subjects the right to appeal to judicial supervision. Indeed, because the Minister lacks prosecutorial independence, the doctrine of prosecutorial discretion is inapplicable. As a result, this Court could be called to review the Minister's discretion to appeal. In doing so, this Court would "become a supervising prosecutor" and cease to be "an independent tribunal".
4. The Applicant requests that this Court declare s. 245(2) of the *NDA* of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982* and requests that this Court quash the Minister's notice of appeal and dismiss the appeal.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, **B.A., vol. I, Tab 2**.

Notice of Motion to Quash, June 18, 2015

Gatineau, June 18, 2015

Lieutenant-Commander Mark Létourneau
Lieutenant-Colonel Jean-Bruno Cloutier
Defence Counsel Services
Asticou Centre, Block 300
241 Cité des Jeunes Blvd.
Gatineau, Québec
J8Y 6L2

Tel.: 819 934-3334
Fax: 819 997-6322
mark.letourneau@forces.gc.ca
jean-bruno.cloutier@forces.gc.ca

Counsel for Applicant

ORIGINAL : THE REGISTRAR

COPY: **Colonel Bruce W. MacGregor**
Counsel instructed by the
Minister of National Defence
Constitution Building, 9th Floor
305 Rideau Street
Ottawa, Ontario
K1A 0K2

Tel.: 613 996-5723
Fax: 613 995-1840
bruce.macgregor@forces.gc.ca

Counsel for Respondent

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion.

APPLICANT'S FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS

I – OVERVIEW OF THE POSITION

1. The Minister of National Defence (Minister) has exercised his right of appeal under s. 245(2) of the *National Defence Act*² (*NDA*). The Applicant seeks an order declaring unconstitutional this legislative provision and does so by preliminary motion to quash the Minister's notice of appeal and to dismiss the appeal. If this Court declares this provision unconstitutional, no appeal lies.
2. Section 245(2) violates the right to an independent prosecutor guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*³ (*Charter*). Prosecutorial independence is a principle of fundamental justice. Section 245(2) of the *NDA* is unconstitutional because it confers the right of appeal on a prosecutor who is not independent: the Minister, a political figure subject to collective ministerial responsibility.
3. Section 245(2) further violates the right to be tried by an independent tribunal guaranteed under s. 11(d) of the *Charter*. Section 245(2) subjects the right to appeal to judicial supervision. Indeed, because the Minister lacks prosecutorial independence, the doctrine of prosecutorial discretion is inapplicable. As a result, this Court could be called to review the Minister's discretion to appeal. In doing so, this Court would "become a supervising prosecutor" and cease to be "an independent tribunal".⁴
4. The Applicant requests that this Court declare s. 245(2) of the *NDA* of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982* and requests that this Court quash the Minister's notice of appeal and dismiss the appeal.⁵

² *National Defence Act*, R.S.C., 1985, c. N-5., Applicant's Book of Authorities, hereinafter "**B.A.**", **vol. I, Tab 1**.

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, **B.A., vol. I, Tab 2**.

⁴ *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at para 31 [*Krieger*], **B.A., vol. I, Tab 8**.

⁵ *Constitution Act, 1982*, s. 52, **B.A., vol. I, Tab 3**.

II – THE FACTS

5. In this case, a General Court Martial found the Applicant guilty of two offences under s. 130 of the *NDA*: one count of possession of child pornography and one count of accessing child pornography.
6. On appeal, the Court Martial Appeal Court of Canada (CMAC) ordered a new trial. One judge dissented.
7. On 4 June 2015, the Minister filed a notice of appeal to this Court pursuant to s. 245(2) of the *NDA*.

III – LEGISLATION

8. The Minister's right of appeal to this Court is provided at s. 245(2) of the *NDA*:⁶

Appeal by Minister

245(2) The Minister, or counsel instructed by the Minister for that purpose, may appeal to the Supreme Court of Canada against a decision of the Court Martial Appeal Court:

- (a) on any question of law on which a judge of the Court Martial Appeal Court dissents; or
- (b) on any question of law, if leave is granted by the Supreme Court of Canada.

Appel par le ministre

245(2) Le ministre ou un avocat à qui il a donné des instructions à cette fin peut interjeter appel à la Cour suprême du Canada d'une décision de la Cour d'appel de la cour martiale sur toute question de droit, dans l'une ou l'autre des situations suivantes :

- (a) un juge de la Cour d'appel de la cour martiale exprime son désaccord à cette égard;
- (b) l'autorisation d'appel est accordée par la Cour suprême.

⁶ Legislative history of s. 245(2) of *NDA*: Original 1950, c. 43, s 196; RSC 1952 c. 184, s. 196; SC 1959, c. 5, s. 6(1); SC 1969-70 c. 44, s. 10; RSC 1970 c. N-4, s. 208; RSC 1985 c. N-5, s. 245; SC 1997 c. 18, s. 134, **B.A., vol. I, Tab 4**. The right of appeal to this Court was first conferred on the Minister in 1959: see Senate Debate, 9 March 1959, pp. 329-30.

PART II – THE ISSUE AS RAISED BY FORMER CHIEF JUSTICE DICKSON

9. This issue concerning the Minister's right of appeal was identified by the *Special Advisory Group on Military Justice and Military Police Investigation Services*, chaired by the Right Honorable Brian Dickson (Second Dickson Report). This report recommended abolishing the Minister's right of appeal. Recommendation 14 reads:⁷

We recommend that the authority of the Minister of National Defence pursuant to section 230.1 and ss. 245(2) of the National Defence Act to exercise a right of appeal from appellate courts be abolished and be exercised by the independent Director of Prosecutions.⁸

10. The Second Dickson Report provided the following rationale for abolishing the Minister's right of appeal:

- The Minister's quasi-judicial power to launch an appeal is a vestige of the British military tradition which assumed that the executive branch of government was the proper authority "to be involved in making decisions relating to individual cases."⁹
- The Minister's involvement in individual cases is contrary to the "requirements for a military judicial system which had to be and appear to be independent."¹⁰
- The Minister's quasi-judicial role, including his right to launch an appeal, conflicts with his executive role to manage the Canadian Forces.¹¹
- "The Minister should be distanced as far as possible from the military justice system."¹²

⁷ Special Advisory Group on the Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, (25 July 1997) at 15, 16 (Chair: the Right Honorable Brian Dickson) [Second Dickson Report], **B.A., vol. II, Tab 37**.

⁸ *Ibid* at 25. For the same reasons, the Second Dickson Report also recommended abolishing the minister's right to appeal a finding that a person is not a "dangerous mentally disordered accused" at 16, **B.A., vol. II, Tab 37**.

⁹ *Ibid* at 6, 7, **B.A., vol. II, Tab 37**.

¹⁰ *Ibid* at 7, **B.A., vol. II, Tab 37**.

¹¹ *Ibid* at 3, 7, **B.A., vol. II, Tab 37**.

¹² *Ibid* at 15, **B.A., vol. II, Tab 37**.

- "... At any point, it is not appropriate that he/she should be involved in the routine decision of how a specific prosecution should be conducted."¹³
- "Indeed, the routine exercise of political judgment in individual cases appears to be neither necessary nor consistent" with the principle of prosecutorial independence."¹⁴ [Emphasis added]

In short, the Second Dickson Report concludes that "the Minister should not be involved in prosecution decisions"¹⁵. [Emphasis added]

PART III – STATEMENT OF ARGUMENT

I- THE LAW

11. Section 245(2) violates ss. 7 and 11(d) of the *Charter* and cannot be justified under s. 1. The appropriate remedy is to strike down s. 245(2) immediately.

A. THE RIGHT TO AN INDEPENDENT PROSECUTOR UNDER SECTION 7

12. Section 245(2) engages the liberty interests of the Applicant under s. 7 of the *Charter* in a manner that is inconsistent with the principles of fundamental justice. Specifically, the principle of fundamental justice that an accused has a right to be prosecuted by a prosecutor with all of the hallmarks of prosecutorial independence.

¹³ *Ibid*, B.A., vol. II, Tab 37.

¹⁴ *Ibid* at 14, B.A., vol. II, Tab 37.

¹⁵ *Ibid* at 16, 23, B.A., vol. II, Tab 37.

13. The Minister's exercise of his right of appeal in this matter (accessing and possessing child pornography) is a prosecutorial decision¹⁶ that engages the Applicant's liberty.¹⁷ If this Court grants the Minister's appeal, the Applicant will be imprisoned for 30 days. Section 7 is engaged.
14. Liberty is engaged in a manner that is inconsistent with the principles of fundamental justice because:
- (a) The right to an independent prosecutor is a principle of fundamental justice; and
 - (b) The Minister is not an independent prosecutor.
- (a) *Prosecutorial Independence Is a Principle of Fundamental Justice***
15. The caselaw referring to the doctrine of prosecutorial discretion is authoritative in demonstrating that prosecutorial independence is a principle of fundamental justice. Indeed, the doctrine of prosecutorial discretion is premised on the principle of prosecutorial independence. Prosecutorial independence is essential to a constitutionally valid exercise of prosecutorial discretion.
16. Principles of fundamental justice have three characteristics.¹⁸ The right to an independent prosecutor meets all three:
- i. The right to an independent prosecutor is a legal principle;
 - ii. There is sufficient consensus that an independent prosecutor is fundamental to the way in which the legal system ought fairly to operate;
 - iii. An independent prosecutor can be identified with sufficient precision to yield a manageable standard.

¹⁶ *R. v. Anderson*, 2014 SCC 41 at para 44 [*Anderson*], **B.A., vol. I, Tab 9**.

¹⁷ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 69 [*Carter*], **B.A., vol. I, Tab 10**; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para 71 [*Federation of Law Societies*], **B.A., vol. I, Tab 11**.

¹⁸ *Ibid* at para 87, **B.A., vol. I, Tab 11**.

i. The Right to an Independent Prosecutor Is a Legal Principle

17. The right to an independent prosecutor is a well-established legal principle in Canada. This legislated¹⁹ principle has been reinforced through a number of legal protections such as the near-absolute unreviewability of prosecutorial discretion²⁰ and near-absolute crown immunity.²¹ This Court has consistently recognized the need for prosecutorial independence in the exercise of prosecutorial discretion.
18. For instance, in *Miazga*, this Court recognized that “the principle of independence requires that the Attorney General act independently of political pressures from government”.²² [Emphasis added]
19. More recently in *Anderson*, this Court approvingly cited *Krieger* stating that prosecutorial discretion is “protected from the influence of improper political and other vitiating factors by the principle of independence.”²³ [Emphasis added]
20. The right to an independent prosecutor is not only a legal principle; it is a constitutional principle. In *Krieger*, this Court declared:

It is a constitutional principle that the Attorneys General of this country must act independently of partisan concern when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.²⁴

[Emphasis added]

¹⁹ *An Act Respecting The Director Of Criminal And Penal Prosecutions*, SQ c. D-9.1.1, s. 29, **B.A., vol. I, Tab 5**. (No prosecutor may be a member of a political party).

²⁰ *Anderson*, *supra* note 15 at para 51, **B.A., vol. I, Tab 9**.

²¹ *Nelles v. Ontario*, [1989] 2 SCR 170 at 191-193, **B.A., vol. I, Tab 12**.

²² *Miazga v. Kvello* [2009] 3 SCR 339 at para 46 [*Miazga*] **B.A., vol. I, Tab 13**.

²³ *Anderson*, *supra* note 15 at para 44, **B.A., vol. I, Tab 9** citing *Krieger*, *supra* note 3 at para 44, **B.A., vol. I, Tab 8**.

²⁴ *Krieger*, *supra* note 3 at para 3, **B.A., vol. I, Tab 8**.

ii. Sufficient Consensus that an Independent Prosecutor Is Fundamental

21. There is a significant societal consensus that an independent prosecutor is fundamental to the way in which the legal system ought fairly to operate. *It is the prosecutor's independence which protects his prosecutorial discretion from political interference or judicial supervision.* In this sense, prosecutorial independence is necessary to uphold the integrity “of our system of prosecution”.²⁵
22. Justice Doherty on behalf of the Ontario Court of Appeal in *R. v. Gill* recognized that prosecutorial independence is “itself a principle of fundamental justice.”²⁶
23. In *Anderson*,²⁷ this Court unanimously reiterated that prosecutorial discretion – which the Applicant argues is premised on prosecutorial independence – is fundamental to the way in which the legal system ought fairly to operate. At paragraph 37, the Court affirmed that:
- “The fundamental importance of prosecutorial discretion was said to lie, “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfillment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as ministers of justice”. This could not be achieved without an independent prosecutor.
 - “Prosecutorial discretion is a necessary part of a properly functioning criminal justice system.” This could not be achieved without an independent prosecutor.
 - “Not only does prosecutorial discretion accord with the principles of fundamental justice – it constitutes an indispensable device for the effective enforcement of the criminal law”.²⁸ This also could not be achieved without an independent prosecutor.

²⁵ *Ibid* at para 32, **B.A., vol. I, Tab 8.**

²⁶ *R. v. Gill*, 2012 ONCA 607, 96 CR (6th) 172, Doherty J at para 57, **B.A., vol. I, Tab 14.**

²⁷ *Anderson*, *supra* note 15 at para 37, **B.A., vol. I, Tab 9.**

²⁸ *Ibid*, **B.A., vol. I, Tab 9.**

24. In *Regan*, Binnie J., dissenting on another point, emphasized the fundamental importance of an independent prosecutor. He stated that everyone in this country is entitled to equal protection under the law and that an important element of the protection of the law is enshrined in the concept that prosecutors “stand independent”²⁹ between the Executive and the accused.
25. Justice Binnie declared that the duty of independence of a Crown Attorney is a principle of fundamental justice. He stressed that prosecutorial independence was “an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power” and that “it is one of the more important checks and balances of our criminal justice system”.³⁰ This conclusion was adopted by this Court in *Krieger*.³¹ In so doing, this Court recognized that prosecutorial independence is a principle of fundamental justice.
26. There is significant consensus that the right to an independent prosecutor is fundamental to dispense justice fairly and impartially, in accordance with the rule of law.³²

iii. An Independent Prosecutor Can Be Identified with Sufficient Precision to Yield a Manageable Standard

27. The right to an independent prosecutor requires that a prosecutor must be “fully protected from the political pressures of government”.³³
28. Like judicial independence and the lawyer’s duty of loyalty, prosecutorial independence should be assessable on an objective standard. As Lord Chief Justice Hewart said: “Justice should not only be done but should manifestly and undoubtedly be seen to be done.”³⁴

²⁹ *R. v. Regan* [2002] 1 SCR 297 at paras 135, 156 [*Regan*], **B.A., vol. I, Tab 15**.

³⁰ *Ibid* at paras 157, 192, **B.A., vol. I, Tab 15**.

³¹ *Krieger, supra* note 3 at para 30, **B.A., vol. I, Tab 8**.

³² Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen's LJ* 813 at para 101, **B.A., vol. II, Tab 43**; James W. O’Reilly and Patrick Healy, *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion: a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Canadian Government Publishing, 1997) at 43. [O’Reilly & Healy], **B.A., vol. II, Tab 44**.

³³ *Krieger, supra* note 3 at para 29, **B.A., vol. I, Tab 8**.

³⁴ *R. v. Sussex Justices Ex parte McCarthy*, 1924 1 KB 256, 1923 All ER 233, **B.A., vol. I, Tab 16**.

29. Reasonable perception of the independence of the prosecutor is essential to maintain public confidence in the administration of justice. As this Court recently declared in *Federation of Law Societies*:

Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through.³⁵

[Emphasis added]

30. The following question provides a precise and manageable standard to identify an independent prosecutor:

Would a reasonable person who is aware of the relationship that exists between the Executive and the prosecutor conclude that the prosecutor is free from pressure by the Executive?

31. It is the relationship that exists between the Executive and the prosecutor that will reveal prosecutorial independence or lack thereof.
32. Prosecutorial independence does not necessarily follow the prosecutorial function. It is important not to confuse the prosecutorial function with the independence which is necessary to perform it. Caselaw on judicial independence make this distinction between function and independence clear. Before *R. v. Généreux*,³⁶ legally appointed military judges – despite their judicial function – lacked judicial independence. Similarly today, the Minister – despite his prosecutorial function – lacks prosecutorial independence.
33. For all of the above reasons, prosecutorial independence is a principle of fundamental justice.

³⁵ *Federation of Law Societies*, *supra* note 16 at para 97, **B.A., vol. I, Tab 11.**

³⁶ *R. v. Généreux*, [1992] 1 SCR 259. [*Généreux*], **B.A., vol. I, Tab 17.**

(b) *The Minister Is Not an Independent Prosecutor*

34. The Minister cannot be an independent prosecutor for three reasons:
- i. the Constitution and the *NDA* reveal that the Minister lacks prosecutorial independence;
 - ii. the Minister lacks the prosecutorial independence of the Attorney General and the Director of public prosecution (DPP); and,
 - iii. a reasonable person would conclude that the Minister is subject to pressure by the Executive.

i. The Constitution and the NDA Reveal that the Minister has No Prosecutorial Independence.

35. As a matter of constitutional convention, the Minister has no prosecutorial independence. The Minister is a Cabinet Minister and “is not independent but is rather a part of the Executive”.³⁷ The Minister is subject to collective ministerial responsibility. As such, the Minister is bound to act under the supreme authority of the cabinet and support any decision reached by the cabinet, even if he is personally opposed to it.³⁸
36. As matter of law, the *NDA* provides the Minister with no prosecutorial independence. For this reason, the Second Dickson Report warns that mere statements uttered by the Minister “could make a fair and independent trial difficult” and “result in a dismissal of the charges”.³⁹
37. Simply put, the Minister is the very antithesis of a prosecutor who is independent of political pressure. The Minister himself *is* the political pressure.

³⁷ Compare with the comments of Lamer CJ on the role of the Judge Advocate General in *Généreux*, *supra* note 35 at 302, **B.A., vol. I, Tab 17**.

³⁸ Peter W. Hogg, *Constitutional Law of Canada*, “loose-leaf” consulted on 24 September 2014), 5th ed. (Toronto: Carswell, 2007) ch. 9 at 14, **B.A., vol. II, Tab 45**.

³⁹ Second Dickson Report, *supra* note 6 at 3, **B.A., vol. II, Tab 37**. See also Jerry Pitzul, Speaking Notes, Advisory Committee on Defence, 3 February 1997, Halifax, last page [Pitzul] **B.A., vol. II, Tab 38**.

ii. The Minister Lacks the Prosecutorial Independence of the Attorney General and the DPP

38. The Minister's constitutional and legal position is quite distinct from the Attorney General and the DPP who are independent prosecutors.
39. Unlike the Attorney General, the Minister is conferred no prosecutorial independence by the Constitution. In *Krieger*, this Court has declared that it is the Attorney General who, as a matter of constitutional principle, is fully independent in the exercise of prosecutorial discretion.⁴⁰
40. The independence of the office of the Attorney General is based upon its constitutional role and lineage. The Court emphasized "the unique and important role of the Attorney General"⁴¹ as guardian of the public interest, Chief Law Enforcement Officer and ultimate keeper of the public peace. The Court then identified the constitutional roots of the office of the Attorney General:

In Canada, the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*. Although the specific duties conventionally exercised by the Attorney General are not enumerated, s. 135 of that Act provides for the extension of the authority and duties of that office as existing prior to Confederation.⁴²

[Emphasis added]

41. The Minister's office has no constitutional dimension.⁴³ The Minister does not hold the guardianship of the public interest in the domain of criminal law in Canada. He is not in a constitutionally protected position to advance the public interest in deciding whether to prosecute

⁴⁰ *Krieger, supra* note 3 at para 3, **B.A., vol. I, Tab 8**. See also Public Prosecution Service of Canada "Public Prosecution Service of Canada Deskbook" (25 September 2014) at 3-4 online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch04.html>, **B.A., vol. II, Tab 39**.

⁴¹ *Krieger, supra* note 3 at para 23 **B.A., vol. I, Tab 8**.

⁴² *Krieger, supra* note 3 (The office of the Attorney General was created amidst a history wherein the Attorney General of England had intentionally never been accorded a place in the British cabinet, a fact of profound constitutional significance which reflected the determination in England that criminal prosecutions would not be politically tainted, at paras 26, 29), **B.A., vol. I, Tab 8**.

⁴³ Pitzul, *supra* note 38 at last page, **B.A., vol. II, Tab 38**.

criminal conduct, especially where the broader public interest⁴⁴ clashes with the distinctly military interests.⁴⁵

42. Furthermore, unlike the DPP, the Minister has no statutorily protected prosecutorial independence. In addition to acting on behalf of a constitutionally independent Attorney General,⁴⁶ the *Director of Public Prosecutions Act* provides the DPP with security of tenure for 7 years⁴⁷ and financial security during that period.⁴⁸ In these circumstances, a reasonable person would conclude that the DPP is free from pressure by the Executive.

iii. A Reasonable Person Would Conclude that the Minister Is Subject to Pressure by the Executive

43. A reasonable person who is aware that the Minister is subject to collective ministerial responsibility would conclude that the prosecutor is subject to pressure by the Executive.
44. On the other hand, a reasonable person, who is aware of the special constitutional protection associated with prosecutorial independence and afforded to the Attorney General, would conclude that the Attorney General is free from pressure by the Executive. The same would be said of the DPP whose prosecutorial independence is statutorily protected.
45. The constitutional and statutory relationship between the Executive and the Minister reveal that, unlike the Attorney General and the DPP, the Minister lacks prosecutorial independence. Neither the Constitution nor the *NDA* provide any principle or measure to ensure any degree of prosecutorial independence to the Minister.

⁴⁴ See e.g. the *Cossitt* affair described in John Edwards, *The Attorney General, Politics and the Public Interest*, London, Sweet & Maxwell, 1984 (the Attorney General in that case emphasized that “in exercising his discretion as to whether or not he should consent to a prosecution under the Official Secrets Act, it was incumbent upon him to ensure that the widest possible public interests of Canada were taken into account” at 360.), **B.A., vol. II, Tab 46.**

⁴⁵ O'Reilly, *supra* note 31 at 43, **B.A., vol. II, Tab 44.**

⁴⁶ *Director of Public Prosecutions Act*, SC 2006, c. 9, s 121 at s 3(3) [*DPP Act*], **B.A., vol. I, Tab 6.**

⁴⁷ *Ibid*, s 5(1), **B.A., vol. I, Tab 6.**

⁴⁸ *Ibid*, s 5(5), **B.A., vol. I, Tab 6.**

(c) Caution: Enforcement Practicality Considerations Have No Place under s. 7

46. This Court may have legitimate concerns over the practical enforcement of military discipline in the event the impugned provision would be declared invalid. It may be tempting for this Court to consider enforcement practicality concerns within the s. 7 analysis – especially in the context of military law.
47. For example, during its s. 7 analysis at paragraph 44 of its decision in *Moriarity*, the CMAC considered that it would be impossible to practically enforce military discipline without s. 130(1)(a). This conclusion is based on no evidence. It is alarmist.⁴⁹
48. During the recent hearing of *Moriarity* before this Court, it was the accused – *and not the government* – who was asked to address this Court's legitimate concerns in relation to the practical enforcement of military discipline without s. 130(1)(a) of the *NDA*.⁵⁰
49. This Court may have the same legitimate concerns in the present case and again be tempted to question the accused – and not the government – on how military discipline will be practically enforced without s. 245(2).
50. With respect, this Court should not yield to such temptation. In *Bedford*, this Court emphasized that enforcement practicality considerations have no place under s. 7.⁵¹ Such considerations are relevant only under s. 1. As a result, it is the government's burden to demonstrate that s. 245(2) is necessary to practically enforce military discipline.
51. In recent analogous cases challenging the Minister's right to appeal to the CMAC under s. 230.1 of the *NDA*, the government proved unable to call any evidence under s. 1.⁵²

⁴⁹ *R. v. Second Lieutenant Moriarity*, 2014 CMAC 1, at para 44, **B.A., vol. I, Tab 18**.

⁵⁰ *R. v. Second Lieutenant Moriarity*, 2015 SCC (Hearing held on 12 May 2015).

⁵¹ *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at paras 113, 124-129, **B.A., vol. I, Tab 19**.

⁵² *R. v. Gagnon*, 2015 CMAC-577; *R. v. Thibault*, 2015 CMAC-581.

52. Conventional assumptions are simply insufficient to justify a *Charter* violation under s. 1⁵³ – even in the context of military law where national security is at stake.⁵⁴

B. THE RIGHT TO AN INDEPENDENT PROSECUTOR UNDER SECTION 11(D)

53. Section 245(2) also violates the right to be tried by an independent tribunal guaranteed under s. 11(d) of the *Charter*. Section 245(2) subjects the right of appeal to judicial supervision. Because the Minister lacks prosecutorial independence, the doctrine of prosecutorial discretion is inapplicable. As a result, this Court could be called to review the Minister's discretion to appeal. In doing so, this Court would “become a supervising prosecutor” and cease to be “an independent tribunal”.⁵⁵
54. The doctrine of prosecutorial discretion – premised on prosecutorial independence – is designed to preserve judicial independence.⁵⁶ In this regard, the reasons of Viscount Dilhorne approvingly quoted by this Court in *R. v. Power* are instructive:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.⁵⁷

[Emphasis added]

55. In *Krieger*, this Court again recognized that judicial review of prosecutorial discretion will infect judicial independence. The Court approvingly quoted from David Vanek who explained:

It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court

⁵³ *Carter*, *supra* note 16 at para 119, **B.A., vol. I, Tab 10**.

⁵⁴ *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR SCC 248, McLaughlin CJC (“So, while Cicero long ago wrote “*inter arma silent leges*” (the laws are silent in battle) (*Pro Milone* 14), we, like others, must strongly disagree” at para 5), **B.A., vol. I, Tab 20**.

⁵⁵ *Krieger*, *supra* note 3 at paras 31, 32, **B.A., vol. I, Tab 8**.

⁵⁶ *Ibid* at para 31, **B.A., vol. I, Tab 8**.

⁵⁷ *R. v. Power*, [1994] 1 SCR 601 at 625, 627, 628, **B.A., vol. I, Tab 21**.

is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.⁵⁸

[Emphasis in original]

56. For these reasons, lack of prosecutorial independence erodes judicial independence.

C. SECTION 245(2) CANNOT BE JUSTIFIED UNDER SECTION 1

57. To justify a s. 7 violation, the Minister must demonstrate⁵⁹ that the purpose of s. 245(2) is pressing and substantial. He must also demonstrate that the Minister's right to appeal minimally impairs the right to be prosecuted by an independent prosecutor guaranteed under s. 7.

(a) The Purpose of s. 245(2) Is Inimical to the Values of a Free and Democratic Society

58. The purpose of s. 245(2) is to confer the right of appeal on the Minister to the exclusion of an independent prosecutor. The legislative facts demonstrate that Parliament chose the Minister, to the exclusion of an independent prosecutor, to exercise the right to appeal. Before adopting Bill C-25, Parliament considered recommendation 14 of the Second Dickson Report (abolishing the Minister's right to appeal).

59. In fact, Bill C-25 was intended to address, *inter alia*, the concerns raised by the quasi-judicial role of the Minister.⁶⁰ In adopting Bill C-25, Parliament accepted the Second Dickson Report's recommendations 1, 2, 3, 4, 6, 10, 11, 12, 13 and 15 abolishing many quasi-judicial powers of the Minister. In adopting Bill C-25, Parliament specifically rejected all recommendations to abolish the Minister's right to appeal.⁶¹

⁵⁸ *Krieger, supra* note 3 at para 31, **B.A., vol. I, Tab 8.**

⁵⁹ *Carter, supra* note 16 at para 119, **B.A., vol. I, Tab 10.**

⁶⁰ David Goetz, *Bill C-25: An Act to Amend the National Defence Act*, LS-311E (Ottawa : Directorate of parliamentary research, 1998) pp. 5, 6, 8, 16, 21, including footnotes 4, 7 at 22, **B.A., vol. I, Tab 7.** [Summary of Bill C-25]

⁶¹ Parliament rejected recommendations 8 and 14. Recommendation 8 was to transfer to the independent director of prosecutions the right to appeal a finding that a person is not a dangerous mentally disordered accused: Second Dickson Report at 16, **B.A., vol. II, Tab 37.**

60. In particular, Parliament rejected recommendation 14 to amend s. 245(2) by abolishing the Minister's right to appeal to this Court.⁶² Parliament knowingly maintained the Minister's right of appeal, to the exclusion of an independent prosecutor.
61. The conferral of the right of appeal on the Minister compromises the independence of the military judicial system at the appellate level. The Second Dickson Report recognized that any statement or action of the Minister concerning a specific case may result in a dismissal of all charges.⁶³ This is so because any suspicion that "politics" plays a part in the handling of prosecutions undermines the integrity of the entire proceeding.⁶⁴ Yet, as prosecutor, the Minister cannot "exercise restraint in matters of military justice".⁶⁵ He must argue. This undermines the integrity of the proceedings at the appellate level.⁶⁶
62. The purpose of s. 245(2) is itself "inimical to the values of a free and democratic society."⁶⁷ It runs contrary to the principle of prosecutorial independence which is a "hallmark of a free society"⁶⁸ and the "cornerstone of our system of criminal justice."⁶⁹

(b) The Purpose of s. 245(2) Is Not Pressing and Substantial

63. As this Court has recognized, the right to an appeal does not flow either from the rule of law⁷⁰ or the common law.⁷¹ The prosecutor's right to an appeal even less so.⁷² There exists no constitutional

⁶² National Defence Minister's Monitoring Committee on Change in the Department of National Defence and the Canadian Forces, *Final Report* (December 1999) at 118 (Recommendation Dickson 2-14), **B.A., vol. II, Tab 40.**

⁶³ Second Dickson Report, *supra* note 6 at 3, **B.A., vol. II, Tab 37.**

⁶⁴ Rosenberg, *supra* note 31 at para 19, **B.A., vol. II, Tab 43.**

⁶⁵ Second Dickson Report, *supra* note 6 at 3, **B.A., vol. II, Tab 37**

⁶⁶ *Ibid*, **B.A., vol. II, Tab 37**

⁶⁷ *Schachter v. Canada*, [1992] 2 SCR 679 at 703, **B.A., vol. II, Tab 22**

⁶⁸ *Krieger*, *supra* note 3 at para 32, **B.A., vol. I, Tab 8**

⁶⁹ *British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)*, 2009 BCCA 337 at para 30, **B.A., vol. II, Tab 23**

⁷⁰ *Charkaoui v. Canada*, [2007] 1 SCR 350 at para 136. [*Charkaoui*], **B.A., vol. II, Tab 24.**

⁷¹ *R. v. Meltzer*, [1989] 1 SCR 1764 ("At common law, there were no appeals" at 1773), **B.A., vol. II, Tab 25.**

⁷² The prosecution's right of appeal is exceptional: see *R. v. Evans*, [1993] 2 SCR 629, 645-46, **B.A., vol. II, Tab 26**; *R. v. Graveline*, [2006] 1 SCR 609 at para 13, **B.A., vol. II, Tab 27.**

or common law right to an appeal. In fact, “appeals are solely creatures of statute.”⁷³ The purpose of s. 245(2) is therefore not pressing and substantial.

(c) Section 245(2) Does Not Minimally Impair the Right to an Independent Prosecutor Guaranteed

64. Section 245(2) does not satisfy the minimal impairment requirement. There is no reason why appeals cannot be conducted by an independent prosecutor. For example, in the United Kingdom, all military prosecutions are under the supervision of the independent Attorney General.⁷⁴
65. Section 245(2) is unnecessary to practically enforce military discipline.⁷⁵ To claim otherwise amounts to fearmongering. Such discourse relies on conventional assumptions. There can be no evidence to justify s. 245(2) under s. 1.
66. Section 245(2) cannot be justified by relying on the current practice of the Minister to be represented by counsel in the office of the Director of Military Prosecutions. Legal counsel acting on behalf of the Minister in this appeal is instructed by the Minister. A solicitor-client relationship binds them. Legal counsel in this appeal is the Minister's advocate. Legal counsel cannot be any more independent than her or his client, the Minister. The Minister's legal counsel cannot stand as a buffer between political power and the citizen.⁷⁶

⁷³ *R. v. Smith*, [2004] 1 SCR 385 at para 21, **B.A., vol. II, Tab 28**; *R. v. W.(G.)*, [1999] 3 SCR 597 at para 8, **B.A., vol. II, Tab 29**; *Kourtesis v.M.N.R.*, [1993] 2 SCR 53 (“There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.” at 69, 70, 81), **B.A., vol. II, Tab 30**.

⁷⁴ See “Guidance Service Prosecuting Authority” online: Service Prosecution Authority <https://www.gov.uk/service-prosecuting-authority>, **B.A., vol. II, Tab 41**; “Prosecutions for the Services”, online: Counsel <<http://counselmagazine.co.uk/>>, **B.A., vol. II, Tab 47**.

⁷⁵ The maintenance of discipline depends, *inter alia*, on speedy trials: *R. v. Généreux*, *supra* note 35, para 60, **B.A., vol. I, Tab 17**; *NDA*, s. 162, **B.A., vol. I, Tab 1**. It cannot be ignored that the Minister's right of appeal is exercised on average 21 months after the commission of the offence. The requirements of military discipline require a maximum delay of 6 months. As such, the Minister's right of appeal cannot be said to be necessary to maintain military discipline: see Bronson Consulting Group, *External Review of the Canadian Military Prosecution Service*, Final Report, 31 March 2008 at 10, **B.A., vol. II, Tab 42**.

⁷⁶ *Regan*, *supra* note 28 at para 160, **B.A., vol. I, Tab 15**.

D. THE APPROPRIATE REMEDY IS TO STRIKE DOWN S. 245(2)

67. There is no alternative to striking down. Reading down and reading in are not available. The intent of Parliament was clear. Parliament intended to confer the right of appeal to the Minister and to no one else. Although Parliament was aware of the provision's defect, Parliament chose to adopt it as is.⁷⁷ Reading in or reading down would therefore usurp Parliament's role. For this reason, striking down is the appropriate remedy under s. 52 of the *Constitution Act, 1982*.⁷⁸

E. THE DECLARATION OF INVALIDITY SHOULD NOT BE SUSPENDED

68. In *Powley*, this Court stated that "it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge."⁷⁹ [Emphasis added]

69. In the present case, the applicant is facing charges relating to possessing and accessing child pornography. The applicant's defence relies on a declaration that s. 245(2) is contrary to his *Charter* rights. If successful, no appeal lies.

70. In other cases, the Minister failed to provide clear justifications to suspend the declaration of invalidity. Rather, he argued that: "... the military justice system's long-held ability to have such offences prosecuted at court martial would disappear."⁸⁰

71. This is fearmongering.

72. Declaring s. 245(2) invalid will have no effect on courts martial. Needless to say, the Minister's right to appeal has no bearing on the DMP's ability to prosecute at court martial.

⁷⁷ Summary of Bill C-25, *supra* note 59, **B.A., vol. I, Tab 7**.

⁷⁸ *R. v. Ferguson*, [2008] 1 SCR 96 at paras 51, 65, **B.A., vol. II, Tab 31**.

⁷⁹ *R. v. Powley*, [2003] 2 SCR 207 at para 52. [*Powley*], **B.A., vol. II, Tab 32**.

⁸⁰ Minister's response to motion of Cpl Thibault at para 51, **B.A., vol. II, Tab 33**.

73. Furthermore, a suspension would not meet the two applicable criteria established in *Schachter* later reiterated in *Hislop*.⁸¹
74. First, striking down s. 245(2) will pose no danger to the public. There is no risk of impunity. Courts martial will continue to try and punish service offences.
75. Second, striking down s. 245(2) is no threat to the rule of law. As this Court has recognized, the right to an appeal does not flow either from the rule of law⁸² or the common law.⁸³ The prosecutor's right to an appeal even less so.⁸⁴ There exists no constitutional or common law right to an appeal. In fact, "appeals are solely creatures of statute."⁸⁵ In short, independent and impartial courts martial will continue to try and punish service offences in accordance with the rule of law.
76. In the alternative, should this Court nevertheless suspend the declaration of invalidity, the applicant asks this Court to be exempted from the period of suspension. This Court has previously recognized that successful *Charter* litigants in penal matters should personally benefit from the declaration of invalidity.⁸⁶
77. There is no reason to justify suspending the declaration of invalidity in this case.

PART IV – SUBMISSIONS CONCERNING COSTS

78. The Applicant does not seek costs on this motion nor should costs be awarded against him.

⁸¹ *Schachter v. Canada*, [1992] 2 SCR 679 at p 719, **B.A., vol. II, Tab 22**; *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429 at para 90, **B.A., vol. II, Tab 34**.

⁸² *Charkaoui v. Canada*, [2007] 1 SCR 350 at para 136, **B.A., vol. II, Tab 24**.

⁸³ *R. v. Meltzer*, *supra* note 70 at 1773, **B.A., vol. II, Tab 25**.

⁸⁴ *R. v. Evans*, *supra* note 71 at 645-46, **B.A., vol. II, Tab 26**; *R. v. Graveline*, *supra* note 71 at para 13, **B.A., vol. II, Tab 27**.

⁸⁵ *R. v. Smith*, *supra* note 72 at para 21, **B.A., vol. II, Tab 28**; *R. v. W.(G.)*, *supra* note 72 at para 8, **B.A., vol. II, Tab 29**; *Kourtessis v.M.N.R.*, *supra* note 72 at 69, 70, 81, **B.A., vol. II, Tab 30**.

⁸⁶ *R. v. Guignard*, [2002] 1 SCR 472 at paras 32, 34, **B.A., vol. II, Tab 35**; *Eurig Estate (Re)*, [1998] 2 SCR 565 at paras 44, 48, **B.A., vol. II, Tab 36**.

Applicant's Factum

Statement of Argument

PART V – ORDER SOUGHT

PLEASE THIS HONOURABLE COURT TO:

DECLARE s. 245(2) of the *National Defence Act*, and its regulatory counterpart found at *Queen's Regulations and Orders for Canadian Forces (QR&O) 115.27* invalid pursuant to s. 52(1) of the *Constitution Act, 1982*;

QUASH the Minister of National Defence's Notice of Appeal;

DISMISS the Minister of National Defence's appeal.

Gatineau, June 18, 2015

Mark Létourneau, LCdr

Jean-Bruno Cloutier, LCol

**Defence Counsel Services
Counsel for the Applicant**

PART VI – TABLE OF AUTHORITIES

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<i>National Defence Act</i> , R.S.C., 1985, c. N-5 1,65
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11 2
<i>Constitution Act</i> , 1982, being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11 4
<i>Legislative History</i> 8
<i>Act respecting the Director of Criminal and Penal Prosecutions</i> , c. D-9.1.1 17
<i>Director of Public Prosecutions Act</i> , SC 2006, c. 9 42
David Goetz, <i>Bill C-25: An Act to Amend the National Defence Act</i> , LS-311E (Ottawa: Law and Government Division, 18 February 1998 59,67
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<i>R. v. Second Lieutenant Moriarity</i> , 2015 SCC (Hearing held on 12 May 2015)	48
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<i>R. v. Gagnon</i> , 2015 CMAC-577	51
<i>R. v. Thibault</i> , 2015 CMAC-581	51
<i>Application under s. 83.28 of the Criminal Code (Re)</i> , [2004] 2 SCR 248	52
<i>R. v. Power</i> , [1994] 1 SCR 601	54
<i>Schachter v. Canada</i> , [1992] 2 SCR 679	62,73
<i>British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)</i> , 2009 BCCA 337	62
<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , [2007] 1 SCR 350	63,75
<i>R. v. Meltzer</i> , [1989] 1 SCR 1764	63,75
<i>R v. Evans</i> , [1993] 2 SCR 629	63,75
<i>R. v. Graveline</i> , [2006] 1 SCR 609	63,75
<i>R. v. Smith</i> , [2004] 1 SCR 385	63,75
<i>R. v. W.(G.)</i> , [1999] 3 SCR 597	63,75
<i>Kourtessis v. M.N.R.</i> , [1993] 2 SCR 53	63,75
<i>R v. Ferguson</i> , [2008] 1 SCR 96	67
<i>R. v. Powley</i> , [2003] 2 SCR 207	68
<i>Minister's Response to motion of Cpl Thibault</i>	70
<i>Canada (Attorney General) v. Hislop</i> , [2007] 1 SCR 429	73
<i>R. v. Guignard</i> , [2002] 1 SCR 472	77
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