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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM JUDGMENTS OF THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

LEADING SEAMAN C.D. EDWARDS
CAPTAIN C.M.C. CRÉPEAU
GUNNER K. FONTAINE
CAPTAIN IREDALE

Appellants (Respondents)

- and –

HIS MAJESTY THE KING

Respondent (Appellant)

AND BETWEEN:

SERGEANT S.R. PROULX
MASTER-CORPORAL J.R.S. CLOUTIER

Appellants (Respondents)

- and –

HIS MAJESTY THE KING

Respondent (Appellant)

- and –

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

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PART I: OVERVIEW

1. In this appeal, the Court is asked to assess the scope and application of the section 11(d) *Charter* right to an independent and impartial tribunal within the context of the military justice system. The appellants ask this Court to depart from the interpretive approach taken in *R. v. Généreux* ("*Généreux*"),[1] which determined that the content of the section 11(d) right may differ in a military context, as the drafters of the *Charter* had acknowledged the existence of military tribunals by including a carve out for military tribunals in section 11(f).

2. The position of the British Columbia Civil Liberties Association ("BCCLA") on *Généreux* is aligned with that of the appellants, but for different reasons. The appellants focus on "[n]ew significant and uncontroversial social facts" that they argue "dissipate" the concerns in *Généreux* that led this Court to confirm the constitutionality of active officers serving on military tribunals.[2] BCCLA submits that the *Généreux* approach to section 11(d) is flawed, particularly in light of post-*Généreux* trends in *Charter* interpretation.

3. BCCLA submits that *Généreux* should no longer be followed by this Court, and that this Court should interpret section 11(d) in the context of military tribunals in a manner that is consistent with its accepted approach to *Charter* interpretation. BCCLA takes no position on whether the current structure of military tribunals in the Canadian Forces is a breach of section 11(d), and if so, whether such a breach is justifiable under section 1.

PART II: STATEMENT OF POINTS IN ISSUE

4. What is the proper interpretive approach to section 11(d) of the *Charter*, and at what stage of the analysis should the circumstances of a military tribunal be taken into account?

PART III: STATEMENT OF ARGUMENT

<u>The accepted approach to *Charter* interpretation</u>

5. Starting with its decision in *R. v. Big M Drug Mart Ltd.*,[3] this Court has consistently endorsed a purposive approach to *Charter* interpretation:

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[1] [1992] 1 SCR 259 [*Généreux*].
[2] Appellants' factum at para 106.
[3] [1985] 1 SCR 295 [*Big M*].

> In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.
>
> [emphasis in original][4]

6. The purposive approach was specifically endorsed by this Court in the context of interpreting section 11(d) in *R. v. Oakes*.[5]

7. The term "purposive" refers to an interpretation that is consistent with the purpose of the right, and is often mistakenly conflated with the term "generous".[6] Generosity of interpretation is subordinate to, and constrained by, a right's purpose.[7] The same interpretive framework that applies to *Charter* rights also applies to exceptions to those rights stated in the *Charter*.[8]

8. When assessing the purpose of a right, it is permissible to look to other provisions of the *Charter* for guidance. This Court has been clear that guidance as to the purpose of a right

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[4] *Big M* at 344, relied on, *inter alia*, in *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 SCR 1469 at 1489 and *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 19 in the context of section 6, *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 at para 20 in the context of section 3; *R. v. K.R.J.*, 2016 SCC 31 at para 37 and *R. v. Stillman*, 2019 SCC 40 at para 21 [*Stillman*] in the context of section 11; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 24 at para 14 [*Toronto (City)*] in the context of section 2.

[5] [1986] 1 SCR 103 at 119 [*Oakes*].

[6] *R. v. Grant*, 2009 SCC 32 at para 17 [*Grant*].

[7] *Grant* at para 17.

[8] *Stillman* at para 22.

can be found from: (a) the *Charter* language used to express the right, (b) the implications available to be drawn from the context in which the right is found (including other parts of the *Charter*), (c) the pre-*Charter* history of the right, and (d) the legislative history of the *Charter*.[9]

9. As *Charter* interpretation matured and developed over the years, this Court adopted a practice of reading *Charter* rights broadly and leaving the balancing of conflicting values or reconciliation of competing rights for a section 1 analysis.[10] By way of one example, La Forest J, writing for the majority in *B. R. v. Children's Aid Society of Metropolitan Toronto* (four years after *Généreux*) stated as follows:

> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(*a*).[11]

10. In certain recent decisions, this Court has begun to favour a "purposive textual interpretation" of constitutional provisions.[12] As stated by Justices Brown and Rowe, writing for the majority in *Quebec (Attorney General) v. 9147-0732 Québec inc.*,[13] "constitutional interpretation, being the interpretation of the text of the constitution, must first and foremost have reference to, and be constrained by, that text."[14] Although *Big M* is clear that the text of the provision in question is a key component of the assessment of a provision's purpose, this recent focus on a textual analysis within a "purposive textual interpretation" has been described as "unmistakably a more restrained approach to interpretation than the method that prevailed for most of the *Charter*'s first four decades."[15]

11. BCCLA has concerns with the "purposive textual" approach that go beyond the scope of this intervention. However, as discussed in further detail below, BCCLA submits that the

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[9] *R. v. Poulin*, 2019 SCC 47 at para 57, citing Peter W. Hogg, *Constitutional Law of Canada* (5th Ed. Supp), vol 2 at p 36-30; *Big M* at 344.

[10] *R. v. Turpin*, [1989] 1 SCR 1296 at 1315; *R. v. Keegstra*, [1990] 2 SCR 697 at 840; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 73; *Multani v. Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 26; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 188.

[11] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 384.

[12] *Toronto (City)* at para 53.

[13] 2020 SCC 32 [*Québec inc.*]

[14] *Québec inc.* at para 9.

[15] Colin Feasby, "The Evolving Approach to *Charter* Interpretation" (2022) 60:1 Alta L Rev 35 at 38.

interpretive approach taken in *Généreux* is not consistent with either a purposive approach or a "purposive textual" approach.

The interpretive exercise in *Généreux*

12. As noted in both the appellants' and the respondent's factum, the independence and impartiality of military judges in Canada was first canvassed by this Court in *R. v. Mackay*,[16] which was decided two years before the *Charter* came into force. *Mackay* involved a challenge to the independence and impartiality of military judges under section 2(f) of the *Bill of Rights*,[17] which provided that no law in Canada shall:

> …deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause.[18]

13. The majority in *Mackay* held that the trial of military members by superior officers did not violate section 2(f) of the *Bill of Rights*. The majority relied heavily on the long tradition of a separate system of military justice in Canada, as well as the "practical necessity" of having military personnel serve a dual role as officers and military judiciary.[19] As discussed below, these same considerations formed part of this Court's analysis in *Généreux*.

14. The first *Charter* case in this Court to consider the content of the section 11(d) guarantee to an independent and impartial tribunal was *R. v. Valente*.[20] Justice Le Dain wrote as follows with respect to the section 11(d) constitutional guarantee of judicial independence:

> The standard of judicial independence for the purposes of s. 11(d) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.[21]

15. This statement was made in the context of this Court's finding that, for the purposes of section 11(d), judicial independence could not be defined by reference to the standards regarding security of tenure and security of salary and pension set out in sections 99 and 100

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[16] [1980] 2 SCR 370 [*Mackay*].
[17] SC 1960, c 44 [*Bill of Rights*].
[18] *Bill of Rights* at s. 2(f).
[19] *Mackay* at 403-404, cited in *Généreux* at 290.
[20] *[1985] 2 SCR 673* [*Valente*].
[21] *Valente* at 694.

of the *Constitution Act*.[22] *Valente* held that the test for independence for purposes of section 11(d) is not whether a tribunal "falls short of the ideal or highest degree" of protection, but whether a tribunal may be reasonably perceived as enjoying the essential conditions of judicial independence.[23] Le Dain J held that there are three essential conditions of institutional judicial independence for the purposes of section 11(d): security of tenure, financial security, and the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function.[24]

16. In the result, Le Dain J held that a judge sitting as a member of the criminal division of Ontario's provincial court was an independent tribunal within the meaning of section 11(d).[25] In light of his conclusion on section 11(d), Le Dain J did not consider section 1.

17. Notably, *Valente* was decided one year before this Court's decision in *R. v. Oakes*, which set out this Court's analytical approach to section 1. The majority's approach *Généreux* was informed by reasoning from both *Mackay* and *Valente*, despite both cases having been decided prior to this Court developing a clear delineation between issues that are relevant to whether a right has been infringed, and issues that are relevant to whether the infringement of a right is justifiable. The analysis in *Mackay* did not contemplate this delineation at all, as the *Bill of Rights* did not have an equivalent to section 1 of the *Charter*. BCCLA submits, as discussed below, that *Généreux* imports issues into its section 11(d) analysis which ought properly to be considered under section 1.

18. In *Généreux*, the majority, per Chief Justice Lamer, confirmed this Court's conclusion in *Mackay* that the military system of justice has significant practical importance, and wrote that the military's unique disciplinary code would be "less effective if the military did not have its own courts to enforce the code's terms."[26] Regarding the essential conditions for judicial independence established in *Valente*, he noted that although "the essence of each condition must be protected in every case," the conditions "are susceptible to flexible application in order to suit the needs of different tribunals."[27]

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[22] *Valente* at 693-694.
[23] *Valente* at 689 and 698.
[24] *Valente* at 694, 704, 708.
[25] *Valente* at 714.
[26] *Généreux* at 294.
[27] *Généreux* at 286.

19. Prior to engaging in the *Valente* analysis, the Chief Justice acknowledged that the close relationship between the military hierarchy and military tribunals "detracts from the absolute independence and impartiality of such tribunals",[28] and held that "a reasonable person might well consider that the military status of a court martial's members would affect its approach to the matters that come before it for decision."[29] Despite these concerning conclusions, the Chief Justice did not find that the dual role of military judges violated section 11(d):

> This, in itself, is not sufficient to constitute a violation of s 11(d) of the *Charter*. In my opinion the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s 11(d) of the *Charter*, must be interpreted in this context.[30]

20. The Chief Justice then turned to his interpretation of section 11(d) itself, which he found supported the above conclusion. When interpreting section 11(d) in the context of military tribunals, the Chief Justice looked to section 11(f) to inform the content of the right guaranteed by section 11(d). The Chief Justice noted that section 11(f) contains a specific exception "in the case of an offence under military law tried before a military tribunal", which abrogates the right to trial by jury in such circumstances. He continued**:**

> Section 11(*f*) reveals, in my opinion, that the *Charter* does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law. The s. 11(*d*) guarantees must therefore be construed with this in mind. The content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. However, any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of s. 11(*d*) it cannot survive unless the infringements can be justified under s. 1.[31]

21. In effect, the Chief Justice looked to an exception to a separate right-conferring provision, section 11(f), to modify the "content of the constitutional guarantee" offered by section 11(d). Section 11(d), of course, expresses an unqualified right to an independent and impartial tribunal, without exception or limitation.

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[28] *Généreux* at 294.
[29] *Généreux* at 295.
[30] *Généreux* at 296.
[31] *Généreux* at 296.

<u>The reasoning in *Généreux* is not consistent with this Court's approach to *Charter* interpretation</u>

22. For the reasons that follow, BCCLA submits that the *Généreux* approach to section 11(d) is an outlier in this Court's otherwise consistent approach to *Charter* interpretation and should not be followed. This is so whether the *Big M* approach remains paramount, or the Court has in fact adopted an interpretive approach which places more emphasis on the text of the *Charter* provision itself.

23. First, the Généreux interpretation of section 11(d) is atextual. Section 11(d) contains no exception or limitation, and Généreux's reliance on the exception in section 11(f) is inconsistent with the plain and unqualified language of section 11(d). There is no indication in the text of section 11(d) that it was meant to be limited by the operation of section 11(f). Nor is there any indication in the opening words of section 11 that the section 11(f) exception for offences "under military law tried before a military tribunal" applies broadly to inform the other right-conferring provisions under section 11.

24. Second, the purpose of the section 11(d) right cannot be served by modifying the right through a reference to the exception found in section 11(f). As noted above, this Court has stated that the context in which a right is found may inform an assessment of the purpose of the right, and that the Court may look to other provisions in the Charter as part of this contextual inquiry. This is why, for example, the rights found in sections 8 to 14 of the Charter "throw light" on the meaning of "principles of fundamental justice" in section 7.[32] However, the interpretive exercise in Généreux does not look to section 11(f) to provide context to the purpose of section 11(d) – it looks to section 11(f) to limit the content of section 11(d).

25. To construe section 11(f) as a limit on section 11(d) undermines the longstanding, fundamental right to a fair trial, which includes the right to an independent and impartial tribunal. This is inconsistent with the purpose of section 11 generally – namely, to protect the liberty and security interests of persons accused of crimes.[33] To broaden the application of the military exception contained in section 11(f) so as to inform the content of other right-

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[32] See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 502-503; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 536-537.
[33] *R. v. Kalanj*, [1989] 1 SCR 1594 at 1609.

conferring provisions under section 11 creates a risk that members of the military will be deprived of the basic legal rights which section 11 confers on all those charged with an offence. This would be inconsistent with the broad, affirmative language used in section 11(d), and equally inconsistent with the purposive approach adopted by this Court in the interpretation of *Charter* rights.

26. The interpretive exercise in *Généreux* does not conform with the flexible application of the conditions of judicial independence contained in section 11(d) to reflect the needs of a particular tribunal, as envisioned in *Valente*. The Chief Justice in *Généreux* did not conclude that the dual role of military judges "falls short of the ideal or highest degree of security", but still meets the essential conditions of judicial independence. Rather, he conceded that the link between the military hierarchy and military tribunals detracted from the independence of military tribunals, and acknowledged the risk of reasonable apprehension of bias. His rationale for finding that section 11(d) was not breached was focused on the practical necessity of having members of the military serve on tribunals to maintain a parallel system of military law and tribunals, and the importance and entrenched history of that parallel system.[34]

27. BCCLA submits that this alleged "practical necessity" must be distinguished from the general need for a military justice system. While the existence of a military justice system may be contemplated by the *Charter*, it does not follow that this Court is precluded from finding that a particular structural component of the military justice system is in breach of section 11(d). The Chief Justice's conclusions in *Généreux* strongly suggest that the section 11(d) right is breached when an accused faces a court martial from a military tribunal. The other considerations in *Généreux* raised by the Chief Justice (the practical necessity of a separate military justice system and the fact that military justice is "deeply entrenched" in our history) reflect potential "goals of fundamental importance"[35] which may be raised under a section 1 analysis.

28. By applying an interpretation that obviates the need for a section 1 analysis, BCCLA submits that the *Généreux* approach to section 11(d) raises several concerns. Firstly, in a proper *Oakes* analysis, the Court would have an opportunity to assess the scope of the impairment and

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[34] *Généreux* at 296.
[35] *Oakes* at 136.

the proportionality between the deleterious and salutary effects of the military justice system's reliance on military officers as judges, which are not considered when the justification analysis is undertaken within section 11(d) itself rather than under section 1.

29. Second, *Généreux* results in a meaningful deprivation of procedural rights for many Canadians accused of serious crimes. This is particularly concerning in light of the power of the military justice system to impose penalties as severe as imprisonment for life.[36] As stated by this court in *R. v. Wigglesworth*, "[i]f an individual is to be subject to penal consequences such as imprisonment--the most severe deprivation of liberty known to our law--then he or she…should be entitled to the highest procedural protection known to our law."[37]

30. The shift in burden from the right-holder to the government under section 1 is a material procedural protection for an accused. Although the standard of proof remains on a balance of probabilities,[38] a government seeking to justify an infringement under section 1 must provide "cogent and persuasive" evidence to meet its burden.[39] An accused faces a substantial disadvantage if he or she bears the burden to prove that an internal limitation on a right has not been engaged, rather than the same or similar analysis taking place under section 1 with the government bearing the burden to prove justification.

31. BCCLA submits that section 11(d) should be interpreted in a broad and purposive manner, consistent with how this Court has approached other right-conferring provisions of the *Charter*. If the unique disciplinary needs of the military render it impractical for the military judiciary to meet the independence requirements contained in section 11(d), the government must bear the burden to establish why that breach is justified through an *Oakes* analysis.

32. BCCLA does not make any submission on whether, properly interpreted, section 11(d) has been breached on the facts of this case. The parties ably address this point, and BCCLA is mindful of its limited role as an intervener. BCCLA also does not make any submissions on whether a breach of section 11(d), if found, is justifiable under section 1.

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[36] *National Defence Act*, s. 139
[37] *R. v. Wigglesworth*, [1987] 2 SCR 541 at 561.
[38] *Oakes* at 137.
[39] *Oakes* at 138.

<u>Departure from “horizontal” *stare decisis*</u>

33. BCCLA acknowledges that it is advocating for this Court to depart from the interpretive approach in *Généreux*. In determining whether to depart from its own precedents, the Court must engage in a balancing exercise between correctness and certainty, and determine whether it is preferable to maintain the certainty of a potentially erroneous existing precedent or correct an error.[40] This assessment of “horizontal” *stare decisis* is discretionary.[41]

34. As outlined above, the interpretive exercise in *Généreux* is plainly inconsistent with the approach to *Charter* interpretation that has been repeatedly endorsed by this Court. The reasoning in *Généreux* is in error. BCCLA submits that this Court should correct the error and bring the interpretation of section 11(d) in the context of military tribunals under the same interpretive umbrella as the rest of the *Charter*. The correction sought by the BCCLA does not create significant uncertainty. As such, BCCLA submits that this Court should exercise its discretion to depart from *Généreux*.

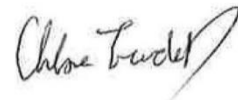
PART IV: COSTS

35. BCCLA seeks no order for costs and asks that no order for costs be made against it.

PART V: NATURE OF ORDER SOUGHT

36. Pursuant to the Order of Justice Côté dated July 4, 2023, BCCLA has been granted leave to present oral argument at the hearing of this appeal for five minutes. As noted above, BCCLA takes no position on the outcome of the appeal.

DATED: August 15, 2023



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[40] *Canada v. Craig*, 2012 SCC 43 at para 27 [*Craig*].
[41] *Craig* at para 27.

PART VI – PUBLICATION BANS

37. BCCLA makes no submissions as to case sensitivity.

PART VII – TABLE OF AUTHORITIES

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