Federal Court  Cour fédérale

**Date: 20180604**

**Docket: T-1546-17**

**Citation: 2018 FC 577**

**Ottawa, Ontario, June 4, 2018**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**PETTY OFFICER 2ND CLASS STEVEN THURROTT**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Petty Officer 2nd Class Steven Thurrott, is a member of the Canadian Forces who held the position of an Electronic Warfare Supervisor on the naval ship HMCS St. John's. Following a summary trial on August 16, 2017, he was found to be absent without leave for the dates of July 28 to 30, 2017, contrary to section 90 of the *National Defence Act*, RSC 1985, c N-5 [*NDA*], and sentenced to a $1,000 fine. The Applicant applied for a review of the summary trial verdict and sentence pursuant to article 108.45 of the *Queen's Regulations and*

*Orders* [*QR&O*]. This review was conducted by Commander G. Noseworthy [the Review Authority], who determined in a letter dated September 12, 2017, that the guilty verdict was appropriate and that the sentence was fair and justified.

[2] The Applicant has now applied pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*], for judicial review of the Review Authority's decision. He asks the Court pursuant to subsection 24(1) of the *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 [*Charter*], to declare that the Canadian Forces' summary trial procedure is constitutionally invalid insofar as it violates a member's rights under section 7, paragraph 11(d), and section 12 of the *Charter*. He also asks the Court to quash the summary trial conviction and the Review Authority's decision and remand the matter to the Director of Military Prosecutions to determine whether a court martial should be convened.

## I. The Review Authority's Decision

[3] In his written submissions to the Review Authority, the Applicant submitted that the verdict and sentence should be set aside for several reasons. First, the matter should have been referred to a court martial because, pursuant to paragraph 164(1) (e) of the *NDA*, a person may be tried by summary trial only if "the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence," and because article 108.34 (1) (a) of the *QR&O* provides that a summary trial shall be adjourned if "there are reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at

the time of the alleged offence." Even if the presiding officer [Presiding Officer] at the summary trial was not briefed on the Applicant's Medical Employment Limitations [MEL] due to his stress-related mental health conditions (which preclude him from being deployed at sea), the Applicant says it should have become apparent during the course of the summary trial hearing.

[4] Second, the Applicant was questioned by his unit superiors and ordered to provide evidence which was used against him in the summary trial, contrary to chapter 5, paragraph 28 of the *Military Justice Summary Trial Level* manual, version 2.2 [the Manual], which states that administrative investigations must be halted when it becomes apparent that a possible service offence has been committed. Third, although the Applicant raised a defence of due diligence, this was not considered by the Presiding Officer. Lastly, the $1,000 sentence was excessively severe for a first time offence.

[5] In addition to the Applicant's submissions to the Review Authority, the Presiding Officer also submitted comments to the Review Authority. With respect to the Applicant's arguments concerning his MEL, the Presiding Officer noted that chapter 11 of the Manual defines the term "unfit to stand trial" as being: "Unable on account of mental disorder to conduct a defence at any stage of a trial by court martial before a finding is made or to instruct counsel to do so, and in particular, unable on account of mental disorder to: understand the nature or object of the proceedings; understand the possible consequences of the proceedings; or communicate with counsel;" and defines the term "mental disorder" as being: "a 'disease of the mind,' and this term includes any illness, disorder or abnormal condition, which impairs the human mind and its functioning…[but] does not include self-induced states caused by drugs, or transitory mental

states such as hysteria or concussion." The Presiding Officer further commented that the Applicant had been well prepared for the summary trial with numerous questions for each witness and had delivered his testimony eloquently, and that he at no time "ever reasonably believe[d] that his Medical Employment Limitations nor evidence presented in testimony…at trial were indicative of any member who did not understand the nature of the proceedings, did not understand the possible consequences of the proceedings, or could not communicate with counsel."

[6] In response to the Applicant's arguments about administrative and disciplinary investigations, the Presiding Officer stated that, to the best of his knowledge, no formal administrative investigation had been ordered, and any inquiries made by the Applicant's superiors were for the purpose of determining whether a charge was warranted. In the Presiding Officer's view, when it became apparent there were grounds for a charge, he believed that no further inquiries were made by the divisional chain of command. The Presiding Officer concluded his comments by stating $1,000 was a fair sentence, an amount which had been applied to similarly situated individuals, and by noting that the Applicant had several marks on his record for failing to inform his chain of command of changes to his personal situation.

[7] The Review Authority agreed with the Presiding Officer's determinations as to the Applicant's mental health, finding there was not sufficient cause for the Presiding Officer to believe the Applicant was suffering from a mental disorder which impaired the human mind and its functioning at the time of the offence or at the summary trial. In the Review Authority's opinion, the Applicant had demonstrated a clear understanding of the nature and object of the

proceedings, could understand the possible consequences of the proceedings, and had been able to articulately present his defence or communicate with counsel if so desired. Accordingly, the Review Authority determined that the Applicant had not produced sufficient evidence to allow the Presiding Officer to find there were reasonable grounds to believe he was unfit to stand trial or suffering from a mental disorder at the time of the offence.

[8] The Review Authority further determined that the charge was written correctly and, after noting he had consulted with the Office of the Judge Advocate General, found that any inquiries made by the Applicant's superiors were for the purpose of determining whether there was documentation authorizing him to be on leave, that any such inquiries ceased at the time a disciplinary investigation was commenced, and that due diligence was not a defence to the charge. The Review Authority further found that the Applicant's absence without authority, combined with the knowledge he was presumed to have regarding his place of duty, was sufficient to establish a guilty state of mind whether his absence was deliberate or arose from forgetfulness, carelessness, or negligence. In view of the comments provided by the Presiding Officer and in consultation with the Office of the Judge Advocate General, the Review Authority concluded that the finding of guilty was appropriate and the sentence imposed upon the Applicant was fair and justified.

## II. Analysis

### A. *Standard of Review*

[9] The parties agree that the standard of review applicable to the Review Authority's decision is that of reasonableness; however, as the Respondent notes, the standard of review for a decision of this nature has not been previously considered. In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court of Canada instructed as follows:

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
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> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[10] I begin this analysis by noting that the Review Authority's decision does not fall within one of the four types of questions identified in *Dunsmuir* as attracting review on a standard of correctness: namely, (i) "constitutional questions regarding the division of powers between Parliament and the provinces…as well as other constitutional issues" (para 58); (ii) true questions of jurisdiction or *vires* "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para 59);

(iii) "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (para 60); and (iv) questions "regarding the jurisdictional lines between two or more competing specialized tribunals" (para 61).

[11] The decision under review clearly does not fall within categories (i), (ii), or (iv). Moreover, the questions decided by the Review Authority under article 108.45(1) of the *QR&O* - specifically, whether to set aside the guilty finding on the ground that it was unjust, or to alter the sentence on the ground that it was unjust or too severe - cannot be said to be of central importance to the legal system and outside the Review Authority's specialized area of expertise. Additionally, there is no privative clause contained in either section 249 of the *NDA* or article 108.45 of the *QR&O*, suggesting that less deference is owed. (Parenthetically, I note there is a weak privative clause contained in section 29.15 of the *NDA* in respect of a decision by a final authority in the grievance process set forth in section 29). None of these factors, therefore, suggests that the Review Authority's decision should be reviewed on a correctness standard.

[12] Furthermore, the Review Authority was interpreting his home statute and has expertise as a high-ranking member of the Canadian Forces who would have been required, pursuant to articles 101.07 and 108.10(2) (a) of the *QR&O*, to receive formal training and certification by the Office of the Judge Advocate General as being qualified to perform the duties of a delegated officer. The questions before the Review Authority were either ones of fact or mixed fact and law. As noted by the Court in *Singh v Canada (Attorney General)*, 2015 FC 93, 474 FTR 164:

> [35] Questions of mixed fact and law are entitled to deference and have been previously determined to be subject to review on the

> reasonableness standard; see the decisions in *Taylor v. Canada (Attorney General)* (2001), 212 F.T.R. 246 at paragraphs 32 and 38, aff'd [2003] 3 F.C. 3, leave to appeal to the Supreme Court of Canada refused, (2004), 321 N.R. 399 (Note); *Cosgrove v. Canadian Judicial Council* (2007), 361 N.R. 201 at paragraph 25 (F.C.A.) and *Akladyous, supra* [*Akladyous v. Canadian Judicial Council* (2008), 325 F.T.R. 240] at paragraphs 40-43.

[13] On this issue, therefore, I conclude that the appropriate standard of review in respect of the Review Authority's decision is reasonableness. The Review Authority was interpreting his home statute, he had expertise in the area, he was assessing questions of fact or mixed fact and law, and he was exercising a specialized role.

[14] Under the reasonableness standard, the Court is tasked with reviewing the Review Authority's decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

B. *Was the Review Authority's decision reasonable?*

[15] The Applicant contends that the Review Authority erred by failing to acknowledge that the matter ought to have proceeded by way of a court martial rather than by a summary trial, and he therefore unreasonably misapplied the law. According to the Applicant, it is demonstrable that

he was suffering from recognized mental health conditions at the time he was absent from his work without leave. In this regard, the Applicant points to paragraph 163(1) (e) of the *NDA*, which provides that a "commanding officer may try an accused person by summary trial if… the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence."

[16] The Respondent says the Review Authority's conclusion concerning the appropriateness of proceeding by summary trial was reasonable because the Applicant had not produced sufficient evidence to show he was "unfit to stand trial" or was suffering from a "mental disorder" as those terms are defined by the *NDA*. The Respondent notes that the Review Authority concluded that the Applicant did not meet the definition of "unfit to stand trial" for several reasons, including his well-prepared and eloquent defence, which included over 100 detailed questions for witnesses, and his conduct at the summary trial, which demonstrated that he understood the nature of the proceedings and the possible consequences; and his repeated affirmations that he fully understood the proceedings. In the Respondent's view, the Review Authority reasonably concluded that the Applicant did not suffer from a mental disorder because evidence of his conduct at the time of the offence and throughout the summary trial left no reasonable basis on which to conclude that the functioning of his mind was impaired. Even though the Presiding Officer was aware that the Applicant's stress-related MEL prevented him from being deployed at sea, this was insufficient, according to the Respondent, to establish a reasonable belief that this condition impaired his mind and its functioning at the time he

committed the offence. The Respondent also notes that the Applicant raised no concerns about his mental state during the summary trial.

[17] There is no evidence to suggest that the Applicant was unfit to stand trial within the meaning of subsection 2(1) or paragraph 163(1) (e) of the *NDA*. Although the Applicant claims he was suffering from a mental disorder at the time of the offence, he has not led any evidence to suggest that his stress-related MEL was impairing the functioning of his mind at the time of the offence. Indeed, the Applicant has provided no evidence whatsoever that this was so and, in fact, has not filed any evidence at all by way of affidavit. In view of the evidentiary record before the Court, it was reasonable for the Review Authority (and for that matter, the Presiding Officer) to conclude the Applicant's mind was not impaired at the time of the offence. I find the Review Authority's decision to be not only justifiable, transparent, and intelligible, but also within the range of acceptable outcomes for the following reasons.

[18] Section 202.13 of the *NDA* contains detailed provisions regarding mental disorder at the time of an offence:

| **Defence of mental disorder** | **Troubles mentaux** |
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| **202.13 (1)** No accused person shall be held responsible under this Act for a service offence in respect of an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. | **202.13 (1)** La responsabilité d'une personne n'est pas engagée à l'égard d'une infraction d'ordre militaire en raison d'un acte ou d'une omission de sa part survenu alors qu'elle était atteinte de troubles mentaux qui la rendaient incapable de juger de la nature et de la qualité de l'acte ou de l'omission, ou de savoir que l'acte ou l'omission |

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| | était mauvais. |
| **Presumption** | **Présomption** |
| **(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities. | **(2)** Chacun est présumé ne pas avoir été atteint de troubles mentaux de nature à ne pas engager sa responsabilité sous le régime du paragraphe (1); cette présomption peut toutefois être renversée, la preuve des troubles mentaux se faisant par prépondérance des probabilités. |
| **Burden of proof** | **Charge de la prevue** |
| **(3)** The burden of proof that an accused person was suffering from a mental disorder so as to be exempt from responsibility is on the party raising the issue. | **(3)** La partie qui entend démontrer l'existence de troubles mentaux chez l'accusé a la charge de le prouver. |

[19] In contrast, paragraph 163(1) (e) of the *NDA* (quoted at paragraph 15 above) sets forth a threshold of "reasonable grounds to believe" that a person was not suffering from a mental disorder at the time of commission of the alleged offence. This is a lower threshold than the balance of probabilities standard under section 202.13 (1) which an accused must meet in order to establish that they suffered from a mental disorder at the time of the offence. While the language of "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong" does not appear in section 163(1) (e) of the *NDA*, it provides context for interpreting the term "mental disorder" in the *NDA* and reinforces the reasonableness of the Review Authority's decision.

[20] Additionally, it warrants note that the definition of "mental disorder" in subsection 2(1) of the *NDA* is very similar to the language used in the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] for a person to be found unfit to stand trial (see *Criminal Code* sections 672.22 to 672.33) or not criminally responsible on account of mental disorder (see *Criminal Code* sections 672.34 to 672.37). An accused may also raise the defence of mental disorder, as recognized by subsection 16(1) of the *Criminal Code*:

| **Defence of mental disorder** | **Troubles mentaux** |
|---|---|
| **16 (1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. | **16 (1)** La responsabilité criminelle d'une personne n'est pas engagée à l'égard d'un acte ou d'une omission de sa part survenu alors qu'elle était atteinte de troubles mentaux qui la rendaient incapable de juger de la nature et de la qualité de l'acte ou de l'omission, ou de savoir que l'acte ou l'omission était mauvais. |

[21] A "mental disorder" is defined in subsection 2(1) of the *Criminal Code* as "a disease of the mind." This definition was considered by the Supreme Court of Canada in *Cooper v R*, [1980] 1 SCR 1149 at page 1159, 110 DLR (3d) 46 [*Cooper*], which defines "disease of the mind" as follows:

> In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.

[22] The definition of a "disease of the mind" as stated in *Cooper* is virtually identical to that in chapter 11 of the Manual. *Cooper* affirms that "mental disorder" is a legal concept, not a medical concept (at pages 1158 and 1159). In other words, if an accused has a mental health condition which could meet the legal definition of a "disease of the mind," it is a question of fact as to whether an accused was impaired by a disease of the mind at the time of the offence such that he or she was incapable of appreciating the nature or quality of the act or knowing it was wrong (*Cooper* at pages 1158 and 1159; see also *R v Stone*, [1999] 2 SCR 290 at paras 193 to 197, [1999] SCJ No 27 [*Stone*]; *R c Bouchard-Lebrun*, 2011 SCC 58 at paras 55 to 58 and 61 to 63, [2011] 3 SCR 575 [*Bouchard-Lebrun*]). As Justice Bastarache remarked in *Stone*:

> 197 Taken alone, the question of what mental conditions are included in the term "disease of the mind" is a question of law. However, the trial judge must also determine whether the condition the accused claims to have suffered from satisfies the legal test for disease of the mind. This involves an assessment of the particular evidence in the case rather than a general principle of law and is thus a question of mixed law and fact… The question of whether the accused actually suffered from a disease of the mind is a question of fact to be determined by the trier of fact.

In my view, this reasoning from *Stone* is equally applicable with respect to the provisions in the *NDA* in view of the nearly-identical language between the *NDA* and the *Criminal Code* as to the definition of "mental disorder".

[23] To summarize, a mental disorder is a legal rather than a medical concept, in that a medical diagnosis such as the Applicant's MEL does not automatically give rise to a factual conclusion that he was suffering from a mental disorder at the time of the offence. For such a conclusion to be reached there must be sufficient evidence to establish that the functioning of an accused's mind was impaired at the time of commission of the offence. In other words, the

impairment must be such that an accused was unable to appreciate the nature or quality of the act or that it was wrong, language which is found in section 202.13(1) of the *NDA*.

[24] In this case, the Applicant led no evidence whatsoever to establish that the functioning of his mind was impaired in any way at the time of the offence. Merely knowing that he had an ongoing MEL is insufficient, since "mental disorder" is a legal rather than a medical concept (*Cooper* at pages 1158 and 1159; *Bouchard-Lebrun* at paras 61 and 62). Furthermore, because the question of whether the Applicant was suffering from a mental disorder at the time of the offence is a question of mixed fact and law, deference is owed to the Review Authority's decision on this point. Given the lack of evidence on which such a conclusion could be based, the Review Authority made a reasonable determination that the Applicant was not suffering from a mental disorder at the time of the offence, particularly in view of subsection 202.13(1) of the *NDA* which states that a mental disorder at the time of the offence is one which "rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."

C. *Is the Canadian Forces' summary trial procedure constitutionally invalid because it violates members' rights under section 7, paragraph 11(d), and section 12 of the* Charter*?*

[25] At the outset of the hearing of this matter, the Court noted that the record was devoid of a Notice of Constitutional Question in the form prescribed by Rule 69 of the *Federal Courts Rules*, SOR/98-106, having been served upon the attorney general of each province and the Attorney General of Canada as stipulated by section 57 of the *FCA*. After hearing the parties' brief oral

submissions in this regard, the Court directed the parties to provide the Court with brief written submissions following the hearing. They have now done so.

[26] Section 57 of the *FCA* provides in relevant part that:

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| **Constitutional questions** | **Questions constitutionnelles** |
| **57 (1)** If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2). | **57 (1)** Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2). |
| **Time of notice** | **Formule et délai de l'avis** |
| **(2)** The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise. | **(2)** L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue. |

[27] The Applicant acknowledges that no Notice of Constitutional Question was served pursuant to section 57. According to the Applicant, no Notice was required because a plain reading of section 57 exempts an applicant from having to do so when considering an Act of Parliament that concerns a "service tribunal within the meaning of the *National Defence Act*." In the Applicant's view, this application directly challenges the constitutional validity of punishments available at a service tribunal under the *NDA* and fits squarely within the exemption concerning a service tribunal contained in section 57. The Applicant contends that the reason Parliament chose to exclude service tribunals is likely because the military justice system falls under the exclusive control of the federal government pursuant to section 91 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK).

[28] The Applicant claims that the provincial attorneys general will suffer no prejudice from not having been served with a Notice of Constitutional Question because they have no interest in this matter, and the Attorney General of Canada will suffer no prejudice as her interests have been fully represented by able counsel from the Department of Justice Canada. According to the Applicant, this case is the first time the constitutionality of a military summary trial has been before a Canadian court. Although the evidence before the Court is limited because the summary trial process is a closed one, the Applicant asserts that the facts are plain and obvious and, as it concerns the lack of independence or impartiality of the decision-maker and possible loss of liberty, the facts are not in dispute.

[29] The Respondent says that because the Applicant has not complied with the mandatory requirements of subsection 57(1), this nullifies his oral request at the hearing of this matter for a

declaration of constitutional invalidity with respect to subsections 163(3) (a) and 163(4) (a) of the *NDA*, and his more general request in his Notice of Application and Memorandum of Fact and Law that the military summary trial procedure be declared constitutionally invalid. In the Respondent's view, the requested declaration of constitutional invalidity falls squarely within subsection 57(1) since the constitutional validity of provisions of the *NDA*, an Act of Parliament, is in question before this Court. According to the Respondent, the exemption with respect to service tribunals is inapplicable since the Applicant is seeking a declaration of constitutional invalidity from this Court, not from a service tribunal.

[30] The Respondent further says the requirement to serve a Notice of Constitutional Question is mandatory, as demonstrated by the use of the word "shall" in subsection 57(1) and in view of *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 53, 142 DLR (4th) 385 [*Eaton*], where the Supreme Court affirmed that where statutory language mandates that notice of a constitutional question "shall" be given, this notice requirement is mandatory and failure to give notice will invalidate any decision regarding constitutional validity, except in limited circumstances not applicable to this case (such as where the attorneys general consent or where there has been a *de facto* notice). The Respondent notes that it learned for the first time at the hearing of this matter that the Applicant sought a declaration of constitutional invalidity with respect to paragraphs 163(3) (a) and 164(3) (a) of the *NDA*, and that neither the Notice of Application nor the Applicant's factum identify these subsections. By identifying these legislative provisions for the first time during oral argument, the Respondent maintains that the Applicant prejudiced the Respondent's ability to provide a full and complete response, while the

provincial attorneys general had no notice whatsoever, and that the failure to serve a notice under subsection 57(1) precludes a declaration of constitutional invalidity.

[31] In my view, the reference to "other than a service tribunal within the meaning of the *National Defence Act*" in subsection 57(1) excludes the requirement for notice if a constitutional question is raised before a service tribunal, but not if it is raised before a different "federal board, commission or other tribunal." In other words, the notice requirement does not apply where a constitutional question is raised before a service tribunal. Moreover, the Federal Court of Canada is not a service tribunal within the meaning of the *NDA* (see *R v Lyons*, [1993] CMAJ No 3 at paras 9 to 11, 5 CMAR 130, where Chief Justice Mahoney affirmed in similar circumstances that the Court Martial Appeal Court of Canada established under subsection 234(1) of the *NDA* is not a service tribunal and that "it would be inappropriate for the Court to treat section 57 itself as inapplicable by ignoring it when the attorneys general have not been afforded an opportunity to be heard on the matter" (para 10)). The mere fact that this matter involves judicial review of a review authority's decision in respect of a service tribunal decision (where, it should be noted, the constitutional question was not raised), or the fact that it involves the constitutionality of provisions of the *NDA* related to service tribunals, is insufficient to dispense with the notice requirement in section 57 of the *FCA*. The notice requirement is mandatory for proceedings challenging the constitutionality of an Act of Parliament before this Court, the Federal Court of Appeal, or a federal board, commission or other tribunal.

[32] The Supreme Court of Canada in *Guindon v Canada*, 2015 SCC 41 at para 19, [2015] 3 SCR 3 [*Guindon*] observed that: "Notice requirements serve a vital purpose in ensuring that

courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation". In *Eaton*, the Supreme Court stated with respect to an analogous provision regarding notice of a constitutional question in the Ontario *Courts of Justice Act*, RSO 1990, c C43, subsection 109(1):

> 48 …In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.
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> 53 In view of the purpose of s. 109 of the *Courts of Justice Act*, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *D.N. v. New Brunswick (Minister of Health & Community Services)*, *supra*, and Arbour J.A. dissenting in *Mandelbaum*, *supra*, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.

[33] In the absence of proper service upon the federal and provincial attorneys general of a Notice of Constitutional Question, it is my view that the Applicant's submissions on the constitutional invalidity of the Canadian Forces summary trial process need not, and indeed

should not, be considered. The Applicant's arguments as to the unconstitutionality of the summary trial structure are ill-founded in the absence of such a notice.

[34] Moreover, and in any event, I agree with the Respondent that the constitutionality of the summary trial process should not be assessed without a proper evidentiary record. The Applicant has not adduced a proper evidentiary record to show whether this process affects the *Charter* rights of any Canadian Forces member other than himself.

[35] Courts have been clear that a proper factual foundation is necessary for constitutional litigation. As noted by Justice Mactavish in *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, [2015] 2 FCR 267 [*Canadian Doctors*]:

> [165] The Supreme Court has been clear that "Charter decisions should not and must not be made in a factual vacuum" and that "Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel": *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 9, [1989] S.C.J. No. 88.
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> [166] Similarly, in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, [1990] S.C.J. No. 92, the Court observed that it had "been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the Charter, particularly where the effects of impugned legislation are the subject of the attack": at para. 26. See also *Canada v. Stanley J. Tessmer Law Corp.*, 2013 FCA 290 at para. 9, [2013] F.C.J. No. 1360.
>
> [167] A distinction is drawn in Charter litigation between "adjudicative facts" and "legislative facts": see *Danson*, above at para. 27 for an explanation of the distinction between the two. More recently, however, the Supreme Court has recognized that social and legislative facts may in fact be intertwined with adjudicative facts: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 52, [2013] S.C.J. No. 72 [*Bedford*].
>
> [168] Although they are not parties to the litigation, the evidence regarding the experiences of unnamed individuals is closer to

> evidence regarding "adjudicative facts" rather than to "legislative facts". According to the Supreme Court in *Danson*, "[s]uch facts are specific, and must be proved by admissible evidence": at para. 27.
>
> [169] That said, as will be discussed further on in these reasons, there is some room in Charter litigation for the use of reasonable hypotheticals which are neither "far-fetched" nor "only marginally imaginable as a live possibility": see, for example, *R. v. Goltz*, [1991] 3 S.C.R. 485 at paras. 68-69, [1991] S.C.J. No. 90.

[36] The Supreme Court elaborated upon the distinction between adjudicative and legislative in *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086, [1990] SCJ No 92 [*Danson*]:

> 27 It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent ...."
>
> 28 Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements…

[37] In this case, the Applicant has established neither the necessary adjudicative nor legislative facts to ground a challenge to the constitutionality of the summary trial regime. The Applicant's arguments as to the alleged lack of independence or *Charter*-compliance of the summary trial process are vague and unsupported by case law, and some are demonstrably inaccurate such as the Applicant not being subject to the possibility of imprisonment, a substantial fine, or other harsh punishment by virtue of article 108.17(1) of the *QR&O*. None of

the Applicant's evidence (to the extent there is any at all) can reach the threshold established in *Danson* for a proper factual foundation to support a constitutional challenge.

[38] Indeed, the Applicant has not even established that his own *Charter* rights were engaged. The Applicant's arguments that his rights under sections 7 and 12 of the *Charter* can be readily dismissed. The $1,000 fine did not in any way engage his right to life, liberty, or security of the person and it certainly does not meet the high threshold for cruel and unusual punishment. The test for whether a punishment is "cruel and unusual" was considered in *Canadian Doctors*:

> [613] The Court concluded in *R. v. Smith* that "cruel and unusual" treatment or punishment is that which is "so excessive as to outrage [our] standards of decency": above at para. 83.
>
> [614] In determining whether treatment or punishment is "cruel and unusual", Canadian courts have looked at a number of factors as part of a kind of 'cost/benefit' analysis. These factors include whether the treatment goes beyond what is necessary to achieve a legitimate aim, whether there are adequate alternatives, whether the treatment is arbitrary and whether it has a value or social purpose. Other considerations include whether the treatment in question is unacceptable to a large segment of the population, whether it accords with public standards of decency or propriety, whether it shocks the general conscience, and whether it is unusually severe and hence degrading to human dignity and worth: *R. v. Smith*, above at para. 44.

[39] The Applicant has not explained why his $1,000 fine meets this high standard, and there is no evidence to suggest that the fine goes beyond what is necessary to achieve a legitimate aim, that there are adequate alternatives, that it is arbitrary, or that it does not have value or social purpose. Furthermore, there is no evidence as to why this fine would not accord with public standards of decency or propriety, that it would shock the general conscience, or that it would be degrading to human dignity or worth.

[40] As for the Applicant's claim that his right under paragraph 11(d) of the *Charter* to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, a person is only entitled to the protections of this paragraph in limited circumstances (see: *R v Wigglesworth*, [1987] 2 SCR 541, [1987] SCJ No 71). The Supreme Court of Canada stated the test in this regard in *Guindon*:

> [44] This Court has deliberately adopted a "somewhat narrow definition of the opening words of s. 11" in order to avoid having to craft differing levels of protection under s. 11 for different sorts of proceedings: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 558. The Court has also acknowledged the difficulty in formulating a precise test to identify particular proceedings which give rise to s. 11 protections: see p. 559. Section 11 protections are available to those charged with criminal offences, not those subject to administrative sanctions: see *Wigglesworth*, at p. 554; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at para. 19. The two parts test for determining which statutory infractions are criminal offences and which are administrative penalties was set out in *Wigglesworth*, at pp. 559-62. Additional analytical criteria were subsequently elaborated in *Martineau*, at paras. 19-24 and 57. As will be explained, an individual is entitled to the procedural protections of s. 11 of the *Charter* where the proceeding is, by its very nature, criminal, or where a "true penal consequence" flows from the sanction.
>
> [45] A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity: see *Martineau*, at paras. 21-22; *Wigglesworth*, at p. 560. The focus of the inquiry is not on the nature of the act which is the subject of the proceedings, but on the nature of the proceedings themselves, taking into account their purpose as well as their procedure: *Martineau*, at paras. 24 and 28-32; *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19. Proceedings have a criminal purpose when they seek to bring the subject of the proceedings "to account to society" for conduct "violating the public interest": *Shubley*, at p. 20.
>
> [46] A "true penal consequence" is "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere

> of activity": *Wigglesworth*, at p. 561; see also *Martineau*, at para. 57. There is inevitably some overlap between the analysis of the purpose of the scheme and the purpose of the sanction, but the jurisprudence has looked at both separately to the extent that is possible, recognizing that the proceeding will be an offence for s. 11 purposes if it meets either branch of the test, and that situations in which a proceeding meets one but not both branches will be rare: *ibid*. [emphasis added]

[41] In view of the fact that the fine imposed by the Presiding Officer was at the low end of the fines available to a presiding officer at a summary trial, and not in excess of 25% of accused's monthly salary (see article 108.17(1) (b) of the *QR&O*), this fine clearly did not appear by its magnitude to be for the purpose of redressing a wrong done to society at large but, rather, was intended to enforce internal discipline within the Canadian Forces. This is reinforced by the Supreme Court's conclusion in *R v Moriarity*, 2015 SCC 55 at para 46, [2015] 3 SCR 485 "that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military." The summary trial process in this case did not engage the Applicant's rights under paragraph 11(d) of the *Charter*.

[42] In short, there were no breaches of the Applicant's *Charter* rights.

## III. Conclusion

[43] The Applicant's application for judicial review is dismissed for the reasons stated above. The Review Authority's decision is justifiable, transparent, and intelligible, and within the range of acceptable outcomes.

[44] In view of the application having been dismissed, the Respondent is entitled to costs from the Applicant. The parties agreed at the hearing of this matter that costs should be fixed in a lump sum amount of $3,000, all-inclusive.

**JUDGMENT in T-1546-17**

**THIS COURT'S JUDGMENT is that:** the Applicant's application for judicial review is dismissed with costs in the lump sum amount of $3,000 to be paid by the Applicant to the Respondent within 20 days of the date of this judgment.

"Keith M. Boswell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1546-17 |
| **STYLE OF CAUSE:** | PETTY OFFICER 2ND CLASS STEVEN THURROTT v CANADA (ATTORNEY GENERAL) |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MAY 14, 2018 |
| **JUDGMENT AND REASONS:** | BOSWELL J. |
| **DATED:** | JUNE 4, 2018 |

**APPEARANCES:**

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| David Aaron | FOR THE RESPONDENT |

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