Federal Court Cour fédérale

Date: 20230427

Dockets: T-1244-22
T-1953-22

Citation: 2023 FC 618

Ottawa, Ontario, April 27, 2023

PRESENT: The Honourable Mr. Justice Zinn

Docket: T-1244-22

BETWEEN:

DANIEL NOONAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1953-22

AND BETWEEN:

WILLIAM STRECKER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Introduction

[1] These two applications were heard together. Although each raises some issues unique to its facts, I have concluded that they must both be allowed based on a common issue they each raise; namely, whether the decisions reasonably interpreted Article 108.17(1)(a) of the Queen's Regulations and Orders [QR&O] to mean that the two Applicants had no right to elect a court martial rather than proceeding by summary trial.

[2] Because that common issue disposes of both applications, I will issue one set of reasons which will be filed in each application.

[3] The common issue relates to the interpretation of Article 108.17(1)(a) of the QR&O which, at the relevant time, read as follows:

108.17 – ELECTION TO BE TRIED BY COURT MARTIAL	**108.17 – DEMANDE DE PROCÈS DEVANT UNE COUR MARTIALE**
(1) An accused person triable by summary trial in respect of a service offence has the right to be tried by court martial unless:	(1) Un accusé qui peut être jugé sommairement à l'égard d'une infraction d'ordre militaire a le droit d'être jugé devant une cour martiale, sauf si les conditions suivantes s'appliquent :
(*a*) the offence is contrary to one of the following provisions of the *National Defence Act*:	*a*) l'infraction a été commise contrairement à l'une des dispositions suivantes de la *Loi sur la défense nationale* :

85 (*Insubordinate Behaviour*),	85 (*Acte d'insubordination*),
86 (*Quarrels and Disturbances*),	86 (*Querelles et désordres*),
90 (*Absence Without Leave*),	90 (*Absence sans permission*),
97 (*Drunkenness*),	97 (*Ivresse*),
129 (*Conduct to the Prejudice of Good Order and Discipline*), but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment; and	129 (*Conduite préjudiciable au bon ordre et à la discipline*), mais seulement lorsque l'infraction se rapporte à la formation militaire, à l'entretien de l'équipement personnel, des quartiers ou du lieu de travail, ou à la tenue et au maintien;
(*b*) the circumstances surrounding the commission of the offence are sufficiently minor in nature that the officer exercising summary trial jurisdiction over the accused concludes that a punishment of detention, reduction in rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted if the accused person were found guilty of the offence.	*b*) les circonstances entourant la commission de l'infraction sont de nature suffisamment mineure pour que l'officier qui exerce sa compétence de juger sommairement l'accusé détermine que, si l'accusé était déclaré coupable de l'infraction, une peine de détention, de rétrogradation ou une amende dépassant 25 pour cent de la solde mensuelle de base ne serait pas justifiée.

[4] That Article was repealed on June 20, 2022, after the decisions under review were rendered.

[5] Two separate decisions were rendered in each matter. The first decision was made by the Presiding Officer at the summary trial and then that decision was referred to the Reviewing Authority for a review decision. There is little to distinguish the basis of the decisions rendered in each matter at these two stages and for ease of reference they will be collectively referred to as the Noonan Decision and the Strecker Decision.

Background to Sgt Noonan's Application

[6] Sergeant [Sgt] Daniel Noonan was charged with two offences under section 129 of the *National Defence Act*, RSC 1985, N-5 [NDA], following incidents in which he is alleged to have made inappropriate comments to civilian staff members of a Canadian Armed Forces fitness facility. That provision reads as follows:

Conduct to the Prejudice of Good Order and Discipline	**Conduite préjudiciable au bon ordre et à la discipline**
129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	**129 (1)** Tout acte, comportement ou négligence préjudiciable au bon ordre et à la discipline constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
(2) An act or omission constituting an offence under section 72 or a contravention by any person of	**(2)** Est préjudiciable au bon ordre et à la discipline tout acte ou omission constituant une des infractions prévues à l'article 72, ou le fait de contrevenir à :
(a) any of the provisions of this Act,	**a)** une disposition de la présente loi;

(b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or

(c) any general, garrison, unit, station, standing, local or other orders,

is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

(3) An attempt to commit any of the offences prescribed in sections 73 to 128 is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

(4) Nothing in subsection (2) or (3) affects the generality of subsection (1).

(5) No person may be charged under this section with any offence for which special provision is made in sections 73 to 128 but the conviction of a person so charged is not invalid by reason only of the charge being in contravention of this subsection unless it appears that an injustice has been done to the person charged by reason of the contravention.

b) des règlements, ordres ou directives publiés pour la gouverne générale de tout ou partie des Forces canadiennes;

c) des ordres généraux, de garnison, d'unité, de station, permanents, locaux ou autres.

(3) Est également préjudiciable au bon ordre et à la discipline la tentative de commettre l'une des infractions prévues aux articles 73 à 128.

(4) Les paragraphes (2) et (3) n'ont pas pour effet de porter atteinte à l'application du paragraphe (1).

(5) Le présent article ne peut être invoqué pour justifier une accusation relative à l'une des infractions expressément prévues aux articles 73 à 128; le fait que l'accusation contrevient au présent paragraphe ne suffit toutefois pas pour invalider la condamnation de la personne ainsi accusée, sauf si la contravention paraît avoir entraîné une injustice à son égard.

(6) The responsibility of any officer for the contravention of subsection (5) is not affected by the validity of any conviction on the charge in contravention of that subsection.	**(6)** La validité de la condamnation ne porte pas atteinte à la responsabilité d’un officier en ce qui a trait à la contravention.

[7] The first charge was that on February 11, 2021, Sgt Noonan made inappropriate comments directed at management staff of a fitness facility at CFB Borden, using words to the effect of: “Dennis and management are incompetent, and I don’t know why they aren’t fired for their incompetence.”

[8] The second charge was that on February 24, 2021, Sgt Noonan made inappropriate comments directed at management of the fitness facility, using words to the effect of: “Can you tell Dennis, and he will know what I mean by this, he knows where I live.”

[9] Sgt Noonan is a non-commissioned member who has served in the Reserve Force for approximately 20 years. At the relevant time, he was on full time service at Canadian Forces Recruiting Group Headquarters at Canadian Forces Base Borden.

[10] Sgt Noonan’s Commanding Officer [CO], Major Ty Waldner, was the Presiding Officer for the summary trial. Major Waldner assigned Captain (subsequently, Major) Kalen Gourley as Sgt Noonan’s Assisting Officer. Captain Gourley is not a lawyer.

[11] Prior to the summary trial, on July 26, 2021, Captain Gourley (as he then was) sent an email to Major Waldner, indicating his belief that Sgt Noonan was entitled to elect trial by court martial. After highlighting Article 108.17(1) and referencing section 129 of the NDA, he wrote:

> As highlighted, since the charge contravenes a DAOD [Defence Administrative Orders and Directives], it no longer falls within the realm of being ineligible for election since it does not pertain to the minor offences listed in (1)(a). Therefore, Sgt Noonan was actually entitled to provide an election. While he has made his intentions clear, in order to maintain procedural fairness and correct the course, he must be given 24 hours to deliberate and make an election as per QR&O Chapter 2, Section 108.17, Subsection 1.

[12] On September 28, 2021, the now-promoted Major Gourley forwarded Sgt Noonan's written request for an election for court martial to the Presiding Officer. Sgt Noonan's request was accompanied by an email to Sgt Noonan from Major Melbourne, a lawyer with Defence Counsel Services.

[13] Major Melbourne's email stated that Sgt Noonan had a right to elect trial by court martial and that his CO was "… misinterpreting the literal meaning of section 129(1) …" of the NDA. It read in relevant part, as follows:

> If I were you, if you truly want to be heard at a CM, I would submit a memo requesting a CM. Your CoC is misinterpreting the literal meaning of section 129(1).
>
> ***but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment.
>
> If you read the section as a whole, it is quite clear that the legislation was made to ONLY cover issues with movement. The definition of "deportment" in the Concise Oxford Dictionary (the

> recognize [*sic*] dictionary in Canadian law and the federal government) it reads:
> - The way in which a person stands and moves
>
> I agree that the American version deal [*sic*] with "a person's behaviour or manners" but again, it has nothing to do with comments!
>
> Deportment issues are related to dress – for example – not saluting
>
> If your CoC disagrees with you at the Summary trial, I would still file a Request for Review under 108.45.
>
> Can you imagine if deportment covered behaviour in general? It would literally cover everything and anything under the sun, which is clearly not the intention of the legislature.

[14] Major Waldner responded in an email dated October 1, 2021, stating that he had legal advice to the contrary of what Major Melbourne provided. No copy of that written advice was then or has since been provided. Major Waldner expressed his view that the particulars of the charges relate directly to your bearing, demeanor, and manners and therefore fall within the definition of "deportment" as defined in the Concise Oxford Dictionary:

> Regarding your right to be tried by Court Martial for the charges laid on 29 Jun 2021, I will attempt to answer your concerns and provide additional comments to you regarding the legal advice I have received which seems to be contradictory to the counsel you have received from Maj Melbourne. I would like to note that Maj Melbourne is a Defence Counsel for Director Defence Counsel Services, which is not directly part of the Office of the Judge Advocate General or DJA and therefore may not be as familiar with the current practices for Summary Trials which are administered in the CAF. QR&O 108.17(1) directs that an election for court martial need not be offered for a charge under NDA Section 129 if the offence relates to dress and deportment (among others), and if the circumstances of the offence are minor. In this case, you have stated you disagree that the offence relates to the definition of deportment.
>
> QR&O 1.04 directs that words and phrases shall be construed according to the meaning in the Concise Oxford Dictionary (unless

> a technical term or elsewhere defined). I have been provided the following definition by my legal advisor: Deportment is defined as "bearing, demeanor, or manners". The particulars of your charges relate directly to your bearing, demeanor, and manners for the alleged incidents occurring on 11 Feb 21 and 24 Feb 21 (and therefore deportment as defined above), which is covered under Section 129.
>
> Additionally, as the officer exercising summary trial jurisdiction, I conclude based on the initial charges that the alleged incidents are sufficiently minor in nature and therefore the two charges you have received under Section 129 do not require an election to be tried by Court Martial. I have also been informed by DJA Borden that this is the prescribed manner to fairly and promptly deal with similar such offences across Canada and I feel confident in proceeding with a Summary Trial at this time.
>
> Finally, as per your request in para 3 of your memo for the resolution to your redress of a grievance, you cannot request a review under QR&O 108.45 as the Summary Trial has not yet been conducted at the time of your submission. Even then, the accused is innocent until proven guilty, therefore if the trial is carried out and you are deemed not guilty, there should be no need to submit a request for review.
>
> If you are found guilty as part of the proceedings of the Summary Trial, then you would be entitled to request a review as per QR&O 108.45, but this request for review is its own formal process and separate from the grievance process.

[15] The summary trial was held on October 4, 2021, and was open to the public. The Presiding Officer had arranged live broadcast of the summary trial over the Microsoft Teams video-teleconferencing system. The Presiding Officer refused Sgt Noonan's request that the trial be recorded.

[16] Sgt Noonan was found guilty of both charges and was sentenced to a fine of $250.00.

[17] Sgt Noonan sought review by the Reviewing Authority of the summary trial. His stated grounds for review were several and included the refusal of the Presiding Officer to permit him to elect trial by court martial.

[18] The Presiding Officer provided the Reviewing Authority with his representations in a letter dated October 12, 2021.

[19] The Reviewing Authority rendered his decision by letter dated October 29, 2021. The Reviewing Authority upheld the Presiding Officer's refusal to permit Sgt Noonan to elect trial by court martial because he agreed that the charges related to "deportment" stating:

> With respect to the matter of jurisdiction for the charges to be heard at summary trial without an election, the Presiding Officer considered your submissions, as well as the applicable references and advice from the unit legal advisor. The presiding officer then determined there was jurisdiction to proceed without an election as the matter relates to your deportment and is sufficiently minor in nature so as to not warrant greater powers of punishment than permitted under *QR&O* 108.17. On the basis of the submissions provided and applicable references, I do not disagree, and thus find the decision was not unjust on this basis.

[20] The only issue raised by Sgt. Noonan in his application for judicial review is the interpretation given in the Noonan Decision to Article 108.17(1)(a) of the QR&O.

Background to LCdr William Strecker's Application

[21] Lieutenant-Commander [LCdr] William Strecker was charged with two offences under section 129 of the NDA regarding incidents where it is alleged he made inappropriate comments

to candidates on an Operations Room Officer course conducted by the Royal Canadian Navy when he was a guest instructor.

[22] The first charge was that on or about November 1, 2021, while instructing officers subordinate to him in rank, he stated “the Vice Chief of Defence Staff was a political appointment that would have only been better if she were trans or pregnant, or better yet both” or words to that effect. The second charge was that on the same day and at the same course he stated “sexual misconduct cases are he said she said” and “sexual misconduct investigations are useless and a media tool used against Canadian Armed Forces” or words to that effect.

[23] LCdr Strecker is a commissioned officer who has served in the Regular Force as a Legal Officer for approximately 18 years. At the relevant time, he was the Deputy Judge Advocate for Canadian Forces Base Greenwood. Since completing basic training, LCdr Strecker has been posted to the Office of the Judge Advocate General [OJAG].

[24] Prior to, and during, the summary trial proceedings, LCdr Strecker requested the option to elect trial by court martial. The Presiding Officer, Commodore [Cmdre] Mazur, refused to grant this request. The Presiding Officer’s ruling was based on the minor nature of the charges. He described his ruling made at the commencement of the summary trial as follows:

> When the trial initially commenced on 2 Jun, after taking my oath, I outlined my reasons for not giving the accused the right to elect Court Martial. Simply put, with what I had read, I felt that the charges were quite minor in nature and that my powers of punishment were sufficient to deal with any potential outcome. I was clear that in receiving testimony, if I heard anything that called this into question, that I would offer the accused a right to elect Court Martial and we would go from there.

[25] After an adjournment, and after receiving further representations from LCdr Strecker, the Presiding Officer, in a written decision writes that he had received legal advice. That advice was not disclosed. His view remained unchanged although he added that LCdr Strecker was in uniform at the time:

> With respect to LCdr Strecker's argument that the [*sic*] he was legally entitled to an election to be tried by court martial based primarily on the application of the term "dress and deportment" in the *QR&O*, I am not persuaded. The circumstances of the incident were not complex and the conduct was relatively minor. LCdr Strecker was in uniform instructing subordinate officers at the time he made the comments. I see no reason to consider this as anything other than a matter related to dress and deportment; as such an election to court martial need not be given.

[26] LCdr Strecker requested that the Presiding Officer record the proceedings using video and audio recording. The Presiding Officer refused.

[27] After finding LCdr Strecker guilty of both offences, he sentenced LCdr Strecker to a $900.00 fine.

[28] On August 9, 2022, LCdr Strecker sought review of the summary trial findings and sentence. The decision of the Review Authority dated August 25, 2022, upheld that he was not entitled to elect court martial as the charges related to dress and deportment. That portion of the decision reads:

> With respect to LCdr Strecker's argument that the [*sic*] he was legally entitled to be tried by court martial based primarily on the application of the term "dress and deportment" in the QR&O, I am not persuaded. The circumstances of the incident were not complex and the conduct was relatively minor. LCdr Strecker was in uniform instructing subordinate officers at the time he made the comments. I see no reason to consider this as anything other than a

> matter related to dress and deportment; as such an election to court martial need not be given.

[29] In addition to the issue of the interpretation given in the decision to Article 108.17(1)(a) of the QR&O, issues were raised, among others, regarding the jurisdiction of LCol Bouchard to refer a charge as a CO and whether there was a conflict of interest with the OJAG necessitating an election. Given that the determination of the first raised issue is determinative, the others need not be addressed.

Standard of Review

[30] The Applicants submit that the standard of review of the decisions interpreting Article 108.17(1)(a) of the QR&O is correctness because these applications are "about the Rule of Law in the application of the CSD [Code of Service Discipline]." The Respondent submits that it is reasonableness.

[31] The Applicants acknowledge that there are "multiple examples of judicial review" of the administration of Canadian Forces affairs where the reasonableness standard has been applied, but they observe that they do not involve the CSD. They say that there are limited examples of judicial review of decisions made under the CSD and that none are analogous to the decisions under review.

[32] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration), v Vavilov,* 2019 SCC 65 [*Vavilov*] at paragraph 16, held that the analysis of the applicable standard of review of an administrative decision starts with a presumption that reasonableness is the

standard to be used. That presumption can be rebutted in two types of situations. The first is where the legislature has indicated that it intends that a different standard or set of standards apply. The second is where the rule of law requires that the standard of correctness be applied. At paragraph 17 of *Vavilov*, it is indicated that “[t]his will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies.”

[33] There is no dispute that the first exception does not apply here and the Applicants concede that there is no constitutional question being addressed. However, they submit that the applications raise a question of law that is of central importance to the Canadian Forces as a whole. They submit that a single determinative answer is required regarding the interpretation of Article 108.17(1)(a) of the QR&O as it relates to offences under section 129 of the NDA.

[34] The Applicants also submit that unlike *Vavilov*, the decisions here are not administrative in nature, but penal in nature. That appears to be conceded by the Respondent who writes in its memorandum that Bill C-77, which repealed Article 108.17 of the QR&O, “replaced summary trials with summary hearings that are administrative in nature and do not carry penal consequences.”

[35] The Respondent submits that the appropriate standard of review to be applied in these applications has been determined by this Court in *Thurrot v Canada (Attorney General)*, 2018 FC 577 [*Thurrot*], where Justice Boswell held that the applicable standard of review of a Review

Authority's decision under section 108.45 of the QR&O is reasonableness. At para 13, Justice Boswell, after a detailed analysis, concluded:

> 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.

[36] The Applicants submit that *Thurrot,* which predates *Vavilov,* has "limited utility" to the current decisions. They note that in *Canada (Director of Military Prosecutions) v Canada (Office of the Chief Military Judge)*, 2020 FC 330 at paragraph 122, Justice Martineau applied the standard of reasonableness for a decision under the CSD regarding a failed attempt by the Director of Military Prosecution to prosecute the former Chief Military Judge, but nonetheless recognized:

> On the other hand, this matter presents unique challenges to the Canadian military justice system. The current process for convening a court martial and assigning a military judge to preside at the court martial is seriously undermined when the Chief Military Judge—or his or her designate—has a conflict of interest or when there are no impartial military judges with the required language skills. <u>Also, in our view, the legal effect of the power to assign under section 165.25 of the NDA falls into the category of general questions of law "of central importance to the legal system as a whole"</u> (*Vavilov*, at paragraphs 17, 53, 58–62). In such cases, a single determinate answer is required (*Vavilov*, at paragraph 62). [emphasis added]

[37] Justice Martineau's *obiter* comments relate to the selection of competent and impartial judges to render decisions. I agree that is a matter that is of central importance to the legal system. That is not the issue here. I am not persuaded that *Vavilov* does not guide the determination of the standard of review in these case.

[38] In the matters before the Court, the Reviewing Authority is interpreting Article 108.17(1)(a) of the QR&O as it pertains to section 129 of the NDA. It is not of "'fundamental importance and broad applicability', with significant legal consequences for the justice system as a whole or for other institutions of government:" see *Vavilov* at para 59. In this case, Article 108.17(1)(a), as it pertains to section 129 of the NDA, does not have legal implications for other statutes, it is not broadly applicable to the CSD, and it does not have implications beyond the two decisions being heard. There are no "significant legal consequences" in this case. Moreover, "reasonableness is the presumptive standard of review of an administrative decision, especially when a tribunal's interpretation of its home statute is at stake:" *Subramaniam v Canada (Citizenship and Immigration)*, 2020 FCA 202 at para 17. The presumption of reasonableness is not rebutted by the Applicants.

[39] The decisions will be reviewed against the standard of reasonableness.

The Reasonableness of the Interpretation given by the Reviewing Authority

[40] The Reviewing Authority in the Noonan Decision affirmed that he was not obliged to be offered a court martial because the "matter relates to your deportment" whereas the Reviewing Authority in the Strecker Decision affirmed it was because the "matter related to dress and deportment."

[41] I agree with the submission of counsel for the Applicants that the Reviewing Authority in Strecker appears to have concluded the matter involved "<u>dress</u> and deportment" because "LCdr Strecker was in uniform instructing subordinate officers at the time he made the comments."

The Reviewing Authority in the Strecker Decision appears to be of the view that the term "dress and deportment" is to be read conjunctively; whereas the Reviewing Authority in the Noonan Decision addresses only "deportment" suggesting that he is reading the term disjunctively.

[42] Faced with this apparent inconsistency, counsel for the Respondent suggested that the "and" in the phrase "dress and deportment" in Article 108.17(1)(a) is to be interpreted as "and/or." Counsel submits that interpreting "dress and deportment" conjunctively in all cases may lead to inconsistencies with the purpose and intent of the legislative scheme. It is submitted that such an interpretation "could have the result of artificially confining the availability of an election for court martial to an offence that involves conduct relating to either "dress" or "deportment" but not both."

[43] Even when decision-makers are interpreting their home statute, they must observe the principles of statutory interpretation laid down by Canadian courts, and most certainly by the Supreme Court of Canada.

[44] The modern principles of statutory interpretation require that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21.

[45] The Supreme Court of Canada in *Vavilov* at paragraph 118, directs that the modern principle of statutory interpretation is applicable to administrative decision-makers interpreting statutes:

> This Court has adopted the “modern principle” as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[46] In the cases before the Court, one cannot say that the decision-makers arrived at their interpretation using the modern principle. Although the Supreme Court in *Vavilov* recognized that the reasoning of an administrative decision-maker need not be reflected in reasoning of the sort a court might offer, nonetheless, as stated at paragraph 120, the modern principle must be observed:

> But whatever form the interpretive exercise takes, the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are “precise and unequivocal”, their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[47] The interpretation of the phrase “dress and deportment” in Article 108.17(1)(a) in the Noonan Decision relies only on the word “deportment”. It fails to examine the words within the phrase or within the entirety of section 129 of the NDA, which is set out in Article 108.17(1)(a). It is not consistent with either the text or the context. Additionally, no analysis was provided of the purpose of Article 108.17(1)(a). The interpretation provided lacks intelligibility, justification, and transparency.

[48] The interpretation of the phrase “dress and deportment” in Article 108.17(1)(a) in the Strecker Decision likewise fails to examine the words within the phrase or within the entirety of section 129 of the NDA, which is set out in Article 108.17(1)(a). It too is not consistent with the text or the context. Similarly, no analysis was provided of the purpose of Article 108.17(1)(a). The interpretation provided lacks intelligibility, justification, and transparency.

[49] I agree with the Applicants that applying the modern principle of interpretation, there is only one reasonable interpretation of the phrase “dress and deportment” in Article 108.17(1)(a). It is not that offered in the decisions under review.

[50] The following is the analysis that ought to have been done. One begins with the context – section 129 of the NDA. The right to elect trial by court martial for a conduct to the prejudice of good order and discipline be withheld:

> … only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment; …

[51] I agree with the Applicants that when legislation enumerates a series of factors, the principle of *ejusdem generis* suggests that these factors represent the same kind or class of factor. In this case, the nature of the specific circumstance of impugned misconduct captured under section 129 of the NDA: see *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13, at paras 16 and 22.

[52] Section 129 of the NDA creates offences to enforce the discipline, efficiency and morale of the members of the Canadian forces. It creates a broad range of conduct, acts or omissions that can be captured as prejudicial to good order and discipline: see *R v Golzari*, 2017 CMAC 3 at para 69.

[53] The exception under Article 108.17(1)(a) of the QR&O is limited to "military training, maintenance of personal equipment, quarters or work space, or dress and deportment". Based on the limitation for election for court martial, Article 108.17(1)(a) of the QR&O relating to section 129 of the NDA was enacted for minor offences that could be dealt with efficiently and expeditiously through summary trial. They are non-electable for this very reason.

[54] Applying the *ejusdem generis* limited class rule favours the Applicants' interpretation that Article 108.17(1)(a) uses the expression "dress and deportment" as a single term of art, as one of the three enumerated categories pertaining to section 129 of the NDA, and in relation to the two other related categories.

[55] "Dress and deportment" read conjunctively renders the phrase, properly interpreted as "deportment" <u>pertaining to</u> "dress" and would cover such things as the wearing of uniforms, cleanliness of the uniform, the shining of boots, or other dress related infractions. This interpretation accords with the other minor non-electable offences, "military training" and "maintenance of personal equipment, quarters or work space."

[56] If "dress and deportment" is interpreted disjunctively, as it was in the Noonan Decision, the consequences of considering "deportment" alone would result in any offence described to be related to "bearing, demeanor, or manners" being determined by summary trial only. The result is not in keeping with the legislative intent that the offences covered be minor offences. For example, assault of a fellow officer or member of the public could be said to fall within that broad definition.

[57] Furthermore, the reading of Article 108.17(1)(a) of the QR&O relating to section 129 of the NDA demonstrates that the Governor in Council did not intend "dress and deportment" to be read disjunctively. If they did, then they would have used "dress <u>or</u> deportment" as was done with the "maintenance of personal equipment, quarters or work space". The use of "and" demonstrates that the Governor in Council was alert to the purpose of Article 108.17(1)(a) of the QR&O and intended it to be read conjunctively.

[58] To reiterate, "dress and deportment" is not to be read conjunctively in the sense that a member would have to violate both "dress" and "deportment" independently in order to be denied the right to a court martial under Article 108.17(1)(a) of QR&O. Rather, "dress and

deportment" is to be interpreted conjunctively so that it covers deportment pertaining to the uniform, such as wearing of uniforms, cleanliness of the uniform, and the like.

[59] This interpretation accords with the other minor non-electable offences, and is consistent with both the text and the context of Article 108.17(1)(a).

[60] For these reasons the decisions under review, both as to guilt and sentence, must be quashed.

[61] Each Applicant is entitled to costs of his Application.

<u>JUDGMENT in T-1244-22 and T-1953-22</u>

THIS COURT'S JUDGMENT is that:

1. These Applications are granted;
2. The Code of Service Discipline proceedings against both Applicants, both the finding of guilt and the punishment imposed, are quashed;
3. Each of the Applicants is entitled to his costs, fixed at $2,500.00.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1244-22 AND T-1953-22
DOCKET:	T-1244-22
STYLE OF CAUSE:	DANIEL NOONAN v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1953-22
STYLE OF CAUSE:	WILLIAM STRECKER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 15, 2023
JUDGMENT AND REASONS:	ZINN J.
DATED:	APRIL 27, 2023

APPEARANCES:

Rory Fowler	FOR THE APPLICANT
Taylor Andreas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law Office of Rory G. Fowler Barrister and Solicitor Kingston, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT