

A most welcome judicial poulitice

By Justice Gilles Létourneau

In *R. v. Gagnon*, 2015 CMAC 2, the accused was acquitted of a charge of sexual assault prosecuted as a service offence before a military court pursuant to s.130 of the National Defence Act (Act). The Minister of National Defence (Minister) appealed to the Court Martial Appeal Court (CMAC) against the acquittal.

Sections 230.1 and 165.11 of the Act give the Minister the right to Appeal:

Appeal by the Minister ”

“**230.1** The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters: ”

“(a)

“(b) the legality of any finding of not guilty;”

“**165.11** The Director of Military Prosecutions is responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The Director of Military Prosecutions also acts as counsel for the Minister in respect of appeals when instructed to do so. ”

“[Emphasis added]”

Counsel for the accused filed a motion to quash and dismiss the appeal on the constitutional ground that the Minister could not reasonably be perceived as an independent prosecutor who could act in an autonomous manner and independently from the chain of command for the overarching reason that he is the head of that chain.

The CMAC ruled that, at every step of the judicial process, section 7 of the Canadian Charter of Rights and Freedoms (Charter) guarantees an accused the constitutional right to an independent prosecutor.

By “independent prosecutor” the CMAC meant a person who may act and be reasonably perceived to be acting independently and impartially in deciding the nature and scope of prosecutions. In the case at hand, it found that the Minister could not reasonably be perceived to be an independent prosecutor acting freely.

Therefore, it concluded that section 230.1 of the Act violates section 7 of the Charter and is not a reasonable limit to that section which can be justified in a free and democratic society.

While the Chief Justice of the CMAC agrees with the conclusion and most of the reasons given by Cournoyer J. A., nevertheless he went on to express the view that the Minister should keep a supervisory power over prosecutions in the penal military justice system. However, he added, that power should be subject to the same limits applicable to the powers of the Attorney General.

In the end the CMAC was unanimous in its conclusion that the right of appeal should be conferred upon the Director of Military Prosecutions. While this is what the CMAC could do