Another step towards a fairer military justice system

In *R. v. Korolyk,* 2016 CM 1002 Chief Military Judge Dutil was asked by the accused to declare subsection 129(2) of the *National Defence Act* (Act) unconstitutional as its violates, on the one hand, his right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice and, on the other hand, the right to be presumed innocent until proven guilty according to law in a fair hearing. These rights are constitutional rights guaranteed by sections 7 and 11 (d) of the *Canadian Charter of Rights and Freedoms* (Charter).

On a charge of conduct to the prejudice of good order and discipline pursuant to subsection 129(1), subsection (2) creates a presumption which relieves the prosecution of the duty of proving that the act or omission constituting the offence resulted in a prejudice to good order and discipline. The subsection reads:

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.

(2) An act or omission constituting an offence under section 72 or a contravention by any person of

(a) any of the provisions of this Act,

(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.

Chief Judge Dutil applied the findings of the Court Martial Appeal Court in *R .v. Tomczyk*, 2012 CMAC 4 and *R. v. Winters (S),* 2011 CMAC 1 and quoted paragraphs 24 and 25 of the *Tomczyk* decision which read as follows:

[24] Section 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF. Subsection 129(1) creates the offence while subsection 129(2) deems a number of activities to be prejudicial. In R. v. Winters (S.), 2011 CMAC 1, 427 N.R. 311 at para. 24 Létourneau J.A. summarized the constituent elements of a section 129 offence as follows:

> When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline.

[25] Proof of prejudice is an essential element of the offence. The conduct must have been actually prejudicial (Winters, supra, paras. 24-25). According to R. v. Jones, 2002 CMAC 11 at para. 7, the standard of proof is that of proof beyond a reasonable doubt. However, prejudice may be inferred if, according to the evidence, prejudice is clearly the natural consequence of proven acts; see R. v. Bradt (B.P.), 2010 CMAC 2, 414 N.R. 219 at paras. 40-41.

Chief Judge Dutil concluded that 129(2) was unconstitutional in that it violates the presumption of innocence protected by s.11(d) of the Charter. Judge Dutil relied for his conclusion on the principles laid out by the Supreme Court of Canada in *R. v. Downey,* (1992) 2 S.C.R. 10 with respect to the presumption of innocence. At page 29 of the *Downey* decision, Cory J. wrote:

I - The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

II - If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s.11 (d). Such a provision would permit a conviction in spite of a reasonable doubt.

III - Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

IV -Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s.11 (d) if it requires the trier of fact to convict in spite of a reasonable doubt.

V - A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11 (d).

VI - A provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the Charter if the provision (such as the truth of a statement) must be established by the accused (see Keegstra, supra).

VII - It must of course be remembered that statutory presumptions which infringe s.11 (d) may still be justified pursuant to s. 1 of the Charter. (As for example in Keegstra, supra.)

Subsection 129(2) creates an irrefutable presumption of prejudice even if, as Judge Dutil pointed out at par. 20 of his decision, “the order is questionably not related to a military duty, unlawful or abusive”.

The prosecution having omitted to file evidence that could save the impugned provision under s.1 of the Charter, Judge Dutil found and declared that subsection 129(2) “is void in so far as it makes an accused liable to be convicted despite the existence of a reasonable doubt on the essential element of prejudice to good order and discipline and because the presumption created in subsection 129(2) of the *National Defence Act* requires the trier of fact to convict in spite of a reasonable