

File No. \_\_\_\_\_

**SUPREME COURT OF CANADA**

**(ON APPEAL FROM A JUDGMENT OF THE COURT MARTIAL  
APPEAL COURT OF CANADA)**

No. **CMAC-588**

BETWEEN:

**HER MAJESTY THE QUEEN**

**APPLICANT  
(APPELLANT)**

– and –

**CORPORAL R.P. BEAUDRY**

**RESPONDENT  
(RESPONDENT)**

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**NOTICE OF MOTION TO A JUDGE – REQUEST TO SUSPEND THE  
DECLARATION OF INVALIDITY**

(Section 65.1 of the *Supreme Court Act* and rule 47 of the  
*Rules of the Supreme Court of Canada*)

Form 47

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TAKE NOTICE that the Applicant, Her Majesty the Queen, applies to a judge of the Supreme Court of Canada, under section 65.1 of the *Supreme Court Act*, for an order suspending the declaration of invalidity of paragraph 130(1)(a) of the *National Defence Act*<sup>1</sup> (*NDA*) made pursuant to section 52 of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> (*Charter*) by the Court Martial Appeal Court (CMAC) on 19 September 2018 until this Court renders its final judgment in the case of *R. v. Stillman et al* (37701) or any further or other order that the judge may deem appropriate;

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<sup>1</sup> R.S.C., 1985, c. N-5.

<sup>2</sup> *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.

AND FURTHER TAKE NOTICE that motion shall be made on the following grounds:

1. The applicant has filed a notice of appeal as of right in this case (*Beaudry*). This Court, having granted leave in *R. v. Stillman et al* (37701), will rule on whether paragraph 130(1)(a) of the *NDA* violates section 11(f) of the *Charter*, which is the sole issue in this case. This Court extended the time for the Applicant to serve and file the Memorandum of Fact and Law in *Stillman* until after the CMAC released its decision in *Beaudry*.
2. There are now three conflicting decisions at the CMAC on the issue raised in this appeal. In the first of these decisions, *R. v. Royes*, 2016 CMAC 1, leave to appeal to SCC refused (February 2, 2017), the CMAC concluded unanimously that paragraph 130(1)(a) of the *NDA* does not violate section 11(f) of the *Charter*.
3. In the second decision, *R. v. Déry et al*, 2016 CMAC 2, two justices wrote reasons why they disagreed with the decision in *Royes*, while the Chief Justice wrote reasons in support of *Royes*. However, the Court unanimously concluded that they were bound by *Royes*. This Court granted leave of this decision on March 8, 2018 (*R. v. Stillman et al*).
4. *Beaudry* is the third decision on this issue. The majority concluded on 19 September 2018 that paragraph 130(1)(a) of the *NDA* does violate section 11(f) of the *Charter* and declared the paragraph to be of no force or effect in its application to any civil offence for which the maximum sentence is five years or more. Chief Justice Bell writing in dissent expressed his support once again for the reasoning in *Royes*.<sup>3</sup>
5. Granting a stay of the CMAC declaration of invalidity in this case will preserve matters between the parties in all these cases, while enabling this Court to render a judgment disposing of this significant issue binding on all parties before this Court. It will also protect the rights of all parties in cases currently proceeding in lower courts through the military justice system, such that they may benefit from this Court's final

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<sup>3</sup> *R. v. Beaudry*, 2018 CMAC 4.

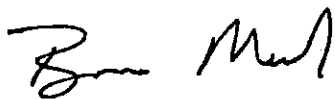
decision on this issue. Forty cases currently in the military justice system are affected by this decision, representing over half of our average annual caseload.<sup>4</sup>

6. Declining to order a stay in this matter will force cases currently proceeding through the military justice system out of that system and into the civilian justice system, creating undesirable delays and jeopardizing the ability to try these cases on their merits before this Court has had an opportunity to render its decision.

7. A suspension of the declaration of invalidity until this Court renders its final decision is appropriate in this case, as the case raises a serious question of law, and the parties, including parties to cases currently within the military justice system, would suffer greater harm if the suspension is refused.

Dated at Ottawa, Ontario, this 21<sup>th</sup> day of September, 2018.

SIGNED BY



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**Bruce W. MacGregor**  
**Colonel**  
Canadian Military Prosecution Service  
National Defence Headquarters  
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101 Colonel By Drive  
Ottawa ON K1A 0K2  
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**Counsel for the Applicant, Her Majesty the Queen**

**ORIGINAL: THE REGISTRAR**

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<sup>4</sup> Affidavit of Heather McNab attached to this motion.

**COPY:**            **Lieutenant-Commander Mark Létourneau**  
**Lieutenant-Colonel Jean-Bruno Cloutier**  
Defence Counsel Services  
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**Counsel for the Respondent**

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

**DRAFT ORDER – NOTICE OF MOTION TO A JUDGE – REQUEST TO SUSPEND  
THE DECLARATION OF INVALIDITY**

UPON APPLICATION by the Appellants for an order suspending the declaration that paragraph 130(1)(a) of the *National Defence Act*, R.S.C., 1985, c. N-5 is of no force or effect in its application to any civil offence for which the maximum sentence is five years or more, issued pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, rendered in the judgment of the Court Martial Appeal Court in *R. v. Beaudry* CMAC-588;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT:

1. The motion is granted. The declaration that paragraph 130(1)(a) of the *National Defence Act*, R.S.C., 1985, c. N-5 is of no force or effect in its application to any civil offence for which the maximum sentence is five years or more is suspended until this Court renders a final decision in the case of *R. v. Stillman* (37701).

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT  
(RESPONDENT)

-AND-

CORPORAL R.P. BEAUDRY

RESPONDENT  
(APPELLANT)

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**AFFIDAVIT**

(Rule 47(1)(b) of the *Rules of the Supreme Court of Canada*)

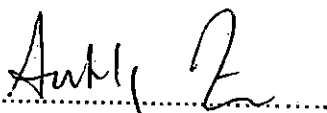
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I, Heather McNab, residing in the Township of Beckwith, Province of Ontario, SOLEMNLY  
DECLARE THAT:

1. I am the paralegal with the Office of the Director of Military Prosecutions and make this affidavit in support of a motion pursuant to Section 65.1 of the *Supreme Court Act* and Rule 47 of the *Rules of the Supreme Court of Canada* to suspend the declaration of invalidity issued by the Court Martial Appeal Court in *R. v. Beaudry*, 2018 CMAC 4.
2. As a paralegal with the Office of the Director of Military Prosecutions, it is my duty to assist with the tracking of all cases referred to the Director of Military Prosecutions.
3. I have reviewed our databases and have concluded that there are currently 38 pending cases that involve charges laid pursuant to paragraph 130(1)(a) of the *National Defence Act* for civil offences for which the prescribed maximum sentence is five years or more; and 2 completed cases of this nature that remain within the appeal period. This represents more than half of our average annual caseload.
4. These numbers include 3 cases where the trial has commenced but for which a decision has yet to be rendered. These 3 cases each involve charges for sexual assault pursuant to section 271 of the *Criminal Code*.

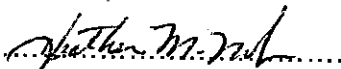
5. Of the remaining 35 cases for which charges have been laid but the trial has yet to commence, 21 involve sexual related offences that include sexual assault pursuant to section 271 of the *Criminal Code*, sexual exploitation pursuant to section 153 of the *Criminal Code* and voyeurism pursuant to section 162(1) of the *Criminal Code*. The remainder include offences of fraud, theft, trafficking in controlled substances, assault and criminal harassment.

SOLEMNLY DECLARED BEFORE ME at  
Ottawa, in the Province of Ontario,  
this 21<sup>st</sup> day of September, 2018.



.....  
LIEUTENANT-COLONEL A. FARRIS  
(Commissioner of Oaths)

A commissioned officer on full-time service  
in the Canadian Forces R.S.O. 1990, C.E. 23, s.44



.....  
HEATHER McNAB  
(Signature of Deponent)