

T-957-21

Court File No.

FEDERAL COURT

FEDERAL COURT COUR FÉDÉRALE	
JUN 14 2021	
J. MACENA	
OTTAWA, ON	

BETWEEN:

DANY FORTIN

Applicant

and

MINISTER OF HEALTH, MINISTER OF NATIONAL DEFENCE,  
PRIME MINISTER OF CANADA, CLERK OF THE PRIVY  
COUNCIL OFFICE

Respondents

APPLICATION UNDER section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

**NOTICE OF APPLICATION**

TO THE RESPONDENT(S)

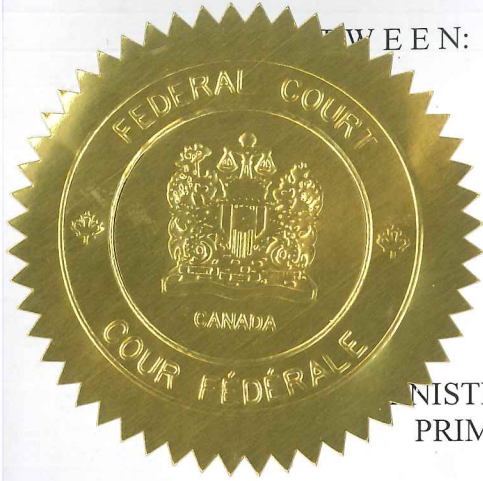
A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.



Date June 14, 2021 Issued by Jonathan Macéna  
(Registry Officer)

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local office: Thomas D'Arcy McGee Building  
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TO: Minister of Health  
c/o Deputy Attorney General of Canada  
Office of the Deputy Attorney General of Canada  
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Ottawa, Ontario  
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AND TO: Minister of National Defence  
c/o Deputy Attorney General of Canada  
Office of the Deputy Attorney General of Canada  
284 Wellington Street  
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AND TO: Prime Minister of Canada  
c/o Deputy Attorney General of Canada  
Office of the Deputy Attorney General of Canada  
284 Wellington Street  
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AND TO: Clerk of the Privy Council Office  
c/o Deputy Attorney General of Canada  
Office of the Deputy Attorney General of Canada  
284 Wellington Street  
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I HEREBY CERTIFY that the above document is a true copy of  
the original files in the Court./

JE CERTIFIE que le document ci-dessus est une copie conforme  
à l'original déposé au dossier de la Cour fédérale.

Filing date  
Date de dépôt

June 14, 2021

June 14, 2021

Dated  
Fait le

**J. MACENA**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

## APPLICATION

**THIS IS AN APPLICATION FOR JUDICIAL REVIEW** in respect of the decision dated May 14, 2014 (the Decision) made by the Minister of Health, the Minister of National Defence, the Prime Minister of Canada (Prime Minister) and the Clerk of the Privy Council Office (PCO) to publicly terminate the secondment of Major-General (MGen) Dany Fortin from the Canadian Armed Forces (CAF) to the Public Health Agency of Canada (PHAC), where MGen Fortin was serving as Vice President of Logistics and Operations for the COVID-19 Vaccine Rollout Task Force until October 31, 2021 and to relieve him from the performance of military duty.

### **THE APPLICANT MAKES APPLICATION FOR:**

1. An order in the nature of *certiorari* quashing the Decision to publicly terminate the applicant's secondment and relieve him from the performance of military duty;
2. An order reinstating him to his secondment at PHAC and/or a position commensurate with his rank of Major-General, as the Decision was unreasonable and breached the applicant's right to procedural fairness;
3. In the alternative, an order referring the matter to the Acting Chief of Defence Staff for a forthwith re-determination consistent with the Court's reasons on this application;
4. An order that this application be specially managed pursuant to Rule 384 of the *Federal Courts Rules*, SOR/98-106;

5. Costs of this application; and
6. Such further and other relief as counsel may advise and the Court may permit.

**THE GROUNDS FOR THE APPLICATION ARE:**

**Background**

7. MGen Fortin is an officer in the Regular Force component of the Canadian Forces. He is a two-star General. He graduated from the Royal Military College of Canada St-Jean, Québec, and the National Security Program at the Canadian Forces College in Toronto, Ontario in 2013. He also holds a master's degree from the U.S. Army Command and General Staff College, in Fort Leavenworth, Kansas.

8. MGen Fortin was the first Commander of the NATO Mission in Iraq from 2018 to 2019. Throughout his distinguished career, he has held key positions including Deputy Commanding General – Operations of I Corps of the U.S. Army at Joint Base Lewis-McChord, in Washington from 2015 to 2017, Director of Operations of Foreign and Defence Policy at the PCO from 2017 to 2018, and Chief of Staff of the Canadian Joint Operations Command. He is the recipient of many awards, medals, and honours.

9. At all material times, MGen Fortin was, and remains, an officer in the Regular Force component of the CAF.

10. On November 27, 2020, the Minister of Health announced that CAF and the Department of National Defence were seconding MGen Fortin to PHAC and naming him Vice President Logistics and Operations to oversee logistical planning in the

Government of Canada's COVID-19 vaccine procurement and distribution program. MGen Fortin's secondment was in response to a Request for Assistance from PHAC to the Canadian Armed Forces made in October 2020.

11. MGen Fortin reported to PHAC on November 23, 2020 to begin his work.
12. On February 24, 2021, Lieutenant-General (LGen) Wayne Eyre was appointed by the Minister of National Defence as Acting Chief of Defence Staff (ACDS).
13. On February 25, 2021, PHAC requested that the secondment be extended to October 31, 2021. This request was approved by the Minister of National Defence on the advice of the ACDS.
14. MGen Fortin's secondment to PHAC was terminated effective May 14, 2021 with a statement from the Department of National Defence and the Minister of National Defence.
15. Since the termination of his secondment, MGen Fortin has been without assignment at the CAF and has, *de facto*, been relieved from performance of military duty.
16. Under MGen Fortin's leadership, Canada procured and distributed over 20 million doses of the COVID-19 vaccine to Canadians. His tenure at PHAC was highly successful in providing the vaccines necessary to curb the rise of COVID-19 transmission in Canada.

### **Events Leading up to the Decision**

17. On March 17, 2021, MGen Fortin met with ACDS LGen Eyre who informed him that he had learned that the Canadian Forces National Investigation Service (CFNIS) had launched an investigation against MGen Fortin for sexual misconduct. ACDS LGen Eyre indicated he wanted MGen Fortin to hear it from him and not the press.

18. MGen Fortin was not given any information on the allegations at this time. ACDS LGen Eyre asked MGen Fortin if he wanted to take any time off, which he declined. MGen Fortin indicated he wished to continue working on vaccine procurement and distribution.

19. Later that evening, MGen Fortin received a call from ACDS LGen Eyre indicating the PCO had been informed of the investigation. ACDS LGen Eyre stated he would advocate for due process, the presumption of innocence and that MGen be allowed to continue to perform his assigned task.

20. On the morning of March 18, 2021, MGen Fortin spoke to Iain Stewart, President of PHAC, to inform him of the investigation. Mr. Stewart stated this was the first time he was hearing about it.

21. In the afternoon of March 18, 2021, Mr. Stewart met with MGen Fortin. He reassured him that there was no change to his status and that it was business as usual. He stated that the investigation would run its course and that this would pass. He reiterated that MGen Fortin was entitled to due process and that he was presumed

innocent. He stated that the Minister of Health's Office and the Prime Minister's Office (PMO) may change their minds later but that he was "OK for now". However, Mr. Stewart told MGen Fortin to prepare himself "for the moment when they determine that you need to be let go." Mr. Stewart said: "Keep your bags packed".

22. On April 9, 2021, MGen Fortin received a call from his deputy who told him he had received a call from one of his subordinates. That subordinate had learned from a military police Sergeant that MGen Fortin was under investigation. That Sergeant had learned of the investigation from a friend who was an investigator with the CFNIS.

23. MGen Fortin called the Chief of Staff to the Chief of Defence Staff (COS CDS) to express his displeasure that CFNIS was not ensuring the confidentiality of the investigation.

24. COS CDS later confirmed he had reached out the Canadian Forces Provost Marshal (CFPM), Brigadier-General (BGen) Trudeau, who said he would investigate the leak. It is unclear if the leak was ever investigated or if the source of the leak was ever identified.

25. On April 15, 2021, MGen Fortin received a call from ACDS LGen Eyre who indicated that the complainant did not want to make the complaint public.

26. On April 19, 2021, MGen Fortin received a call from a CFNIS investigator who indicated MGen Fortin was being investigated for one instance of sexual misconduct. The investigator named the complainant and shared that the alleged misconduct was alleged to have occurred more than thirty years ago.

**The Decision to Terminate Secondment, Relieve Applicant from the Performance of Military Duty, and Make Investigation Public**

27. On May 13, 2021, Mr. Stewart met with MGen Fortin. He told him that the Ministers of Health and National Defence had discussed the issue and that they wanted to remove him. He was told to “take a sick day tomorrow”. MGen Fortin indicated he would take a day off.

28. That evening, ACDS LGen Eyre called MGen Fortin and told him they would work on a transition the next day with PHAC and the PCO. MGen Fortin asked whether the CFNIS had completed their investigation but was not given any information about what had triggered his removal. ACDS LGen Eyre said that the “political calculus” had changed and that the PCO had said he would have to be removed.

29. On May 14, 2021, ACDS LGen Eyre confirmed that he and Mr. Stewart had not been successful in delaying MGen Fortin’s departure. ACDS LGen Eyre stated that a statement would be released to the public regarding his departure; this was not negotiable. MGen Fortin was given two options regarding the wording of the statement. Ultimately, he chose the statement in which it appeared that he had decided to step down and resign his assigned military duty at PHAC.

30. The decision was presented as a *fait accompli*. MGen Fortin was not presented with an opportunity to make representations in respect of a potential decision. MGen Fortin did not at any time receive any written communication of the Decision publicly terminating his secondment and/or relieving him from the performance of military duty.



31. That same day, the Department of National Defence released the following statement:

Today, Major-General Dany Fortin has left his assignment with the Public Health Agency of Canada, pending the results of a military investigation. Acting Chief of the Defence Staff, Lieutenant-General Eyre will be reviewing next steps with Major-General Fortin. We will have no further comment.

32. However, the Minister of National Defence also issued a statement following the announcement of the investigation, saying:

I am committed to working to build a true culture of inclusion for the Canadian Armed Forces and the Department of National Defence, where everyone is treated with dignity and respect. We are committed to this lasting change – one that sheds toxic and outdated values, practices, and policies.

33. On May 18, 2021, the Minister of National Defence's spokesperson stated, "The Minister asked that the complainant receive any necessary support and stated that the investigation must take its due course".

34. The statements together made clear to the public that MGen Fortin was under investigation for improper conduct, and it could easily be surmised that the improper conduct was sexual in nature.

35. It is MGen Fortin's understanding that the Decision to terminate his secondment and make the reasons public was made by the Ministers of Health and National Defence in collaboration with the PMO and the PCO. Because he was not informed of his termination personally by any of one of them and because he did not receive any written confirmation of the Decision, the Decision appears to have been

made jointly and severally by the Minister of Health, the Minister of National Defence, the Prime Minister and the Clerk of the Privy Council.

36. By virtue of the statutory duties, powers, and functions of the Chief of the Defence Staff, and the regulations pertaining to relief from performance of military duty, ACDS LGen Eyre ought to have made the Decision. However, the above decision-makers circumvented and interfered with ACDS LGen Eyre's powers and functions in making the Decision, and effectively prevented ACDS LGen Eyre from reassigning MGen Fortin to another position commensurate with his rank. As a result, MGen Fortin, has, *de facto*, been relieved from performance of his military duty.

37. On May 18, 2021, the Prime Minister stated publicly that he was informed "a number of weeks ago" that the allegation had been made against MGen Fortin but that he had not received details of the allegation. He also said publicly on or shortly before that date that the PMO "is provided status updates on senior personnel decisions by the Privy Council Office".

38. On May 19, 2021, the CFPM released a statement confirming that the CFNIS investigation involved an allegation of sexual misconduct and that the matter was being referred to the Director of Criminal and Penal Prosecutions of Quebec. MGen Fortin learned about the referral for the first time that day through news media reports.

#### **The Decision was Unreasonable**

39. The Decision to terminate MGen Fortin's secondment and relieve him from the performance of military duty was unreasonable, given the following factors:

- (a) the Decision, including both the reasoning process and the outcome of the Decision, was not justified, transparent or intelligible;
- (b) the Decision, including both the reasoning process and the outcome of the Decision, was arbitrary and made without regard to any material before the decision-maker(s), including:
  - (i) the nature of MGen Fortin's work and its importance to public health during an unprecedented global pandemic;
  - (ii) the success of MGen Fortin's efforts at procuring and distributing vaccines to Canadians;
  - (iii) the fact that the investigation appeared to be ongoing;
  - (iv) the historical nature of the allegation under investigation; and
  - (v) the significant reputational harm of a public termination, especially for someone of MGen Fortin's stature and public profile.
- (c) the Decision, including both the reasoning process and the outcome of the Decision, was not internally coherent, it lacked a rational chain of analysis and was not justified in relation to the facts and law that constrained the decision-maker(s), including:
  - (i) the Decision was made jointly and severally by the Minister of National Defence, the Minister of Health, the Prime Minister

and the Clerk of the Privy Council, which amounted to improper political interference in the CAF when, in accordance with the proper military chain of command, it should have been made by the ACDS LGen Eyre;

- (ii) the Decision prevented ACDS LGen Eyre from reassigning MGen Fortin to a position commensurate with his rank, *de facto* relieving MGen Fortin of his military duties, which amounted to improper political interference in the CAF when, in accordance with the proper military chain of command, the Decision should have been made by ACDS LGen Eyre;
- (iii) the secondment was for a fixed term ending October 31, 2021, and therefore it could only be terminated for cause; and
- (iv) the facts set out in (b) above.

40. It was also unreasonable to make the fact and substance of the investigation public as part of the Decision to terminate MGen Fortin's secondment, given the following factors:

- (a) the disclosure amounted to a breach of MGen Fortin's right to not have his personal information disclosed without his consent under subsection 8(1) of the *Privacy Act*, RSC 1985, c P-21;
- (b) the complainant's desire for the investigation to be kept confidential;

- (c) the reputational harm of allegations of misconduct, especially of a sexual nature, whether or not they can be disproven or are found to be frivolous or unsubstantiated;
- (d) disclosing that there is an investigation amounts to impermissibly commenting on an ongoing investigation, thereby potentially compromising same; and
- (e) the Decision, in combination with the Minister of National Defence's public comments, allowed the public to surmise the nature of the allegations giving rise to the investigation, but without the appropriate context that it was based on a single allegation dating more than 30 years, fueling speculation and further damaging MGen Fortin's reputation.

41. As a result of the public termination of MGen Fortin's secondment and his relief from the performance of military duty, his reputation has been irreparably harmed.

42. The Ministers of Health and National Defence, the PMO and the PCO improperly interfered with the military chain of command by preventing ACDS LGen Eyre from reassigning MGen Fortin, thereby causing MGen Fortin's relief from the performance of military duty.

43. MGen Fortin is currently without assignment with the CAF. He expects he will no longer be considered for any promotions, special missions or key positions due to the significant reputational damage that has resulted from the Decision.

44. Given other recent precedents, the Ministers of Health and National Defence, the Prime Minister and the Clerk of the PCO knew or ought to have known that serious reputational harm would follow the public termination of MGen Fortin's secondment.

45. The Ministers of Health and National Defence, the Prime Minister and the Clerk of the PCO unreasonably failed to consider the factors outlined above when they decided to publicly terminate MGen Fortin's secondment to PHAC and relieve MGen Fortin from the performance of military duty.

#### **The Applicant was Denied Procedural Fairness**

46. MGen Fortin was denied procedural fairness in the lead-up to the Decision, which the respondents knew or ought to have known would have grave consequences on his life, reputation and career, namely:

- (a) the decision-maker(s) failed to give him an opportunity to be heard on why he should not be removed from his position at PHAC and not reassigned;
- (b) the decision-maker(s) failed to give MGen Fortin an opportunity to be heard on why the investigation should not have been referenced in a public announcement regarding his departure and in subsequent public statements;
- (c) it remains unclear precisely who made the Decision to terminate MGen Fortin's secondment publicly and not reassign him, on whose advice

and for what reason(s). Despite the public nature of the outcome, the process has been shrouded in secrecy and was arbitrary;

- (d) MGen Fortin did not know who the decision-maker(s) was or were, and was therefore unable to advocate his position;
- (e) MGen Fortin was not given reasons for the Decision to remove him publicly and not reassign him other than second or third hand speculation that the “political calculus” had changed, which was wholly inadequate and, in any event, did not come directly from the decision-maker(s).
- (f) MGen Fortin was not asked whether he consented to his personal information being disclosed under s. 8(1) of the *Privacy Act*, RSC 1985, c P-21;
- (g) MGen Fortin had a legitimate expectation that he would not be terminated from his position absent the requisite procedural fairness;
- (h) MGen Fortin had a legitimate expectation that any relief from the performance of military duty would follow the process established under the *National Defence Act*, RSC 1985, c N-5, *Queen's Regulations and Orders* and the *Defence Administrative Orders and Directives* for the CAF and that he would be afforded the procedural fairness required under same;

- (i) MGen Fortin was not afforded fair and impartial decision-making. The Decision was politically motivated and the outcome was pre-determined, demonstrating the decision-maker(s)'s closed mind(s) and/or a reasonable apprehension of bias;
- (j) the Decision was arbitrary, not in the public interest and made solely for the personal and political gain of the Ministers of Health and National Defence and the Prime Minister;
- (k) the Decision was not made by ACDS LGen Eyre but by the Ministers of Health and Defence, the Prime Minister and the Clerk of the PCO, jointly and severally, improperly interfering in the military chain of command; and
- (l) the Prime Minister and/or the PMO was impermissibly involved in the Decision to terminate MGen Fortin's secondment, despite the Prime Minister's public statements to the contrary.

47. A moderate to high degree of procedural fairness was required in this case given the presence of the following factors:

- (a) the nature of the Decision risked impairing the highly important and urgent work of vaccine procurement and distribution that the respondents had appointed MGen Fortin to lead during a global pandemic;



- (b) the Decision was of great importance to MGen Fortin personally, as it was known that it would result in significant damage to his reputation, and significantly impact his future career prospects as a high-ranking military officer;
- (c) the basis of the Decision appears to have been related to the underlying allegation of misconduct and the subsequent investigation, which attracts a higher level of procedural fairness, including the right to be heard and to written reasons; and
- (d) MGen Fortin had a legitimate expectation that he would be afforded the level of procedural fairness established under the *Queen's Regulations and Orders* and the *Defence Administrative Orders and Directives* for the CAF.

48. As a result of the unreasonableness of the Decision, including its lack of justifiability, transparency and intelligibility, as well as the significant breaches of MGen Fortin's right to procedural fairness and privacy, there is no other reasonable outcome other than to quash the Decision and to reinstate MGen Fortin to his secondment at PHAC and/or a position commensurate with his rank of Major-General.

49. In the alternative, the Decision should be quashed and remitted to the ACDS LGen Eyre, the proper decision-maker, for a re-determination, with an opportunity for MGen Fortin to be heard, and fulsome reasons provided for the new decision.

50. The applicant pleads and relies on:

- (a) section 8 of the *Privacy Act*, RSC 1985 c P-21;
- (b) the *National Defence Act*, RSC 1985, c N-5;
- (c) the *Queen's Regulations and Orders for the Canadian Forces*; and
- (d) the *Defence Administrative Orders and Directives*.

51. The applicant requests that this application be heard on an expedited basis, given the significant and ongoing damage to his reputation resulting from the Decision, and the fact that the term of secondment was set to expire on or about October 31, 2021, less than four months from the date of issuance of this Notice of Application. To that end, the applicant requests that this application be specially managed pursuant to Rule 384 of the *Federal Courts Rules*, SOR/98-106.

**THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

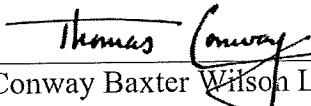
- (a) The affidavit of MGen Dany Fortin to be sworn in support of the within application and the exhibits thereto; and
- (b) Such further and other material as counsel may advise and this Honourable Court may permit.

**THIS APPLICANT REQUESTS** pursuant to Rule 317 of the *Federal Courts Rules* that each respondent send a certified copy of the following material that is not in the

possession of the applicant but is in the possession of each of the respondents to the applicant and to the Registry:

1. The full record of all material which was before each of the respondents, or formed part of its, his or her files, at the time of the Decision, including all documents, memoranda, reports, emails, notes and other communications considered, prepared and/or collected in the preparation of the Decision;
2. Without limiting the generality of the foregoing, any documents relevant to the adjudication of the applicant's request.

June 14, 2021

  
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