COURT MARTIAL

Citation: *R. v. Caicedo*, 2015 CM 4018

Date: 20151123
Docket: 201514

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Second Lieutenant C.W. Caicedo, Accused

Before: Commander J.B.M. Pelletier, M.J.

DECISION ON AN APPLICATION BY DEFENCE CHALLENGING THE CONSTITUTIONALITY OF SECTION 158.6 OF THE *NATIONAL DEFENCE ACT*

(Orally)

INTRODUCTION

[1] The accused, Second Lieutenant Caicedo, is facing 13 charges on the charge sheet preferred by a representative of the Director of Military Prosecutions on 14 October 2015, and introduced in these proceedings as Exhibit 2. The third and fifth charges allege offences of absence without leave contrary to section 90 of the *National Defence Act* (*NDA*). The remaining 11 charges allege failure to comply with a condition imposed or an undertaking given under Division 3, contrary to section 101.1 of the *NDA*. Four of these charges, the first, second, fourth and sixth charges, refer to conditions of release imposed by custody review officers. The others relate to conditions imposed by military judges.

[2] The proceedings of this Standing Court Martial began in Gatineau on 19 October 2015. Before the accused was asked to plead on the charges, defence counsel submitted an application under article 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) challenging the constitutionality of section 158.6 of the *NDA*, under which custody review officers acted in imposing the release conditions, which are the subject of the first, second, fourth and sixth charges. The applicant is seeking a declaration that section 158.6 is of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*, and is consequently asking the court to order a stay of proceedings on these four charges. A notice of constitutional question was filed and introduced as Exhibit M1-1. It was served on the Attorney General of Canada and the Attorney Generals of provinces and territories, but none chose to participate in these proceedings.

THE LAW

[3] The applicant relies on section 7 of the *Canadian Charter of Rights and Freedoms* and on section 52 of the *Constitution Act, 1982*. These provisions read as follows:

> Life, liberty and security of person
> **7.** Everyone has the 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.

Article 52 of the *Constitution Act*, 1982 reads as follows:

> Primacy of Constitution of Canada
> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[4] The provision challenged by the applicant reads as follows under 158.6 of the *National Defence Act*:

> **158.6** (1) The custody review officer may direct that the person be released without conditions or that the person be released and, as a condition of release, direct the person to comply with any of the following conditions:
>
> *(a)* remain under military authority;
>
> *(b)* report at specified times to a specified military authority;
>
> *(c)* remain within the confines of a specified defence establishment or at a location within a geographical area;
>
> *(d)* abstain from communicating with any witness or specified person, or refrain from going to any specified place; and
>
> *(e)* comply with such other reasonable conditions as are specified.

> (2) A direction to release a person with or without conditions may, on application, be reviewed by
>
> > *(a)* if the custody review officer is an officer designated by a commanding officer, that commanding officer; or
> >
> > *(b)* if the custody review officer is a commanding officer, the next superior officer to whom the commanding officer is responsible in matters of discipline.
>
> (3) After giving a representative of the Canadian Forces and the released person an opportunity to be heard, the officer conducting the review may make any direction respecting conditions that a custody review officer may make under subsection (1).

[5] This provision is found in the Code of Service Discipline, Part III of the *NDA*, which constitutes the military justice system set up by Parliament to address the specific disciplinary needs of the Canadian Armed Forces. The military justice system has a two-tiered tribunal structure. Summary trials, conducted by military officers, generally within the accused's chain of command, deal with mostly minor service offences. Courts martial, on the other hand, are presided by a judicial authority, a military judge, and conducted in accordance with rules of evidence and procedure similar to those followed by civilian criminal courts in Canada. They usually deal with more serious matters.

[6] The Code of Service Discipline applies to a variety of essential aspects, including in Division 3: Arrest and Pre-Trial Custody, covered in sections 153 to 159.9 of the *NDA*. Under these provisions, officers or non-commissioned members, including those appointed as military police, may arrest, with or without warrant, a person subject to the Code of Service Discipline. A person making an arrest may believe that it is necessary that a person under arrest be retained in custody. In such an eventuality, the person arrested may be committed to the service custody of a member of the military police or person in charge of a guard-room. A process is then initiated to allow a custody review officer to review the custody and decide whether the person in custody shall be released with or without conditions or remain detained. If the person in custody is released with conditions, then a review of that decision and of any conditions imposed may be requested to a superior of the custody review officer under section 158.6, the provision impugned in this application. If the custody review officer decides not to release the person from custody having regard to all circumstances, including those at paragraph 158(1) of the *NDA*, then a review by a military judge will take place.

THE FACTS

[7] The evidence relating to this application was introduced by means of a joint statement of facts produced by counsel and introduced as Exhibit M1-7. In addition to the facts included in that document, additional facts were also agreed on by counsel and related to the court verbally at the hearing. Even if arguments by counsel were focussed on the legislation and its context, the following facts illustrate how the impugned

provision, pertaining to review of custody, operates and how the accused was actually dealt with in this case.

(a) On 9 October 2014, Second Lieutenant Caicedo was arrested at 2052 hours by the military police for driving a vehicle with a suspended licence, disobeying a lawful command and assaulting a peace officer. He was placed in custody.

(b) The next day, 10 October 2014, Second Lieutenant Caicedo was released from custody by a custody review officer at 1205 hours with the following conditions, appearing on the form produced as Exhibit M1-5:

i. report to the chain of command on duty days at 1530 hours and report to the base duty officer on non-duty days at 1530 hours;

ii. refrain from going to the Base Borden Officers' Mess;

iii. keep the peace and be of good behaviour;

iv. abstain from the consumption or possession of alcohol or any intoxicating substances;

v. not use, possess or consume any non-medically prescribed, restricted or prohibited drugs; and

vi. refrain from attending any establishment whose primary purpose is the conveyance of alcohol.

(c) Second Lieutenant Caicedo never requested a review of the conditions of release imposed by the custody review officer on 10 October 2014.

(d) On 23 October 2014, Second Lieutenant Caicedo did not report to his chain of command at 1530 hours. On 25 October 2014, the base duty officer informed the military police that Second Lieutenant Caicedo had failed to report at 1530 hours as directed by his conditions of release.

(e) On 4 November 2104, Second Lieutenant Caicedo did not report for duty at 0930 hours as directed by his chain of command. From that moment he was considered to be absent without authority. A "Description of Absentee or Deserter" for Second Lieutenant Caicedo was forwarded by his unit to the military police on 6 November 2014.

(f) Second Lieutenant Caicedo's whereabouts were unknown until he reported to the base duty officer at 1945 hours on 9 November 2014, at which time the base duty officer contacted the military police to advise them of his return. Second Lieutenant Caicedo was placed in custody at

1953 hours by the military police for failure to comply with a condition of release and absence without leave.

(g) On 10 November 2014, Second Lieutenant Caicedo was released from custody by a custody review officer at 0906 hours with a number of conditions very similar to those previously imposed on 10 October as it appears on the form produced as Exhibit M1-6.

(h) The next day, 11 November 2014, Second Lieutenant Caicedo failed to report for the Remembrance Day parade in Borden as directed by his chain of command. An arrest warrant was issued. Second Lieutenant Caicedo remained absent from work until 1522 hours on 19 November 2014, when he was arrested at his unit, where he had attended in civilian attire.

(i) Second Lieutenant Caicedo never requested a review of the conditions of release imposed by the custody review officer on 10 November 2014.

(j) On 20 November 2014, the custody review officer did not release Second Lieutenant Caicedo. His custody was reviewed the next day, 21 November 2014, by Military Judge Dutil, the Chief Military Judge. Second Lieutenant Caicedo was released upon signing an undertaking produced as Exhibit M1-10 containing a number of conditions, including a daily reporting requirement and the obligation to refrain from attending any establishment whose primary purpose is the conveyance of alcohol, including the Canadian Forces Base (CFB) Borden Officers' Mess.

(k) On the same day, at around 2100 hours, Second Lieutenant Caicedo attended the Huron Club (Junior Ranks' Mess) at CFB Borden. He ordered an energy drink, noting to a friend that he was not allowed to drink alcohol. His presence was noticed by a senior officer in attendance and, at approximately 2130 hours, Second Lieutenant Caicedo was arrested by the military police as he was attending the Huron Club, a bar whose primary purpose is the conveyance of alcohol.

(l) On 22 November 2014, Second Lieutenant Caicedo was not released by the custody review officer. He was released from custody by Military Judge d'Auteuil on 26 November 2014, after signing an undertaking produced as Exhibit M1-11 containing a number of conditions, including a daily reporting requirement and an obligation to remain within the confines of Base Borden, except for authorized leave or when otherwise authorized.

(m) On 6, 7 and 10 December 2014, Second Lieutenant Caicedo either failed to respect some of the reporting conditions or departed Base Borden. Yet, he was not re-arrested and his undertaking remained as imposed by

> Military Judge d'Auteuil until 17 April 2015, when it was varied on consent of the Director of Military Prosecutions, after charges had been preferred on 25 February 2015. From that point, as it appears from Exhibit M1-12, Second Lieutenant Caicedo was no longer subjected to the following conditions: reporting requirements, the obligation to remain within the confines of Base Borden unless authorized, the obligation to refrain from the consumption or possession of alcohol or intoxicating substances and the obligation to refrain from attending any establishment whose primary purpose is the conveyance of alcohol.

SUBMISSIONS OF THE PARTIES

[8] In the notice of application at Exhibit M1-2 and in oral submissions, the applicant challenges the constitutionality of section 158.6 on two distinct grounds. First, he argues that the section engages section 7 of the *Charter* by its potential to cause a "loss of liberty associated with detention" in a manner contrary to a principle of fundamental justice given the provision does not provide for a hearing before an independent and impartial magistrate to review release conditions imposed by a custody review officer. Secondly, the applicant argues that section 158.6, in providing for a review of release conditions by a commanding officer or the next superior officer to whom the commanding officer is responsible in matters of discipline, violates the unwritten principle of judicial independence, as such a responsibility can only be performed by independent and impartial magistrates.

[9] The applicant's counsel made it clear in opening his oral submissions that it is the legislative provision at section 158.6 which he seeks to challenge, not the behaviour of any actor in applying this provision. He is relying on section 52 of the *Constitution Act, 1982*, not section 24(1) of the *Charter*. The remedy of a stay being sought on four charges of failing to comply with a condition is simply a consequence of the fact that the section under which the conditions were imposed should be declared of no force and effect, and, therefore, could not form the basis of a conviction under section 101.1 of the *NDA*.

[10] In a response at Exhibit M1-3 and in oral arguments, the respondent argued that the only power exercised by a custody review officer without review by a military judge is made in the context of the release of a person from custody, not its continued detention. It should not be subject to principles of fundamental justice applicable to detention. On judicial independence, the respondent argues that military officers can be granted judicial powers without having to be judges. While the requirement for judicial independence was deemed essential for justices of the peace, the scope of the duties of custody review officers and military authorities reviewing their decisions is more limited and cannot be equated with the conduct of bail hearings.

[11] The respondent did not submit any arguments or evidence to satisfy its burden of justifying any potential infringement under section 1 of the *Charter*. Consequently, if the impugned provision is found to violate section 7 as alleged, the focus of the analysis

will turn to remedies, including striking down section 158.6 as requested by the applicant.

ANALYSIS

Issues

[12] The grounds in the application raise the following two issues:

(a) Does section 158.6 of the *NDA*, in providing for imposition and review of release conditions by military officers infringe section 7 of the *Charter*?

(b) Does section 158.6 of the *NDA*, in providing for imposition and review of release conditions by military officers, infringe the unwritten principle of judicial independence?

First issue – alleged infringement of section 7 of the *Charter*

A. Is Section 7 engaged?

[13] Section 7 of the *Charter* guarantees the 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. Any challenge under section 7 requires a claimant to prove two things: first, that there has been or could be a deprivation of the right to life, liberty and security of the person; and, second, that the deprivation was not or would not be in accordance with the principles of fundamental justice.

[14] The respondent concedes that section 7 is engaged in this case and I agree. Section 158.6, by allowing the imposition of release conditions that may include, for instance, an obligation to remain within the confines of a defence establishment, engage the liberty interests of persons released under conditions. Furthermore, in this specific case, the applicant's liberty interests are engaged by the charges laid against him under section 101.1 of the *NDA*, which make him liable to the punishment of imprisonment.

B. What is the applicable principle of fundamental justice?

The position of the parties

[15] At the second stage of the section 7 analysis, the applicant is required to prove that the deprivation was not or would not be in accordance with the principles of fundamental justice. There are two elements involved: a determination of what deprivation of liberty exactly is caused by the impugned provision and a determination of which principle of fundamental justice applies to that precise deprivation. The applicant submits that section 158.6 allows a loss of liberty associated with detention and that the principle of fundamental justice that applies to detention is, as identified by

the Supreme Court of Canada at paragraph 28 of *Charkaoui v. Canada*, 2007 SCC 9, paragraph 28 (*Charkaoui*):

> [B]efore the state can detain people for significant periods of time, it must accord them a fair judicial process.

[16] In reply, the respondent submitted that the deprivation of liberty involved by section 158.6 is not detention. The only power exercised by a custody review officer without review by a military judge is the power to decide whether a person released from custody should be released with or without conditions and, if the person is released with conditions, to decide which conditions from the list at paragraph 158.6(1) would be imposed and their modalities. This decision is one pertaining to release on conditions, not to detention. Therefore, the principle of fundamental justice identified by the applicant does not apply.

Position of the applicant and the Harris decision by d'Auteuil, MJ

[17] Counsel for the applicant readily conceded that the existence of detention arising out of the operation of section 158.6 is the crux of the matter, as it pertains to the applicability of the principle of fundamental justice which he has identified. The applicant submits that the actions of a custody review officer applying section 158.6 can be assimilated to "detention for a significant period of time," referring to the reasons of Military Judge d'Auteuil presiding as the Standing Court Martial of *Corporal B.L. Harris*, 2009 CM 3012 (*Harris*) and he quoted in footnote 9 of his notice of application, in part, as follows:

> [61] After a reading of the conditions listed at subsection 158.6(1) of the *NDA*, I note that it would allow a custody review officer to proceed to a suspension of individual's liberty by imposing conditions, taken individually or combined, to a person subject to the Code of Service Discipline that would have significant physical and psychological restraints.
>
> [62] Then, I conclude that section 156.8 of the *NDA* gives to a custody review officer the authority to impose conditions for the release from custody of person that would amount to a detention in the meaning of section 9 of the *Charter*.

Harris does not support the position of the applicant.

[18] As those last words suggest, the quoted portion of Judge d'Auteuil's reasons pertained to section 9 of the *Charter*, more precisely in the context of the application of the then freshly-released Supreme Court decision in *R. v. Grant*, 2009 SCC 32. This is not the section of the *Charter* at issue before me in this application. However, starting with the very next paragraph, Judge d'Auteuil analysed the constitutionality of section 158.6 under section 7 of the *Charter*, the very issue raised by this application.

[19] Having concluded, as I have, that section 158.6 of the *NDA* engages liberty interests, Judge d'Auteuil asks, at paragraph 84,whether the section deprives a person

subject to the Code of Service Discipline of his or her right to liberty in accordance with the principles of fundamental justice. In analysing this question, Judge d'Auteuil found that the principle of fundamental justice to be applied is the principle at paragraph 107 of *Charkaoui*, to the effect that:

> [W]here a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful opportunities to challenge their continued detention or the conditions of their release.

Inspired by the decision of the Court Martial Appeal Court in *R. v. Larocque*, 2001 CMAC 2, he simply adapted that principle from the immigration context in *Charkaoui* to the context of the release of a person with conditions by a custody review officer under the *NDA*, confirming that it met the requirement for principles of fundamental justice set by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.

Harris and judicial comity

[20] Despite the appearances, what the applicant is asking me to do in ruling on this application is not to follow *Harris*, but rather to overrule this decision of my fellow military judge by applying a different principle of fundamental justice to the very same issue of the constitutionality of section 158.6 under section 7 of the *Charter*. I must refrain from doing so. In my view, the principle of judicial comity should be applied between military judges presiding different courts martial in order to promote certainty and consistency in the law. It is proper for judicial comity to be applied before courts martial, in the same way as it is applied before the Federal Court whose judges apply judicial comity between them, as recognized, for instance, in *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1025 (*Almrei*), at paragraph 61. Wilson J. of the BC Supreme Court expressed best what judicial comity should mean for a judge in *Re Hansard Spruce Mills Ltd.* [1954] 13 W.W.R. (N.S.) 285, in these words:

> I have no power to override a brother judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.

[21] Yet, judicial comity is not to be applied absolutely. Wilson J. went on to state that a judge should only decline to follow a decision of the same court if: (1) subsequent decisions have affected the validity of the previous decision, (2) it is demonstrated that some binding precedent or relevant statute was not considered, or (3) the judgment was not considered, as it was given as an immediate decision without opportunity to consult authority. Similar exceptions were adopted by the Federal Court (*Almrei* at paragraph 62). These exceptions support another important principle relevant to legal precedents,

namely correctness. A judge can depart from judicial comity to avoid perpetuating an error in the interpretation of the law.

[22] In this case, however, there has been no error on the part of my fellow military judge as it pertains to the principle of fundamental justice applicable to a challenge of section 158.6 under section 7 of the *Charter* and no contemporary development that would preclude applying that principle recognized by Judge d'Auteuil in *Harris*. The principle developed is applicable on the facts and arguments raised in this case, even if the challenge to section 158.6 is phrased differently here. The principle is specific to onerous conditions of release for an extended period, which is precisely the risk to liberty rights protected by section 7 of the *Charter* that could be engaged by section 158.6 of the *NDA*, impugned in this application.

The principle of fundamental justice to be applied

[23] I conclude, therefore, that the principle of fundamental justice that should be applied in this case is the same that was found applicable by Judge d'Auteuil at paragraph 93 of his reasons in *Harris* in these words:

> [W]here a person is detained or is subject to onerous conditions of release for an extended period of time further to his or her arrest, and while waiting a decision for being charged or not, the detention or the release with conditions must be accompanied by a meaningful process of review that takes into account the context and circumstances of the individual case. Such person must have a meaningful opportunity to challenge their continued detention or the conditions of their release.

C. Should the conclusion of d'Auteuil, MJ in *Harris* on section 7 be applied?

The conclusion of d'Auteuil, MJ

[24] In applying that principle of fundamental justice quoted above, Judge d'Auteuil concluded in these words, on the issue of whether the deprivation of liberty resulting from the application of section 158.6 of the *NDA* occurs in accordance with the relevant principal of fundamental justice:

> [99] Simply put, the answer is yes. A person subject to the Code of Service Discipline released with conditions, which could be potentially onerous and for an extensive period of time, pursuant to the authority given to the custody review officer by section 158.6 of the *NDA*, may initiate a meaningful review of those conditions in accordance with paragraphs 2 and 3 of the same section. I am of the opinion that this review mechanism is sufficient in order to allow a person in custody to have a review of relevancy of the direction to release him or her with conditions, and how suitable are the release conditions while awaiting a decision from authorities to have charges laid or not.
>
> [100] It is important to remember that the custody review officer's authority to review suffers some limitation in reason of the nature of the charges that could be considered, and depending of the circumstances of the arrest. In some situations, the officer has no other choice but to order detention which will result in any case, with a custodial review

> hearing presided by a military judge. In some other cases, further to the review, he may decide to engage the custody review hearing by a military judge by simply directing that the person be retained in custody despite the fact he has authority to release. In any case, the review mechanism may be triggered in both instances by the person in custody, no matter if a decision is made to release or not.

[25] This conclusion relates to the same issue that is before me in this application, namely the conformity of section 158.6 with section 7 of the *Charter*. I believe the applicant cannot be right on his section 7 argument without Judge d'Auteuil's decision in *Harris* being overruled. Yet, that decision was rendered over six years ago. It was apparently accepted as Corporal Harris pleaded guilty subsequent to the decision on the application. In all likelihood, military law practitioners have been relying on the *Harris* decision, especially in advising persons subject to the Code of Service Discipline. Ignoring this precedent could undermine the important principle of certainty in the law.

The section 7 analysis in Harris is a sound precedent

[26] Judicial comity would require that I apply *Harris*. However, as stated previously, judicial comity is not an excuse to perpetuate errors. I should refuse to apply this precedent if I deem it to be erroneous. That is not the case.

Harris considers and respects the context of section 158.6

[27] *Harris* respects the legislative context where section 158.6 finds itself in the *NDA*. Contrary to the submission of the applicant, consideration of the context is not reserved to the stage of justification under section 1 of the *Charter*. As the Chief Justice of Canada said at paragraphs 20 and 22 of *Charkaoui*:

> 20. Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake (citations omitted) The procedures required to meet the demands of fundamental justice depend on the context (citations omitted)
>
> . . .
>
> 22. The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7.

[28] In this case, the context is release with conditions by a custody review officer of a person subject to the Code of Service Discipline, specifically, the review mechanism that applies should a custody review officer, having decided to release the person in custody, decides to impose onerous conditions of release for an extended period. Judge d'Auteuil concluded that the review process provided in section 158.6, by the commanding officer or the next superior officer, not by a judge or magistrate, is fair

having regard to its nature and the interests at stake, especially in light of the limited authority of the custody review officer.

[29] I agree. The review process is not fundamentally unfair to the person so released with conditions. The Chief Justice was clear at paragraph 25 of *Charkaoui* to the effect that:

> The seriousness of the individual interests at stake forms part of the contextual analysis. As this Court stated in *Suresh*, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*.

Here, the maximum effect that a decision of a custody review officer may have on the liberty interests of persons subject to his or her decision is limited in three ways by the context: first, a custody review officer who decides to keep a person in custody must bring that person before a military judge – the review of that decision not to release is done by a military judge outside of the mechanism of section 158.6; second, a custody review officer cannot decide to release a person who has been charged with a designated offence – that person will be brought before a military judge for a review of custody; and third, the conditions that a custody review officer who decides to release with conditions can impose are limited to those listed at subparagraphs (*a*) to (*e*) of section 158.6(1).

Upcoming legislative changes and the constitutionality of the current provision

[30] Section 31 of Bill C-15, *Strengthening Military Justice in the Defence of Canada Act*, was passed by Parliament and received Royal Assent on 19 June 2013, but has yet to come into force. That provision adds a new section 158.7 to the *NDA*, which will allow a review, by a military judge, of any direction imposed on a person released with conditions that was reviewed or imposed by a review authority under paragraph 158.6(2). The applicant suggests that the passing of this new provision reveals that the current section is constitutionally defective, citing the clause-by-clause analysis introduced in consent as Exhibit M1-8 to the effect that the rationale for the change is "to provide greater protection of individual liberty interests of persons who are arrested and released with conditions, consistent with the *Canadian Charter of Rights and Freedoms*."

[31] With respect, I cannot see in this paragraph any admission to the effect that the current provision is unconstitutional. In any event, the new provision, even if it were in force, would not address the violation of section 7 that the applicant alleges. Indeed, he challenges the absence of access to a judge or magistrate to review the decision of a custody review officer to impose release conditions. That situation would not be cured with the new provision. What the new section 158.7 provides is a review mechanism targeting the review of the decision of a custody review officer by a commanding officer or the next superior officer in matters of discipline. In effect, what that section does is provide for a military judge to perform a judicial review of a kind similar to what can currently be performed by a Federal Court judge, who would, in all likelihood,

require that the review mechanism available under section 158.6 be exhausted before entertaining an application for judicial review. In my view, the future provision is not a new element that could change the conclusion that Judge d'Auteuil arrived at in *Harris*.

[32] That being said, the new section 158.7 is a definite improvement for persons subject to the Code of Service Discipline and I agree with the statement made at Exhibit M1-8 to the effect that it will provide greater protection of liberty interests. It is unfortunate that although this clause was proposed by the Executive as early as October 2011 when Bill C-15 was first tabled in Parliament, it has not yet been brought into force over 29 months after the bill was passed in June 2013. I believe the protection of liberty interests of persons subject to the Code of Service Discipline deserve a quicker implementation.

Judicial review is available under the current provision

[33] As alluded to above, even if the review mechanism of section 158.6 does not currently provide for a review of release conditions by a judge or magistrate, a party dissatisfied with the decision of a custody review officer, a commanding officer or another review authority has the opportunity to apply for judicial review from Federal Court or, potentially, to seek *habeas corpus* from a superior court of a province should one consider conditions imposed to be so stringent as to open the door to such a remedy.

[34] On that point, the applicant argued that the application process is cumbersome and could be ineffective as it is too lengthy, providing at Exhibit M1-9 a timeline for applications, published on the Federal Court website, showing that such an application may not be ready for hearing before 130 days following a notice of application. However, that evidence does not cover the possibility to proceed by interlocutory injunction under Part 8 of the *Federal Court Rules*, which provides an opportunity to request an expedited hearing. As for the suggestion that recourse to civil courts of review may be too cumbersome for a person subject to stringent release conditions, I note from previous Federal Court cases and evidence introduced by the respondent that a member of the Canadian Armed Forces may benefit from representation free of charge from Defence Counsel Services on an application for judicial review. Exhibit M1-13 reveals that counsel from Defence Counsel Services sought a judicial review, as recently as January of this year, of a decision of a commanding officer at a summary trial. I conclude that a meaningful judicial review is available should a person wish to challenge the decision of a custody review officer or of an authority reviewing the decision of that officer under section 158.6.

D. Conclusion on the first issue

[35] I conclude, therefore, on that first issue, that the decision of Judge d'Auteuil in *Harris* is authoritative and a sound precedent to be applied here. I find there has been no violation of section 7 of the *Charter*. I now turn to the second argument of the applicant.

Second issue – alleged infringement of the unwritten principle of judicial independence

A. The position of the applicant

[36] The applicant submits that section 158.6, in providing for a review of release conditions by a commanding officer or the next superior officer to whom the commanding officer is responsible in matters of discipline, violates the unwritten principle of judicial independence. The argument is expressed in written submissions at Exhibit M1-2 in three sentences: the review of release conditions is a judicial function; as a result, the constitutional principle of judicial independence applies to the commanding officer or superior officer performing that review function; and as neither of those officers possesses judicial independence, the legislative provision conferring this judicial power to these officers should be invalidated.

[37] In support of his argument, the applicant relies on the Supreme Court decision of *Ell v. Alberta*, 2003 SCC 35, where the Justice Major, for a unanimous court, has found that the principle of judicial independence applied to the office of the Alberta Justices of the Peace. The applicant also relies on *R. v. Pomerleau*, [2004] R.J.Q. 83, a decision rendered by the Quebec Court of Appeal, essentially applying *Ell* to one of its earlier decisions. In that case, the Attorney General of Quebec conceded that Quebec's Justice of the Peace who authorized the issuance of search warrants did not have sufficient guarantees of independence, and that the searches were, therefore, illegal. As a result of the declaration of constitutional invalidity conceded to by the Attorney General, the legislation was invalidated to remove judicial powers from those who were found to require judicial independence to exercise them.

B. Analysis

[38] The question raised by the applicant's argument on judicial independence is whether the commanding or other officers performing review under section 158.6 need judicial independence to validly review conditions of release imposed by custody review officers.

[39] The demonstration by the applicant has failed to convince the court to the required standard. The applicant was unable to cite any authority suggesting that a limited judicial function, such as the one performed by custody review officers or those officers reviewing conditions of release imposed by custody review officers, needs to be performed by persons possessing the attributes of judicial independence.

[40] The reasons of Major J. in *Ell* suggest strongly that it is the cumulating powers held by Alberta justices of the peace, especially the power to hold bail hearings, which lead to the conclusion that the persons holding these offices are required to exercise significant judicial discretion in adjudicating on these matters. The formulation of the court's conclusion at paragraph 24 is telling in that regard.

[41] The Quebec justices of the peace also held cumulating powers. Even if it is the power to issue a search warrant that was at issue in *Pomerleau*, the conclusion of the court, based on the concession by the Attorney General, is that the justices of the peace did not have the minimum guarantees of independence to perform all of the powers allocated to them.

[42] On the other hand, custody review officers acting under the *NDA* do not perform functions that can be assimilated to holding a bail hearing. Essentially, a custody review officer is empowered either to release a person in custody or to cause that person to be taken before a military judge for a custody review hearing. It is only the power to release with conditions that is relevant to the second issue raised by the applicant. Although this limited power can be considered a judicial function, as is the power to review how that power was exercised by a custody review officer in a given case, the applicant has not established to the court's satisfaction that the performance of those powers require judicial independence. There is, in my view, no relation between the powers exercised by justices of the peace in *Ell* and *Pomerleau* and the powers conferred to custody review officers and review authorities.

[43] In addition to the actual powers being exercised, there is another fundamental difference between the roles of custody review officers and review authorities under section 158.6 and the roles of justices of the peace as analysed in *Ell* and *Pomerleau*. Indeed, the fundamental role of justices of the peace is to assist courts in performing judicial duties. As mentioned in *Ell* at paragraph 26:

> Each of the above judicial responsibilities makes clear that the respondents played an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate.

In light of that supporting role, the judicial functions justices of the peace perform relate in a very particular way to the basis upon which the principle of judicial independence is founded, notably as it pertains to preservation of the constitutional order and the requirement to uphold the public's confidence in the administration of justice.

[44] On the other hand, custody review officers and the authorities reviewing their decisions perform their functions under the *NDA* not in direct support of the courts or the judiciary. They rather substitute for those judicial authorities in the context of a system of military justice which empowers military authorities to perform functions attributed to civilian courts. This includes, under the summary trial scheme set out in the *NDA* and its regulations, conviction for offences and the imposition of resulting punishments that may involve deprivation of liberty. The role of these military authorities stands on its own in administrating discipline in relation to persons subject to the Code of Service Discipline. The exercise of judicial roles by members of the military was recognized by the Supreme Court over 35 years ago in *R. v. MacKay*, [1980] 2 S.C.R. 370, especially in these words by McIntyre J. joined by Dickson J. at page 402:

> Since very early times it has been recognized in England and in Western European countries which have passed their legal traditions and principles to North America that the special situation created by the presence in society of an armed military force, taken with the special need for the maintenance of efficiency and discipline in that force, has made it necessary to develop a separate body of law which has become known as military law. The development of this body of law included, sometimes in varying degree but always clearly recognized, a judicial role for the officers of the military force concerned.

[45] The applicant has not convinced me that precedents related to justices of the peace are authoritative in the military law context. No authority has been brought to the court's attention to the effect that the judicial nature of the powers conferred to military authorities in section 158.6 must be reserved for judges. To the contrary, there are some authorities confirming that legislation may confer powers on certain agents of the state who are not judicial officers to exercise a discretion which may impact on *Charter* rights of individuals. As pointed out as an example by the respondent in oral submissions, Dickson J. in *Hunter et al. v. Southam Inc*., [1984] 2 S.C.R. 145 at pages 161-162, recognized that an authorization procedure for a search warrant requires that the person authorizing the search to be able to assess the evidence as to whether a given standard has been met, in an entirely neutral and impartial manner. As to the status this person must have, he had this to say:

> While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

[46] The applicant has not convinced me that custody review officers and review authorities are not capable of acting judicially. The limited arcs provided in the *NDA* for the actions of these authorities, as well as the suggestion at QR&O articles 105.18 and 105.23 to both seek legal advice prior to reaching decisions, would indicate that these authorities are meant to be acting judicially in the execution of their functions. As for the capacity to act in a neutral and impartial manner, Justice McIntyre had this to say in *MacKay* at pages 403-404:

> It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline—which includes the welfare of their men—are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.

C. Conclusion on the second issue

[47] Consequently, I conclude that section 158.6 does not violate the principle of judicial independence. The second argument of the applicant must, therefore, be rejected.

CONCLUSION

[48] The court has not been convinced that section 158.6 of the *NDA* and specifically the review mechanism applicable to decisions of custody review officers to release with or without conditions infringes either section 7 of the *Charter* or the unwritten principle of judicial independence.

[49] To be clear, this conclusion does not prevent a person charged with breach of a condition imposed by a custody review officer under section 101.1 of the *NDA* from challenging the manner in which that officer or a review authority acted in the exercise of the authority granted to them in section 158.6. If actions of these officials violate the rights of a person subject to release conditions, a case-by-case remedy remains available under section 24(1) of the *Charter*. The applicant has not advanced such a violation in this case and the court, on the evidence submitted to it in this application, does not find any. The mere presence of a risk of a *Charter* violation that could materialize with the actions of an agent of the state in the performance of powers expressly provided in legislation is not sufficient, in itself, to invalidate the provision granting these powers.

DISPOSITION

[50] For these reasons, I find that this application to declare invalid section 158.6 of the *NDA* and its regulatory counterpart under section 52(1) of the *Constitution Act, 1982*, must be dismissed.

Counsel:

Lieutenant-Commander P.D. Desbiens and Lieutenant-Commander M. Letourneau, Defence Counsel Services, Counsel for Second Lieutenant C.W. Caicedo

The Director of Military Prosecutions, as represented by Major J.S.P. Doucet
Counsel for the respondent