COURT MARTIAL

Citation: *R. v. Pett*, 2020 CM 4002

Date: 20200110
Docket: 201925

Standing Court Martial

Moss Park Armoury
Toronto, Ontario, Canada

Between:

Her Majesty the Queen,

Respondent

- and -

Master Corporal K.G. Pett,

Applicant

Application heard in Gatineau, Quebec, on 28 November 2019
Decision rendered orally in Toronto, Ontario, on 2 December 2019
Written reasons delivered in Gatineau, Quebec, 10 January 2020

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

DECISION ON A PLEA IN BAR APPLICATION BY DEFENCE

INTRODUCTION

The charges and the Standing Court Martial

[1] Master Corporal Pett, a member of the Primary Reserve on part-time service with the 48th Highlanders of Canada, stands charged with two offences under the Code of Service Discipline stemming from an incident which allegedly occurred on the evening of 16 November 2018 in Moss Park Armory in Toronto. The first charge, laid under section 85 of the *National Defence Act*[1] (*NDA*), alleges that Master Corporal Pett behaved with contempt towards a superior officer by walking away from Master

Warrant Officer Lang as he was being spoken to, saying "fuck this" or words to that effect. The second charge laid under section 95 of the *NDA* for ill-treatment of a subordinate alleges that Master Corporal Pett said to Corporal Turner "I will fucking beat you up" or words to that effect.

[2] The Court Martial Administrator (CMA) issued a convening order on 7 November 2019, ordering the accused to appear before a Standing Court Martial at Moss Park Armory on 2 December 2019.

The application

[3] By Notice of Application received on 15 November 2019[2], counsel for the accused has indicated his intention to challenge the independence of military judges including the military judge assigned to preside at this court martial, constituting the Standing Court Martial. It is argued that an order from the Chief of the Defence Staff (CDS) issued on 2 October 2019 purports to subject military judges to the disciplinary powers of a general officer in the military hierarchy, an alleged violation of the constitutional principles of judicial independence and of an accused's rights under paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

[4] The applicant seeks declarations and an order for a stay of the proceedings against Master Corporal Pett, due to the breach of his right to be tried by an independent and impartial tribunal guaranteed by paragraph 11(*d*) of the *Charter*. Yet, if I am to find that the Standing Court Martial is not an independent and impartial tribunal under the *Charter*, as requested, it would mean that the court is without jurisdiction. Applications such as this one are considered as pleas in bar of trial under article 112.24 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) as determined by the Court Martial Appeal Court (CMAC) in *R. v. Larouche*.[3] The QR&O provide that the remedy for a plea in bar is the termination of proceedings in respect of any charge to which a plea has been allowed.[4]

Hearing

[5] At the request of parties, this application was heard before the date set for the beginning of court martial proceedings. This allowed the trial to commence on the date scheduled, in consideration of the fact that Reserve Force personnel involved as parties, witnesses and supporting staff had cleared the week set for trial for military service.

[6] After hearing the submissions of counsel on 28 November 2019, I informed the parties that I would consider the matter over the next three days and announce my decision at the beginning of the proceedings of the Standing Court Martial. On Monday, 2 December 2019, I informed the parties of my decision to dismiss the application with reasons to follow. I then proceeded with the trial. Master Corporal Pett pleaded not guilty but was found guilty of all charges on 5 December. The court closed to determine sentence on 6 December. What follows are the reasons for my decision to dismiss the plea in bar application.

THE EVIDENCE

[7] The evidence submitted by the parties consists of a copy of the impugned order of 2 October 2019 by the CDS, which has been reproduced and included as an Annex to this decision. Copies of previous CDS orders of a similar nature, as well as Canadian Forces Organizational Orders (CFOOs) and Ministerial Organizational Orders (MOOs) applicable to the Office of the Chief Military Judge and the Canadian Forces Support Unit Ottawa or its successor Canadian Forces Base Ottawa-Gatineau respectively have also been entered as exhibits.[5]

[8] At the beginning of the hearing I engaged counsel on those facts and matters contained in *Military Rules of Evidence*[6] 15 and 16, that is to say, required and discretionary judicial notice, so that I could refer to matters mentioned in these rules to decide the issues pertaining to this application. Counsel did not have any objections in that regard so I may take these matters under judicial notice as required.

POSITION OF THE PARTIES

The applicant

[9] The applicant submits that the 2 October 2019 order by the CDS giving disciplinary power over military judges to the executive impugns judicial independence in a manner which cannot be sufficiently remedied by the institutional background of the military judiciary. In that order, the CDS designates the officer appointed to the position of Deputy Vice Chief of the Defence Staff (DVCDS) to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge. The next superior officer to whom the DVCDS is responsible, when exercising these powers, is the Vice Chief of the Defence Staff (VCDS).

[10] In written submissions, the applicant highlighted the symbiotic and interrelated roles and status of military judges as both judges and officers. The impugned order is described as the symptom of what ails the status of military judges as independent judicial officers. Orally, counsel for the applicant highlighted the insufficient separation between what is described as the conflicting roles of military judges as judicial and executive officers. Pointing to the impugned order and other regulations and orders, the applicant submits that the possibility of interference by the military hierarchy crosses a "bright line" which objectively threatens judicial independence and violates any accused's rights under paragraph 11(*d*) of the *Charter*. In the applicant's view, this defect is systematic and cannot be cured simply by ignoring or declaring the impugned order unlawful.

The respondent

[11] The respondent argues that there are no concerns of judicial independence at play in this application, the 2 October 2019 order being simply an update of a similar order previously issued to take into account an administrative reorganization which saw the creation of a position of DVCDS. The impugned order does nothing more than designate a commanding officer to exercise disciplinary powers over military judges to ensure that the administrative requirements necessary to apply the Code of Service Discipline to military judges are met, just as they are for every member of the Canadian Armed Forces (CAF). Therefore, the impugned order does nothing to alter the situation of military judges vis-à-vis the Code of Service Discipline: they can be charged, dealt with and tried under the *Code* as they have always been.

[12] The essence of the respondent's argument is that Parliament has stated that military judges need to be officers and that officers are subject to the Code of Service Discipline. The Supreme Court of Canada has recognized the dual role of military judges as judicial officials and military officers. Hence a reasonable observer would not apprehend bias when the military hierarchy takes measures such as the impugned order to ensure that the Code of Service Discipline is applied to military judges. That is especially so given the many protections built into the *NDA* and QR&O ensuring judicial independence. These measures should lead me to conclude that the applicant has not met its burden to demonstrate that the "bright line" referred to has been crossed. Therefore, the respondent concludes that no allegations pertaining to judicial independence of military judges can be brought on an institutional level. The only receivable challenge to the impugned order could be from a military judge facing charges and alleging that the designated commanding officer has not exercised his or her discretion appropriately.

ANALYSIS

The questions raised by this application

[13] Having read and heard the arguments of the parties and considered them in light of the applicable jurisprudence, I have concluded that this application can be analyzed and ultimately decided by answering the following questions:

(a) How does the Code of Service Discipline allow the prosecution of an officer who also holds the office of military judge?

(b) Does the liability of officers holding the office of Military Judge under the Code of Service Discipline raise concerns of judicial impartiality?

(c) If so, are there sufficient safeguards to alleviate these judicial impartiality concerns?

(d) Does the impugned CDS order undermine these safeguards to the extent that a reasonable person fully informed of all the circumstances would

consider that military judges do not enjoy the necessary guarantees of judicial impartiality?

(e) If so, should the plea in bar be granted or are there other appropriate remedies to address any concerns raised by this application?

First question: How does the Code of Service Discipline allow the prosecution of an officer who also holds the office of military judge?

(a) Introduction

[14] Both parties submit that military judges are subject to the Code of Service Discipline by virtue of their status as officers in the CAF. However, their views differ as to the impact of that legal fact. It will be helpful at this stage to review exactly how the Code of Service Discipline applies to an officer who also holds the office of Military Judge. Explaining how a military judge could be charged and dealt with while reviewing the role of the various members of the Executive involved will provide the backdrop necessary to the analysis of the issues of judicial independence and impartiality raised by this application. This will hopefully ease the understanding of issues related to the legislative and regulatory framework as well as the impact of the impugned CDS order of 2 October 2019.

(b) Analysis

Regular force officers are subject to the Code of Service Discipline

[15] Subsection 60(1) of the *NDA* provides that an officer or non-commissioned member of the regular force are subject to the Code of Service Discipline. This jurisdiction applies at all times and in all places.[7] The *NDA* is silent about the application or non-application of the Code of Service Discipline to an officer on the basis of his or her office as military judge or on the basis of the performance of judicial duties at the time of or in relation to an alleged offence.

Military judges are officers in the regular force

[16] Anyone wishing to be appointed as a military judge must first be an officer.[8] Those appointed by Governor in Council to be military judges continue to be officers, holding the same officer rank they had at the time of their appointment. However, appointment to the office of Chief Military Judge requires the incumbent to hold or be assigned a rank that is not less than colonel.[9] Since the major revision of the *NDA* brought by the passing of Bill C-25 in 1998 and the resulting regulatory changes which came into force in 1999, there has been as few as two and as many as five military judges serving concurrently. At the time of their appointment, they were all members of the bar of a province and serving legal officers with the Office of the Judge Advocate General (Office of the JAG), regular or reserve force, in the rank of lieutenant-colonel or colonel or their naval equivalent.

[17] On appointment, military judges resign from their law society as they are no longer lawyers. They are no longer legal officers in the Office of the JAG. However, they remain members of the Legal Branch, a personal branch of the CAF which includes officers and non-commissioned members involved in the legal field, mainly for cohesion and ceremonial purposes.

[18] Military judges are or become members of the regular force following their appointment, performing their duties on a full-time basis. It is to be noted that there are currently no part-time military judges: legislative provisions providing for a Reserve Force Military Judges Panel have not resulted in such a panel being put in place in practice. Under current legislation, only a former military judge can be a reserve force military judge.

[19] Military judges preside at courts martial and perform other judicial duties such as presiding at custody review hearings. They may also perform non-judicial duties as assigned by the Chief Military Judge. In practical terms, the day-to-day duties of a military judge are not any different than those of civilian judges. The main particularity of their judicial duties, by no means unique to the military judiciary, is that they frequently need to travel on duty from their residence in the National Capital Region to military installations where they preside at courts martial or other judicial proceedings. They also attend conferences and training sessions for the judiciary. When they are not on travel status, military judges review decisions prior to publication, prepare for upcoming hearings and cases, keep up to date with developments in the law or perform similar duties from facilities in the National Capital Region hosting the Office of the Chief Military Judge.

[20] Military judges cease to hold their office once they are administratively released from the CAF at their request or upon attaining the age of 60 years.[10] However, a military judge may resign from that office upon giving notice in writing to the Minister of National Defence (the Minister).[11] Once the resignation takes effect, the officer is no longer a military judge but remains an officer in the CAF, regular force, until released. There is no mechanism for the automatic administrative release from the service of an officer who ceases to hold the office of military judge. Such an officer could continue to serve in the CAF in whatever capacity, most likely in the legal field, once readmitted to a provincial bar. A former military judge could also serve as an officer in any CAF position which does not require a particular occupational affiliation.

[21] Anyone subject to the Code of Service Discipline at the time of the alleged commission of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence even after ceasing to be subject to the *Code*, for instance after release from the CAF.[12] A military judge could therefore have to respond to charges after retirement from the Bench and the CAF, as a civilian.

The laying of charges under the Code of Service Discipline

[22] Proceedings against a military judge who is alleged to have committed a service offence would be initiated by the laying of a charge in accordance with regulations.[13] QR&O article 107.02 provide that a commanding officer, a member authorized by a commanding officer or a member of the military police assigned to investigative duties with the Canadian Forces National Investigation Service (CFNIS) may lay charges under the Code of Service Discipline. The DVCDS has been designated by the impugned order to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge. There was no evidence introduced as to whether the DVCDS has authorized anyone under his or her command to lay charges against a military judge but as commanding officer he or she could lay such a charge. Anyone authorized to lay a charge against an officer, including a military judge, must obtain legal advice from a legal officer of the Office of the JAG.[14]

The Canadian Forces National Investigation Service (CFNIS)

[23] The CFNIS was established in 1997 as a Military Police unit entrusted with the mandate to investigate serious and sensitive matters related to the Department of National Defence (DND) and the CAF independently from the military chain of command. The CFNIS is composed of approximately 65 to 70 Military Police investigators under the command of a Commanding Officer who reports directly to the Canadian Forces Provost Marshal. (Provost Marshal). The Provost Marshal is a military police officer who is appointed by the CDS and acts under the general supervision of the VCDS.[15] Given the nature of their mandate to investigate serious and sensitive matters, CFNIS investigators frequently testify before military judges at courts martial.

The referral of charges

[24] After a charge is laid, it must be referred to an officer who is a commanding officer in respect of the accused person.[16] In the case of a military judge, the impugned order provides that the DVCDS would fill that role. Any commanding officer to whom a charge against an officer has been referred shall make a decision as to its disposal, in essence deciding whether to proceed with the charge or not. Advice from a legal officer of the Office of the JAG must be obtained prior to deciding to dispose of a charge laid against a military judge. Any decision not to act on the legal advice provided must be justified in writing and provided to the legal officer who provided the advice and to the officer to whom the commanding officer is responsible in matters of discipline.[17] Furthermore, a decision not to proceed with a charge laid by an investigator from the CFNIS requires the commanding officer to communicate the decision and reasons in writing to the investigator, with copy to the officer to whom the commanding officer is responsible in matters of discipline. The CFNIS investigator can then refer the charge directly to a referral authority if he or she considers the charge should be proceeded with.[18] A commanding officer who decides to proceed with the charge may further refer the charge for trial, either by court martial or summary trial. A referral for summary trial can be made to a superior commander who may try summarily an officer of the rank of lieutenant-colonel or below in some circumstances.[19] However, the *NDA* provides expressly at section 164 (1.3) that military judges cannot be tried summarily.[20]

Essentially then, any charge against a military judge would need to be referred to the DMP with a recommendation for trial by court martial through a referral authority.[21]

The Director of Military Prosecutions (DMP)

[25] It is then the DMP, an officer with at least ten years standing at the bar of a province, appointed by the Minister, who is responsible for making the decision as to whether the charge or charges that has or have been referred or any other charge shall be preferred for trial by court martial. The DMP also conducts all prosecutions at courts martial and represents the Minister on all appeals to the CMAC and the Supreme Court of Canada.[22] In the exercise of these roles, the DMP is assisted and represented by approximately 15 to 20 regular force legal officers from the Office of the JAG.

[26] The referral would not likely be the first occasion that the DMP has been made aware of charge(s) being considered against a military judge. Indeed, the DMP is responsible for providing advice in support of investigations conducted by the CFNIS. An investigation involving a military judge would most likely be considered a serious and sensitive matter within the mandate of the CFNIS. Therefore, in all likelihood, a legal officer or prosecutor under command of the DMP will have provided advice to investigators as required prior to any charge being laid against a military judge, whether it is a Regional Military Prosecutor or a Prosecutor or legal officer affected to CFNIS Headquarters in Ottawa.[23]

[27] I have considered the DMP Policy Directive on appointment of special prosecutors[24] and it does nothing to change the legislated situation. In law, there is only one official – the DMP – who is granted the authority to decide who is brought before a court martial and on what charges, regardless of whether the military prosecutor representing the DMP is a legal officer from the Office of the JAG or not. The DMP cannot cease to exercise his or her office in relation to a given matter. He or she is the DMP and acts under the general supervision of the JAG in his/her prosecutorial exercise and remains under the command of the JAG.

The Judge Advocate General (JAG)

[28] The JAG is the senior legal officer, appointed by the Governor in Council to act as legal adviser to the Governor General, the Minister, the DND and the CAF in matters relating to military law.[25] Importantly, the JAG is also entrusted by the *NDA* with the superintendence of the administration of military justice.[26] The JAG commands all legal officers posted to a position established within the Office of the JAG, including legal officers and prosecutors assigned to the DMP as well as the Director of Defence Counsel Services (DDCS).[27] This represents approximately 200 to 220 legal officers.

[29] The role of the JAG is all encompassing. Legal officers under command of the JAG are given responsibilities to provide advice at all levels and in relation to various legal issues that may arise in any given matter involving responsible officers of the chain of command and members of the CAF. Traditionally, uniformed legal officers,

who must be members of a provincial bar, provide legal advice in the three pillars of military law: military operations, military discipline and military administrative law. In providing this advice, legal officers are not subject to the command of an officer who is not a legal officer.[28]

[30] To illustrate with an issue of concern in recent years, DAOD 5019-5 provides that an incident of sexual misconduct shall be reported to either a commanding officer, the military police or a local representative of the JAG.[29] Therefore, legal officers under command of the JAG may have to advise a complainant or a victim of sexual misconduct. From that initial stage, legal officers under command of the JAG either directly or through the DMP have responsibilities for the delivery of legal advice to the investigator(s), the person laying any charge, the commanding officers and other members of the military hierarchy dealing with charges up to the point of referral to the DMP, after which they conduct the prosecution and any appeals to the CMAC and the Supreme Court of Canada as required.

[31] Therefore, legal officers of the Office of the JAG provide legal advice when a charge is laid. This disciplinary process involving charges and trial is not the only means by which military authorities may reconsider a person's career with the CAF. Even if military tribunals have the power to impose punishments such as dismissal or reduction in rank which have immediate career consequences,[30] similar consequences may also result from a process of administrative review of any member of the CAF who is believed to have been involved in misconduct, regardless of whether a court martial or criminal trial in civil court was held.[31] Following administrative review, the assessment of career consequences that must or may flow from the misconduct is a matter to be decided by authorities in the military hierarchy, acting on the advice of legal officers from the Office of the JAG as required.

[32] Legal officers are particularly apt at advising on all issues of disciplinary and administrative law, considering that the Office of the JAG has had significant involvement in developing the legislation, regulations, as well as the orders and instructions which constitute the core of the body of law known as military law and, more specifically, the military justice system. As recognized recently by the Supreme Court of Canada, the military justice system has come a long way in the last 30 years, growing and responding to developments in law and society, a dynamic evolution that will no doubt continue into the future.[32] Key to this evolution is the contribution of legal officers who have recommended changes to the *NDA* and its regulations and advised parliamentarian and other officials through appearances at Senate and House of Commons committees as subject-matter experts.

Convening of courts martial by the Court Martial Administrator

[33] Once a charge is preferred by the DMP, meaning that the charge appears on a charge sheet signed by the DMP or a representative and filed with the Court Martial Administrator (CMA), a court martial has to be convened.[33] The CMA is an office provided for in the *NDA*. It is occupied by a civilian who acts under the general

supervision of the Chief Military Judge.[34] After receipt of a preferral, the CMA convenes a General or Standing Court Martial, depending on the nature of the charge and on the choice of the accused person.[35] The composition of a General Court Martial panel is set out in section 167 of the *NDA*. Membership on the panel is based on the rank of the accused person. For instance, if the accused is an officer of the rank of lieutenant-colonel, as most military judges are, the five members of the panel must be officers of or above the rank of lieutenant-colonel.[36] Members of the panel of a General Court Martial capable of understanding the evidence in the language of trial chosen by the accused are selected using random methodology.[37] Some officers are not eligible for appointment, for instance if serving in the unit of the accused.[38] The regulations provide that selected personnel may be excused in certain circumstances.[39]

[34] Upon receipt of a preferral, the CMA informs the Chief Military Judge or a delegated military judge who then assigns a military judge to preside at the court martial.[40] Once the type of court martial has been selected and the required details necessary for the trial to take place have been determined[41], typically following a coordinating teleconference with counsel for both parties before the Chief Military Judge or a delegate, the CMA issues a convening order for the Court Martial.

[35] The convening order gives its existence to a specific type of court martial, presided by a named judge to try a specific accused on the charges appearing on the charge sheet. Hence, courts martial are *ad hoc* tribunals. They come to existence by virtue of the convening order and their existence ceases once the military judge pronounces the proceedings to be terminated. There is no permanent military court. Military judges are therefore part of a military judiciary "pool" to be assigned to preside courts martial.

(c) Conclusion

[36] I conclude that the legislative provisions require that military judges be officers prior to their appointment and remain officers to keep their judicial office. That makes them liable to be charged and dealt with under the Code of Service Discipline for any offence committed during that period of service as officers. No legislative or regulatory provisions limit the prosecution of an officer on the basis of holding the office of military judge or on the basis of the performance of judicial duties at the time of or in relation to an alleged offence.

[37] On the basis of that legislated and regulatory framework, a military judge can be charged either by a commanding officer, a member designated by a commanding officer or by an investigator with the CFNIS. The impugned order designates the DVCDS to exercise the powers and jurisdiction of a commanding officer for that purpose. The charge is then subsequently referred onwards through a number of military authorities to be finally considered by the DMP for a decision as to whether to prefer a charge for trial by court martial, the only mode of trial available to military judges. Legal officers from the Office of the JAG are involved throughout this process in providing legal advice within a legal framework they are most familiar with given the role of the Office

of the JAG in the development of military law and the superintendence of the military justice system.

Second question: does the liability of officers holding the office of Military Judge under the Code of Service Discipline raise concerns of judicial impartiality?

(a) Introduction

[38] I have demonstrated how the legislative and regulatory provisions operate to make military judges liable to be charged and dealt with under the Code of Service Discipline while they hold their judicial office. I have also elaborated on the role of the actors involved. I now need to address the arguments of parties as to what impact the liability of military judges under the Code of Service Discipline in these circumstances has on judicial impartiality.

(b) Analysis

Position of Parties

[39] The applicant argues that the degree of connection between a military judge's judicial and executive status crosses a bright line of what is permitted by paragraph 11(*d*) of the *Charter* to enter into an area of "insufficient" judicial independence, illustrated by the impugned order.[42] The respondent replies that the order could only threaten judicial independence if the commanding officer attempted to exercise undue influence on a military judge through the laying of charges or the threat to do so.[43]

Framework of Analysis

[40] On the basis of these arguments, the framework of analysis used by the Supreme Court of Canada in *R. v. Lippé*[44] can provide some assistance. *Lippé* is a case where the Quebec municipal court system permitting judges to also be practicing lawyers was analyzed for conformity with paragraph 11(*d*) of the *Charter*.

[41] The applicant is not challenging the impartiality of military judges on the basis of personal bias.[45] Even if the applicant has framed its application as an issue of judicial independence, his arguments on the dual status of military judges reaches more broadly, straddling both concepts of independence and impartiality, the other component of the right protected in paragraph 11(*d*). These concepts were discussed at length by Lamer C.J. in *Lippé*.[46] In short, the Supreme Court of Canada found that the overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality. Judicial independence is a critical prerequisite to the public's perception of impartiality but it is only one of its components. Judicial impartiality also includes institutional impartiality. *Lippé* recognizes that even if a court may meet the three criteria of judicial independence discussed in *Valente v. The Queen*[47] there may also exist a reasonable apprehension of bias on an institutional or structural level.

Test to be applied

[42] The test for judicial impartiality, of which judicial independence is a component, is whether the structure of the court or judicial entity under analysis would give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person. Both this application and *Lippé* involve allegations of partiality on an institutional level. The similarity in the analysis of dual judicial and professional roles in relation to paragraph 11(*d*) of the *Charter* is useful for this application. The first step of the test is to determine whether any reasonable apprehension of bias would arise in a substantial number of cases. If it is so, allegations of apprehension of bias can be brought on an institutional level as opposed to being dealt with on a case-by-case basis. The test therefore addresses the parties' arguments: the applicant arguing that the institutional degree of connection between a military judge's judicial and executive status crosses a bright line and the respondent replying that any threat to judicial independence would be the result of an attempt to exercise undue influence in a specific case.

[43] Both the liability under the Code of Service Discipline of officers holding the office of military judges and the impugned order signalling an intent by the military hierarchy to exercise disciplinary powers over officers while in office as military judges raise issues of judicial impartiality at the institutional level.

Judicial independence concerns

[44] First, as it pertains to judicial independence, it is useful to return to the analysis of the municipal court system in *Lippé*, where Lamer C.J. quickly assumed that the three judicial independence criteria from *Valente* were satisfied. In mentioning that there were no issues of judicial independence to be analyzed, reliance was placed on the absence of a simultaneous disciplinary regime in respect of the dual judicial and professional roles of municipal court judges:

> The facts of this case raise no "independence" problem because the Barreau du Québec has no authority over the municipal court judge in his or her capacity as a judge. However, if legislation provided for the discipline of municipal court judges by the Barreau du Québec, such provisions would raise problems of judicial independence.[48]
> [Emphasis in original.]

[45] The situation of military judges is different. Indeed, the CAF hierarchy has disciplinary authority over military judges under the legislative and regulatory framework and has expressed in the impugned order an intention to exercise that authority. As explained, military judges as officers in the regular force, they are at all times liable to be charged and dealt with under the Code of Service Discipline. Not excluded from the application of the disciplinary jurisdiction of the CAF by legislation, military judges are further expressly included in the exercise of that disciplinary jurisdiction by the impugned order. I must conclude that military judges, contrary to municipal court judges, are under the disciplinary authority of the military hierarchy as officers even in their capacity as judges.

[46] In *Lippé*, Lamer C.J. mentions that the content of the principle of judicial independence is limited to independence from the government. Yet, "government" has a broad meaning:

> I do not intend, however, to limit this concept of "government" to simply the executive or legislative branches. By "government", in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state.[49]
> [Emphasis in original.]

[47] Members of the military hierarchy are part of "government" in this regard. It is trite to state that the laying or referring of a charge against a military judge would exert pressure on this member of the judiciary. Consequently, the general liability of military judges under the Code of Service Discipline and the specific authority given to a general officer of the military hierarchy to deal with charges against them by the impugned order engages issues of judicial independence.

[48] In oral argument, the suggestion was made that there can be no institutional issue of judicial independence as any involvement of members of the military hierarchy and legal officers in charging and dealing with a charge against a military judge would be ultimately decided by an independent judicial official, namely another military judge presiding the trial of his or her colleague. This appears to me as circular reasoning which does not take into account the impact of a military judge being charged and dealt with under the Code of Service Discipline. Indeed, as soon as a charge is laid or even before, a military judge would in effect be isolated from judicial functions at courts martial. The possibility of a military judge being obliged to isolate himself or herself from judicial duties as a result of a charge and even an investigation initiated exclusively by government agents is sufficient, in the context of the Code of Service Discipline, to generate legitimate concerns of judicial independence and impartiality.

Institutional Impartiality Concerns

[49] Turning now to institutional impartiality, the respondent argues that since the Supreme Court of Canada decision in *R. v. Généreux*[50] in 1992, questions of independence of courts martial have all been addressed in the *NDA* and QR&O, including security of tenure following the CMAC decision in *R. v. Leblanc*.[51] The existence of independence or impartiality concerns in relation to military judges who are also officers is by no means new and I agree the road travelled since *Généreux* has been filled with worthy landmarks in terms of improvements to judicial independence. However, the question remains as to whether these changes are sufficient to address the broader judicial impartiality issues.

[50] The specificity of military tribunals has been recognized by the Supreme Court of Canada, even before the *Charter*, in relation to the performance of judicial functions by officers in the operation of a separate system of military law. In *MacKay v. The Queen*, the Court has found that the status of the president of a Standing Court Martial as an officer did not prevent the tribunal from being an independent tribunal within the

meaning of paragraph 2(f) of the *Canadian Bill of Rights*.[52] A similar conclusion was reached in *Généreux* where Lamer C.J. recognized that the idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system.[53]

[51] These decisions suggest that the conditions of judicial independence need not be applied with a uniform institutional standard to military tribunals – some flexibility must be granted in the application. However, the importance of the independence was nevertheless restated in *Généreux* in these words:

> It is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces. [54]

[52] An important landmark on the road to judicial impartiality came in 1997 with the release of the First and Second Dickson reports[55] as well as the Somalia Inquiry Report.[56] These reports addressed the fundamental importance of independence of the military judiciary.[57] Many of the recommendations found in these reports were implemented in Bill C-25[58] and consequential QR&O amendments, together representing the significant military justice reform of 1997-1999. Yet, these important developments were not sufficient to alleviate concerns regarding institutional impartiality.

[53] Indeed, the 1997-1999 reforms were independently reviewed by former Chief Justice Lamer in his landmark report of 2003 constituting the first independent review of the provisions and operation of Bill C-25.[59] The *Lamer Report* remarked that despite significant improvements, the measures put into place to ensure the independence of the military judiciary remain inadequate. A recommendation was made to confer security of tenure to military judges until retirement.[60] That recommendation had not been implemented by the time the issue was addressed by the CMAC in *R. v. Leblanc*, which found the five-year terms in force at the time to be unconstitutional, giving Parliament six months to establish an adequate scheme.[61] Legislation to accomplish this security of tenure requirement came into force a few days before the deadline.[62]

[54] Former Chief Justice Lamer also recommended in his report that the *NDA* be amended to establish a permanent military court of record to deal most efficiently with difficulties faced by military judges as they try to contort the system of *ad hoc* courts martial into an independent judicial institution. Recommending that a working group be established to identify the most effective framework for its creation, he went on to recommend interim measures to be implemented before the permanent military court could be set up.[63] Some of these interim measures have been put in place, notably by the quick passing of Bill C-60 in June 2008[64], in response to the CMAC decision in *R. v. Trépanier*, which had brought the court martial system to a halt until Parliament intervened.[65]

[55] The second mandated review of the military justice system was completed in 2011 by the Honourable Patrick J. LeSage, former Chief Justice of Ontario.[66] Despite

being closely supported by members of the Office of the JAG throughout his work, Justice LeSage stated that he was not given access to any work product related to the establishment of a permanent military court, which he supported.[67] Consequently, as former Chief Justice Lamer had done before, he took position for interim measures to enhance the capacity of military judges to function as a permanent institution. For instance, he recommended that military judges be granted authority in legislation to convene a court martial immediately after a charge is preferred so they can deal with the case using trial management powers, thereby avoiding delay.[68] Justice LeSage also expressed his concerns with the optics of an independent judiciary within a military structure and recommended that there be one distinct rank of "military judge" for all military judges, including the Chief Military Judge. That way, it would be made clear to observers that although the chain of command is important in a military structure, it cannot govern the job performed by military judges, even from within the military judiciary.[69] The foresight of the LeSage recommendations is obvious when one considers subsequent developments.[70]

[56] Even if interim measures were implemented, the main recommendation of these eminent jurists for the establishment of a permanent military court was evidently not pursued. Military judges keep operating within the CAF structure, even in the exercise of their judicial functions. They have a rank that places them in a given position in the CAF rank structure to most observers.

[57] I am aware that the failure to implement recommendations aimed at enhancing judicial independence does not mean, in itself, that courts martial presided by military judges are not independent and impartial tribunals. As recognized in *Valente*, efforts to strengthen the conditions of judicial independence in a movement towards the ideal may need to be adjusted to reflect the variety of tribunals.[71] The constitutional protections of judicial independence do not guarantee the ideal.[72] That said, the observations made in 2003 and 2011 are relevant to the determination of whether the military judiciary may be reasonably perceived as independent and impartial. As recognized by Lamer J. in his report "constitutionality is a minimum standard. … [T]hose responsible for organizing and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied."[73]

Sufficiency of these efforts to address institutional impartiality concerns

[58] The test that must ultimately be met to assess institutional impartiality is based on perception. It is whether the institutional structure of the court or judicial entity under analysis would give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person. That standpoint may evolve over time, as demonstrated by the imperatives which have lead the military justice system on a continuous path of improvement, including unfavourable judicial decisions on the constitutionality of legislative provisions. That is not surprising. The concept of judicial independence has been an evolving one not unlike other constitutional protections.[74] *Charter* rights have the possibility of growth and adjustment over time and must not be constrained by historical considerations of the time they were enacted.[75] What may

have been acceptable for accused persons before courts martial in terms of judicial independence in 1980 and 1996 may no longer be acceptable in 2019.

[59] There has been no doubt many positive changes made in strengthening the institutional impartiality of military judges over time. However, those changes are not sufficient to fully address institutional impartiality issues, as military judges are facing today a clear expression of intent from the military hierarchy by the impugned order that they be treated as any other officer for the application of the Code of Service Discipline and there are no institutional barriers in place to prevent that institutional imposition from materializing.

(c) Conclusion

[60] This situation could lead an informed observer to reasonably conclude that military judges do not enjoy the essential conditions of judicial independence, in this case the independence from government. The same observer could also conclude that the institutional impartiality of military judges is threatened by the existence of simultaneous disciplinary regimes for judges and officers, as well as the lack of adequate response to concerns expressed by eminent jurists on the independence of the military judiciary, most notably recommendations for the creation of a permanent military court by Justice Lamer and, to a lesser extent, the creation of a rank of "military judge" by Justice LeSage.

[61] The problem of judicial independence raised by this application is not so much a military judge also being an officer but rather a military judge being liable to be charged in his or her capacity as a judge, which is exactly what the impugned order does: the CDS, a government official member of the executive, can reasonably be seen as specifically targeting military judges on the basis of their office to ensure that they can be charged and dealt with under the Code of Service Discipline as every other officer.

[62] I conclude, therefore, that there could be a reasonable apprehension of bias in the mind of a fully informed person appearing before a military judge presiding either a Standing or General Court Martial in a substantial number of cases. Therefore, in relation to step one of the test in *Lippé*, I find that allegations pertaining to the lack of judicial impartiality of military judges can be brought at an institutional level by the applicant. The status of military judges as officers liable to be charged and dealt with under the Code of Service Discipline through the disciplinary authority of members of the military hierarchy in their capacity as judges is *per se* incompatible with the function of a judge.

Third question: Are there sufficient safeguards to alleviate judicial impartiality concerns?

(a) Introduction

[63] Having concluded, in step one of the test in *Lippé*, that allegations pertaining to the lack of judicial impartiality of military judges can be brought at an institutional level by the applicant, I now need to determine whether the effects of that incompatibility have been sufficiently attenuated by safeguards built into the applicable legislative framework.

[64] Without referring to *Lippé*, the respondent has submitted arguments in line with step 2 of the *Lippé* analysis, mentioning the existence of a number of safeguards, in the *NDA* and QR&O, to minimize the prejudicial effects of the alleged incompatibility of status and ensure the judicial impartiality of military judges. In response, the applicant provided a Book of Authority containing extracts of a number of provisions, especially from QR&O, showing that military judges are indeed subject to potential pressures or obligations imposed by the military hierarchy.

[65] Despite these conflicting submissions, it remains that the question to be answered is whether the fully informed person, who of course has knowledge of safeguards in place, would be of the view that judicial impartiality issues have been substantially resolved. To once again borrow from the applicant's submissions, the issue is whether the safeguards in place move the military judges and the courts martial they preside to the constitutional side of the bright line.

(b) Analysis

Position of the Parties

[66] The respondent submits that the requirement for obtaining legal advice both before a charge is laid against a military judge, and before the commanding officer makes a determination as to whether the charge ought to proceed, acts as a safeguard to prevent a commanding officer from using the military justice system improperly in relation to a military judge.[76] I respectfully disagree and will deal with the submission shortly.

[67] In addition, the respondent refers to eight dispositions acting as safeguards in his pleadings, as follows:[77]

(a) A military judge can only be removed for cause (*NDA* subsection 165.21 (3));

(b) A military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction (*NDA* section 165.231);

(c) Only the Chief Military Judge can assign duties to a military judge, so long that they are not incompatible with their judicial duties (*NDA* subsection 165.23 (2));

(d) Military judges have a separate pay scheme (*NDA* section 165.33 and QR&O Chapter 204);

(e) A military judge can only be released voluntarily (QR&O articles 15.01, 15.17 and 15.18);

(f) A military judge cannot be the object of a Relief from Performance of Military Duty (QR&O article 19.75);

(g) Military judges have a separate scheme for grievances (*NDA* section 29.101); and

(h) No personal report, assessment or other documents shall be completed for a military judge if such a document can be used in whole or in part to determine the training, posting or rate of pay of the officer, or whether the officer is qualified to be promoted (QR&O articles 26.10 and 26.12).

[68] I agree that all of these provisions act as safeguards at various degrees. However, I need to comment on four aspects in particular which have been the subject of discussions at the hearing of the application.

Relief from performance of military duty

[69] While it is true that military judges have been expressly exempted from the provisions dealing with relief from performance of military duty, such exemption has also been provided to the benefit of all other offices in the *NDA* held during good behaviour. The exemption therefore applies to the Provost Marshal, the DMP and the DDCS. Consequently, this exemption has not been designed specifically as a safeguard against the prejudicial effect of the dual function of officer and military judge.

[70] While it is true that QR&O article 19.75 deals with relief from the performance of military duty in general, the provision found at QR&O article 101.09 on "Relief from Performance of Military Duty – Pre and Post Trial" is more relevant to the issues raised in this application. This article provides that an officer may be relieved from the performance of military duty on three occasions: where an investigation has commenced and there are reasonable grounds to believe that the member has committed an offence, where the member has been charged with an offence; and where the member has been found guilty of an offence. This provision does not apply to a military judge, the Provost Marshal, the DMP or the DDCS. However, it does provide a strong indication to these office holders as to what occurrences should lead them to step away or relieve themselves from their duties given that all of these circumstances may generate an apprehension of bias in the mind of an informed observer as to the impartial performance of duties by these officers. For instance, how can a military judge be perceived to be objective in assessing the constitutional validity of an investigation on any grounds if he is under investigation by the same agency himself? How can she be perceived to be impartial vis-à-vis the representative of the DMP before her if the same

office is responsible to advise the investigation concerning her and to assess whether charges should be preferred? In that sense, the exemption from the application of the relief from duty provisions offers little protection from the risk discussed above of an investigation or a charge which will, in effect, isolate a military judge from his or her judicial functions.

Immunity of military judges

[71] Section 165.231 of the *NDA* deals with the immunity of military judges, providing that a military judge has the same immunity from liability as a judge of a superior court of criminal jurisdiction. This enactment results from a recommendation by former Chief Justice Lamer in his report, in the discussion pertaining to institutional independence of military judges and tribunals.[78] The respondent submits that this provision is to the effect that military judges cannot be charged in relation to an act or omission committed in relation to their duties.[79] I respectfully disagree. As the applicant submitted, the scope of this provision is limited to civil liability. The *Lamer Report* expressly mentions protection from civil liability in justifying its recommendation regarding this provision. Section 165.231 does not deal with the application of the Code of Service Discipline. The analysis of the general issue of immunity of superior court judges in relation to a similar provision reveals that this immunity concerns matters of civil liability and does not extend to purely extrajudicial acts or those alien to judicial duties.[80]

[72] While the immunity provision is a safeguard in relation to institutional independence, it does not have the effect alleged by the respondent. A military judge is not immune from liability under the Code of Service Discipline in relation to what he or she says and does in the performance of judicial duties. Furthermore, from a judicial impartiality point of view, protection from civil liability is not likely to have any effect on a potential perception of improper influence by members of the military hierarchy.

Provision of legal advice

[73] As it pertains to the requirement to obtain legal advice when decisions are made by commanding officers and referral authorities in relation to charges, I am not convinced of the respondent's argument as it pertains to the safeguarding effect of such a measure in the context of military judges.

[74] I acknowledge that commanding officers and the legal officers advising them at every significant step of the way are presumed to be exercising any discretion involved in charging and appropriately dealing with the accused.[81] However, the issue in terms of judicial impartiality is one of perception of the relationship between military judges and the government, which includes the military hierarchy and legal officers advising them. Indeed, both are state agents who enable the conduct of military operations while occasionally exercising a level of prosecutorial discretion. The Supreme Court has recognized in *Généreux* the close ties between the JAG and the executive in its analysis of the judicial independence of courts martial.[82] That is certainly the view expressed by Letourneau J.A. from the CMAC in *R. v. Lauzon*[83]. Those decisions predate the

creation of the DMP following the 1997-1999 reforms but the office of the DMP is still within the CAF and closely linked to the JAG, who has the authority to issue both general and case-specific instructions to the DMP.[84] Therefore, for the purpose of the judicial impartiality analysis, the military hierarchy, JAG and the DMP are all part of the government.

[75] From a perception point of view, it is useful to recall that one of the main concerns leading to the military justice reforms of 1997-1999 was that members of the chain of command may have covered up indiscipline and serious offences committed by their troops in the preparation for and deployment to Somalia. The solution adopted was to limit the control of the chain of command in three ways: first on investigations by conferring to the CFNIS the responsibility for serious and sensitive offences and allow a CFNIS investigator to refer a charge to DMP should a commanding officer decide not to proceed;[85] second, on charges by abolishing the power to dismiss charges and to oblige a commander to justify a decision not to proceed with charges laid by the CFNIS;[86] third, by creating a measure of external review by obliging commanders to obtain legal advice at every significant step once an investigation is completed and to oblige justification for departure from that advice.[87]

[76] In effect, these measures shifted a measure of control over who gets charged and prosecuted under the Code of Service Discipline away from the military hierarchy to officers under the command of the JAG who advise them and CFNIS investigators who can refer charges to the DMP over contrary decisions from the chain of command. Yet, this shift is wholly within the executive and, therefore, I fail to see how it could influence perceptions of judicial impartiality.

[77] This is not to say that disciplinary actions against a military judge may not be perceived as being related to an interest by the state actors involved. Leniency may be perceived as the manifestation of a protective instinct to the benefit of a fellow member of the small CAF legal community. Conversely, the decision to charge a military judge may be seen as retaliation, either on the part of a military commander acting disingenuously to punish a military judge who has rendered an unpopular decision or from legal officers in retaliation for past decisions of a military judge which conflict with the positions defended by the Office of the JAG on legislation, means of investigation and/or strength of a case for instance. The respondent was prompt in warning against imaginary risks of legal advisors acting improperly. I agree. However, that is not the issue. The analysis is about is the perception flowing from the fact that legal officers under the command of the JAG, who have significant control over who gets charged and dealt with under the Code of Service Discipline, are deciding whether a former member of their office who has been appointed military judge should be charged, hence effectively separated from judicial functions while being brought to trial by court martial. The professionalism of those involved is not in my view sufficient to alleviate the perception issue, especially on judicial independence and impartiality protected by the *Charter*.

[78] Consequently, I am of the view that the requirement for legal advice is not in itself a safeguard capable of rectifying any judicial impartiality issue in relation to a military judge.

Limits on the assignment of duties

[79] The applicant's written submissions mention on a number of occasion the status and role of military judges as members of the executive. During oral arguments I could not get a clear answer from the applicant as to what executive role military judges actually perform. I gather from this silence that the concern being raised has more to do with the status of military judges as officers, hence subject to orders and regulations as any other officer. The respondent submits that rank or status as officer does not matter given that military judges are immune from direction of officers other than the Chief Military Judge, who only has the limited power, under the combined authority of section 165.25 and subsection 165.23(2) of the *NDA*, to direct military judges to perform other duties not incompatible with their judicial duties.

[80] I agree with the submission of the respondent. The provisions of the *NDA* dealing with duties to be performed by military judges act as a significant safeguard against the perception that, as officers, military judges are under the command authority of members of the military hierarchy.

[81] In reality, military judges are no different than civilian judges as it pertains to day-to-day duties. This may not be well understood however, as evidenced by the submissions made by the applicant on what is alleged to be orders from the CDS imposing obligations on officers to do or refrain from doing certain things. The respondent argues that these orders are not applicable. I agree.

[82] In fairness to the applicant, I acknowledge that, in all likelihood, many observers knowing the rank of military judges may in good faith conclude that, as any other officers, military judges are part of the military hierarchy. However, these observers are not the informed observers that are relevant at this stage of the judicial impartiality analysis. The informed observer is the one that knows of the safeguards of the *NDA* pertaining to military judges duties. The informed observer also understands that respect for judicial impartiality does not require total isolation from orders and instructions applicable to all members of the CAF. For instance, such observer can accept that military judges will be reimbursed for duty travel expenses in conformity with conditions set up by the Treasury Board and administered by personnel of the CAF, will obtain medical care within parameters fixed by CAF medical authorities and will comply with regulations and orders pertaining to leave administration in the CAF when scheduling time off.

[83] The reasonable observer would not question more pedestrian matters such as the wearing of the military uniform by military judges, an issue brought to my attention by counsel for the respondent at the hearing, which was the subject of a recent judicial pronouncement to the effect that military judges may choose to wear uniform or civilian

clothes on duty when not presiding a court martial in judicial robes, but have accepted the norm of wearing civilian clothes while they are on duty in connection to a court martial.[88]

[84] This example of what military judges do should not pose judicial impartiality concerns to a reasonable, well-informed observer. Military judges by necessity have to operate within a number of administrative processes governed by regulations and orders issued for the governance of the CAF. The same is true for any other judges who fulfil their duties within administrative frameworks of federal or provincial departments of justice. Total administrative isolation is not in my view required to meet judicial impartiality requirements.

Orders applicable to officers

[85] The applicant, in apparent reply to the respondent's list of orders attenuating the prejudicial effects of the combination of officer and judicial status, provided a book of authority containing a number of provisions allegedly showing that officers, hence military judges, are subject to potential pressures or obligations imposed by the military hierarchy given their status as officers. Those orders essentially provide for duties or compulsory requirements applicable to officers without express exemption for military judges. The presence of express exemptions for some professional groups, for instance, chaplains that are excluded from command at QR&O article 3.31, is acknowledged. However, the absence of express exemption *per se* does not threaten judicial impartiality. An informed observer would in my view know that military judges are necessarily immune from orders incompatible with their duties, recognizing that military judges cannot lobby the military hierarchy for exemptions without causing significant concerns regarding judicial independence.

[86] An example of these orders is found at QR&O article 4.05, discussed at the hearing, which provides that an officer visiting a base or unit shall report to the officer in command before proceeding with the object of the visit. An accused would likely object to a judge travelling to preside over his or her trial first stopping by the office of an officer who was in all likelihood instrumental in getting him or her charged in the first place and/or dealt with by court martial. For that reason there are no such visits done by military judges. To my knowledge, there have been no commanders demanding such visit. Indeed, officers in command are usually well-informed and as such would know how inappropriate any request of that nature would be. They do not need to read an express mention to the effect that such an order does not apply to military judges.

[87] The respondent also identified DAOD 5012-2 on Administrative Review as a potential threat to judicial impartiality. This order gives members of the military hierarchy authority to engage an administrative review of an officer's career when administrative action is envisaged following an incident, a professional deficiency or other circumstance that calls into question the viability of that officer's continued service in the CAF. The *NDA* and its regulations are silent as to what extent, if any, a

military judge may be subject to administrative actions or measures such as recorded warnings or counselling and probation. Yet, the difficulties in applying this order to military judges are obvious as an officer holding the office of military judge can only be released from the CAF following death or upon request.[89] What purpose could then be reached in having a military authority evaluating the viability of that military judge's continued service? The impugned order designating a commanding officer with respect to military judges does not relate to administrative actions or measures, as argued by the respondent.[90] Even the Chief Military Judge could not exercise such authority without affecting judicial independence.[91] The only conclusion an informed observer could arrive at is that military judges are not subject to administrative actions.

[88] The provisions of the *NDA* dealing with duties to be performed by military judges act as a safeguard against the perception that, as officers, military judges are under the command authority of members of the military hierarchy. This is not attenuated in any way by other orders which a reasonable observer would conclude do not apply to military judges, even absent express exclusion.

Military Judges Inquiry Committee

[89] As seen above, the respondent lists subsection 165.21(3) as a safeguard against any perception of judicial impartiality, qualifying this provision as a "removal for cause" protection. That is true but a more complete picture may be obtained by examining how causes for removal are to be assessed.

[90] The Military Judges Inquiry Committee is made up of judges from the CMAC.[92] Its role is to assess the conduct and capacity of a military judge to execute his or her judicial duties and to protect officers holding the office of military judges from termination of their service through administrative action they have not themselves initiated. The area of inquiry conferred by Parliament to the Military Judges Inquiry Committee is significant. It offers a complete solution not only for issues of capacity or ability of a military judge to remain in that role, but also to address departures from standards of conduct and fitness applicable to officers.

[91] The role of the Military Judges Inquiry Committee is both the "bright line" which protects the military judge from the exercise of power by the executive and the means to qualify the impugned CDS order as appropriate or unlawful, depending on the position of parties.

What does the Military Judges Inquiry Committee do?

[92] It is worth reproducing the provisions pertaining to the range of subject matters of any opinion the Military Judges Inquiry Committee may render, found at subsection 165.32(7) of the *NDA*:

(7) The inquiry committee may recommend to the Governor in Council	**(7)** Le comité peut recommander au gouverneur en conseil de révoquer le juge

that the military judge be removed if, in its opinion, **(a)** the military judge has become incapacitated or disabled from the due execution of his or her judicial duties by reason of **(i)** infirmity, **(ii)** having been guilty of misconduct, **(iii)** having failed in the due execution of his or her judicial duties, or **(iv)** having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her judicial duties; or **(b)** the military judge does not satisfy the physical and medical fitness standards applicable to officers.	militaire s'il est d'avis que celui-ci, selon le cas : **a)** est inapte à remplir ses fonctions judiciaires pour l'un ou l'autre des motifs suivants : **(i)** infirmité, **(ii)** manquement à l'honneur et à la dignité, **(iii)** manquement aux devoirs de la charge de juge militaire, **(iv)** situation d'incompatibilité, qu'elle soit imputable au juge militaire ou à toute autre cause; **b)** ne possède pas les aptitudes physiques et l'état de santé exigés des officiers.

[93] This scheme is unique in the *NDA*, although the DMP and DDCS are subject to a similar scheme by regulations.[93] These provisions are also broader than those applicable to other judges of federal nomination, found in the *Judges Act*[94] which do not include any reference to physical and medical fitness standards.

[94] This provision provides a number of safeguards in that it allows the conduct, performance and fitness for duty of a military judge to be evaluated by other judges on the Military Judges Inquiry Committee. In short, it is a scheme by which judges' conduct and fitness is evaluated by peers. It not only allows inquiry into conduct or failures related to the execution of judicial duties but also inquiry into misconduct and any conduct otherwise incompatible with the due execution of judicial duties, whether the misconduct or incompatible conduct occurs on duty or not.[95] The provision also allows the import of standards applicable to officers in concluding on the physical and medical fitness of a military judge to continue with his or her duty.

[95] The importance of this physical and medical fitness clause cannot be understated, especially in comparison with the provisions imposing similar conditions on officers in the CAF.

[96] Medical fitness provides a valuable illustration. An officer in the CAF who is assessed by the CAF medical staff as being disabled and unfit to perform duties on medical grounds will eventually be released under item 3 of the Table to QR&O article

15.01, following a detailed and often lengthy process. That process cannot be applied the same way in relation to an officer holding the office of military judge. As stated previously, a military judge can only be released from the CAF following death or upon request.[96] Should a military judge be assessed by CAF medical personnel as being unfit on medical grounds, the question of whether he or she satisfies the medical fitness standard applicable to officers is to be the subject of an inquiry by the Military Judges Inquiry Committee. This will be followed by a recommendation to the Governor in Council for removal and a report to the Minister of its inquiry.[97]

[97] It is revealing that in an effort to protect judicial independence and impartiality, the legislation does not allow the CAF medical staff to directly affect the release of an officer holding the office of military judge as it would for any other officer. What needs to happen first in the case of military judges is a removal for cause by the Governor in Council on the recommendation of the Military Judges Inquiry Committee.[98] The moment the removal is effective, the military judge reverts to the status of "officer only", as held before his or her appointment, and can then be treated as an officer for the application of the release policy. That officer will eventually be administratively released.

[98] Isolating the CAF medical staff from decisions that directly influence the tenure of a military judge is in no way an expression of mistrust on the medical judgement or abilities of those providing care or making medical decisions affecting members of the CAF. It is strictly a measure of isolation of members of the executive on the tenure of members of the judiciary. It is a recognition that such issues must be determined by judicial peers, on the evidence of medical professionals. A parallel may be drawn with the previous analysis pertaining to legal officers advising on charges in relation to military judges. The perceived need for isolation of these members of the executive on what will have a direct effect on the employment of a member of the judiciary has nothing to do with mistrust in their judgement or legal abilities.

[99] The medical release issue illustrates the legal fact that an officer also holding the office of military judge reverts to the status of "officer only" when no longer in office. This can be for a long period of time should the military judge resign from office and continue serving as an officer[99], for a shorter period of time if he or she is removed for cause on grounds of medical fitness or for a very short time when the military judge reaches retirement age. Indeed, in such a situation, the military judge automatically ceases to hold office on attaining the age of 60 years and is then released from the CAF for service completed under item 5(a) of the Table to QR&O article 15.01, in all likelihood the same day, given that age 60 is also the retirement age for CAF officers.

[100] It is once again revealing to realize the mechanics of such a process for something as uncontroversial as a military judge reaching retirement age. Again it was felt that the protection of judicial independence and impartiality required that while holding office, a military judge can only be released from the CAF, hence expelled from his or her office, by a decision of judicial peers. No process governed by the executive can affect the administrative release of a military judge from service in the CAF.

[101] I also wish to highlight another important element on the range of subject matters within the reach of the Military Judges Inquiry Committee, namely the standards applicable to officers. Specific reference to standards applicable to officers in concluding on the physical and medical fitness of a military judge to continue with his or her duty should not lead to the conclusion that these standards are only relevant for that purpose. Standards applicable to the conduct of officers could also be considered by the Military Judges Inquiry Committee when inquiring on questions such as "having been guilty of misconduct/manquement à l'honneur et à la dignité" and "having been placed in a position incompatible with the due execution of judicial duties/situation d'incompatibilité". That includes standards set out in CDS orders pertaining to conduct and performance deficiencies as foreseen at DAOD 5019-0. Violations of these orders cannot be dealt with through the imposition of an administrative measure by a member of the executive or the Chief Military Judge, in relation to a military judge, but could be considered by the Military Judges Inquiry Committee, in addition of course to standards applicable to all members of the judiciary.

[102] The existence of a committee of judicial peers capable of addressing a broad range of issues pertaining to any alleged misconduct or fitness regarding a military judge acts as a significant safeguard to minimize the prejudicial effect of the dual status of military judges as officers and judges. This safeguard must be understood in conjunction with other important safeguards discussed previously, to the effect that military judges are immune from the assignment of duties by members of the executive and are not liable to administrative sanctions, even as a result of an alleged departure from norms of conduct applicable to officers. Any enforcement of such order can and should be done in priority by the Military Judges Inquiry Committee to ensure that the safeguarding effect of the measure is maximized.

(c) Conclusion

[103] I conclude, in relation to this third question, that the *NDA* and its regulations provide for a number of safeguards sufficient to ensure that the system would not give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person. These safeguards include the limitation on the imposition of duties to military judges and, most importantly, the evaluation of fitness and conduct of military judges by a committee of judicial peers. Keeping in mind the benefits of the administration of military justice by officials who are also officers, these safeguards ensure that courts martial presided by military judges, are as free as possible from the interference of the military hierarchy.

[104] This conclusion entails that from a legislative and regulatory perspective, the structure applicable to the discipline of military judges meets the requirement of judicial impartiality, as long as the significant safeguard provided by the Military Judges Inquiry Committee is allowed to operate efficiently. This safeguard ensures that military judges are immune from any disciplinary or administrative measures initiated by the executive and prevents any reasonable apprehension of bias from forming in the mind

of a reasonable, well-informed person looking at the structure governing the military judiciary and the courts martial system.

Fourth question: Does the impugned CDS order undermine these safeguards to the extent that a reasonable person fully informed of all the circumstances would consider that military judges do not enjoy the necessary guarantees of judicial impartiality?

(a) Introduction

[105] The applicant has met his burden of proving that there is an issue of judicial impartiality at play in this case at step one of the analysis in *Lippé*, given the *prima facie* incompatibility of the simultaneous functions of officer and that of judge. At the second step of the analysis, I found that safeguards in place, most importantly the existence of a Military Judges Inquiry Committee to inquire on issues of misconduct and fitness, were sufficient to alleviate the risk of bias. In concluding as I did, I rejected one of the complaints of the applicant to the effect that the courts martial system cannot be reasonably seen to be free to perform its adjudicative role without interference from the executive. It remains that the applicant's starting point is the impugned order, qualified as a symptom, showing the executive's interference.

[106] The respondent argues that the impugned order is simply a mechanism to ensure that military judges can be treated as any other officer as it pertains to required actions under the Code of Service Discipline. It may be so, but herein lies the problem. In treating military judges in the same way as other officers, the order ignores the existence of a separate regime to deal with misconduct on the part of military judges, a regime that is not applicable to other officers.

(b) Analysis

The nature of the impugned order of 2 October 2019

[107] The impugned order specifically targets the office of military judges. That way, it purports to allow a disciplinary process driven by the chain of command to run parallel to the Military Judges Inquiry Committee process provided for by Parliament at sections 165.31 and 165.32 of the *NDA*, driven by the judiciary and entrusted to determine whether a military judge is guilty of misconduct or has been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her judicial duties.

[108] A reasonable observer looking at the impugned order would perceive that the military hierarchy at the highest level is stating its intention to impose its justice system on military judges in the same way it is imposed on other officers, when they are believed to have misbehaved in the opinion of investigators, commanding officers and the legal officers from the Office of the JAG advising all of these actors. In doing so,

they may deprive the military judges of the judicial disciplinary scheme specifically created for them for the purpose of bolstering their judicial independence.

[109] The same reasonable observer would also observe that the order is singular in a number of ways. First, the impugned order targets a small group of two to five officers by reference to their office. Second, it targets military judges, a unique group of officers who benefit from significant protection in the *NDA* and its regulations to safeguard their independence from the military hierarchy, given the power granted to members of this small group to sentence those offenders found guilty to a range of punishments including the lengthiest sentences of imprisonment available in Canadian law. Although previous general orders allowing charges to be laid against certain groups of officers on strength at National Defence Headquarters may have been used to charge a military judge, the 2 October 2019 order and its predecessor dated 19 January 2018[100] appears to be the first ones to target military judges specifically.

The order raises judicial impartiality problems

[110] Military judges cannot be treated as any other officers; doing so violates judicial impartiality guaranteed to accused persons tried before military judges. By the nature of its wording the order imposes on military judges a system of military justice in which members of the executive have a significant role over the system of misconduct and fitness administered by judicial officials provided for in the legislation. The contrast between the two systems is significant as to who is involved between state agents and judicial officials in deciding if a trial, on the one hand, or an inquiry, in the other, will take place. A reasonable observer considering the order expressing the desire to submit military judges to a disciplinary process initiated by the executive over the legislated process administered by judicial peers could reasonably apprehend that the military judge could be biased in favour of the executive in the performance of his or her duties.

The impugned order offends the legislative intent for military judges' discipline

[111] Although there is no express provision in the *NDA* and its regulations as to how the two disciplinary systems applicable to military judges ought to interact and which one has priority over the other, a number of legal and practical considerations reveal that the nature of the impugned order is contrary to the legislative intent and the proper operation of a disciplinary system for judges.

[112] The following legal considerations militate for the application of the Military Judges Inquiry Committee scheme in priority over the military disciplinary system applicable to all officers:

(a) First, the express mention in the *NDA* of an exceptional treatment for military judges in subsection 164(1.3) to the effect that a superior commander may not try a military judge by summary trial. That points to the legislator's intention that military judges are not to be treated as

any other officer under the Code of Service Discipline but as members of the judiciary.

(b) Second, the provisions in the *NDA* to the effect that the Code of Service Discipline does not affect the jurisdiction of any civil court to try a person for any offence.[101] As evidenced by the safeguards discussed above and the similar duties of military judges in relation to civilian judges, one can deduce that military judges should be treated the same as any other judicial officials when suspected of having committed and offence: civilian courts' jurisdiction should first be considered when the alleged misconduct constitutes an offence triable by that court.

(c) Third, the operation of the Military Judges Inquiry Committee in relation to issues of medical fitness and retirement age reveal that the Committee's process must take priority over any process engaged by the executive.

[113] These legal considerations are enhanced by practical considerations supporting the conclusion that the Military Judges Inquiry Committee process should be allowed to come to its proper conclusion before the military justice system process applicable to all officers is applied. It is only when the military judge is removed following a process governed by his peers that he or she should be treated as an officer and as required be charged and dealt with under the Code of Service Discipline. This sequence in proceedings is the only one which allows both the judges and officers respective disciplinary processes to run their course fully to their logical conclusion.

[114] Indeed, a military judge can only be tried by court martial. Should a guilty verdict ensue, the court would not be able to fully consider an adequate sentence as imposing a number of available punishments from the list at section 139 of the *NDA* would cause significant practical difficulties both for CAF authorities than for any subsequent Military Judges Inquiry Committee that would have to be convened should a military judge be found guilty of an offence. The imposition of punishments of dismissal, dismissal with disgrace and, as far as the Chief Military Judge is concerned, reduction in rank would cause difficulties on two fronts. On the administrative front, dismissals are not effective unless and until they are administratively implemented. Implementation would be impossible as a military judge cannot be released under item 1 of the Table to QR&O article 15.01. If the sentence was to be implemented, the dismissal would render any subsequent Military Judges Inquiry Committee moot. As for reduction in rank imposed on the Chief Military Judge, any implementation would cause the incumbent to be effectively removed from his office as the Chief Military Judge must be of no less than the rank of colonel.[102] There is no provision allowing the Chief Military Judge to be removed from that office or even resign from it and revert to being a puisne military judge. These are two distinct offices.

[115] Of course, there remains the option of a court martial refraining from imposing these sentences. However, such self-limitation would reduce the efficiency of the Code

of Service Discipline process without benefitting the Military Judges Inquiry Committee process. It is much more respectful of both processes and adherent to legislative intent to let the judiciary disciplinary process unfold first, then should the military judge be removed, proceed if warranted with charges under the Code of Service Discipline.

[116] To be clear, I am not concluding that the impugned order violates judicial impartiality guaranteed to accused persons because of practical difficulties relating to the enforcement of the Code of Service Discipline in priority to the judicial disciplinary process. I am concluding that the impugned order, by targeting military judges specifically, imposes a system of discipline without due consideration of the system of discipline preferred by the legislator. That, itself, violates judicial impartiality.

The impugned order is not inextricably linked to jurisdiction

[117] Both parties argue that the impugned order is inextricably linked to jurisdiction under the Code of Service Discipline, leading the applicant to argue that the order is a symptom of a structural defect and the applicant to argue that the order is innocuous.

[118] The existence of jurisdiction over military judges as officers in the regular force under section 60 of the *NDA* is not all that is required to be able to validly exercise this jurisdiction. There is no exact correlation between the existence of jurisdiction and the right to exercise that jurisdiction. Not every person who is subject to the Code of Service Discipline can be charged and dealt with under the Code in all circumstances. Although military judges are subject to the Code of Service Discipline by virtue of their status as officers of the regular force, it is within the courts role to determine if their status as judicial officials require that they be exempt from the jurisdiction of courts martial presided by their colleagues while they hold office in order to protect all accused persons' rights under paragraph 11(*d*) of the *Charter*.

[119] As recently stated by the Supreme Court of Canada in *R. v. Stillman*[103], the distinction between the existence of jurisdiction and the exercise of jurisdiction is an important one. The role of defining the scope of military prosecutors' jurisdiction belongs to the courts, while the role of deciding whether jurisdiction should be exercised in any particular case – and what factors guide that decision – is properly left to military prosecutors.

[120] An illustration of a court-imposed limit on the scope of military prosecutors' jurisdiction has been offered over five years ago by the CMAC as it pertains to civilians in *R. v. Wehmeier.*[104] This was an appeal from a court martial decision which found that the prosecution's decision to proceed with the prosecution of a civilian accompanying a CAF contingent deployed overseas violated section 7 as an abuse of process. The CMAC found there had not been an abuse of process but rather that the proceedings were inconsistent with the principles of fundamental justice as the prosecution of Mr. Wehmeier in the military justice system was arbitrary given a lack of any connection

with the objectives sought to be achieved by making accompanying civilians subject to the Code of Service Discipline.

[121] A similar approach can be adopted here: the prosecution of a military judge in the military justice system is a violation of judicial impartiality given that it subjects the judge to a process largely controlled by the executive in opposition to a process administered by judicial peers. In both cases the scope of military prosecutors' jurisdiction is framed by the court. The issue is not whether prosecutorial discretion should be exercised in a given way when the case concerns a military judge, but rather whether charges or accusations targeting a military judge in office are even within the purview of military prosecutors to assess and act upon. In my opinion, they are not.

The impugned order is not required to ensure equality before the law

[122] Another concern central to the respondent's argument is to the effect that the impugned order is required to ensure equality before the law. Yet, equality does not involve treating everyone the same. A finding that military judges are not liable to be charged under the Code of Service Discipline while in office by virtue of their status as judicial officials does not violate principles of equality, either in relation with other persons subject to the Code of Service Discipline or in relation with other citizens.

[123] As far as internal equality is concerned, the issue of who can be charged and dealt with under the Code of Service Discipline cannot make abstraction of the reality of a system of justice reflective of the CAF as small and hierarchical. This means the higher one gets in the chain of command, the more difficult it will be to have that person charged and dealt with in conformity with existing legislative and regulatory provisions. An obvious example is the Chief of the Defence Staff. The officer entrusted with that office is subject to the Code of Service Discipline, yet, in effect, cannot be charged while in office as he or she has no commanding officer.

[124] Furthermore, it is difficult to imagine how the JAG, the DMP and the Provost Marshal can be investigated given that it would be personnel under their command who would conduct either the investigation or provide the mandatory legal advice in relation to an investigation targeting them. It is also difficult to imagine how charges could be preferred for court martial against the DMP and JAG given that the DMP can hardly be performing the quasi-judicial function of determining if charges should be preferred against him or her, let alone be responsible for conduct of the prosecution against him or herself. Once again, the DMP is the only office that can perform these functions under the *NDA* regardless of any instruction the DMP can decide to impose on him or herself.[105] The same can be said about charges targeting the JAG, the DMP's direct superior in the chain of command, who has the authority to issue direction to the DMP and who provides the DMP with the human and financial resources necessary for the functioning of the military prosecution service. That is simply a reflection of the size of the CAF and the fact that the key officials required to run this unique military justice system cannot transfer their responsibilities to a parallel jurisdiction.

[125] The only way to reconcile these jurisdictional bars for some persons under the Code of Service Discipline with the principle of equality before the law is to understand and accept that there is a difference between an office and the officer holding that office. It is possible to accept that Code of Service Discipline proceedings cannot be initiated against an officer while he or she is holding a given office such as the CDS or JAG without infringing on equality before the law. Indeed, these office holders do not cease to be officers if they are no longer in their respective offices. Officers in these two positions have continued to serve the CAF in their rank after leaving their office.[106] I realize it is practically easier to remove an officer from "at pleasure" appointments such as the CDS or JAG[107] and more difficult to remove an office holder such as the CAF Provost Marshal, DMP and DDCS who all serve "during good behaviour" and can only be removed on recommendation of an inquiry committee.[108] Regardless, these officers can be charged and dealt with once they are no longer in office. The law applies to them just as it does for a military judge who could only be charged once removed from his or her office.

[126] The nature of the CAF as an organization and in the way the Code of Service Discipline necessarily needs to be set up to conform with the principle of command responsibility means that not all officers can be treated equally. The differences in treatment herein discussed are entirely acceptable in practice and in law. They recognize the role office holders play in control and administration of the CAF on the one hand and on supporting the administration of military justice on the other. Military judges have a unique responsibility which under the *Charter* demand conformity with the principle of judicial impartiality. Recognizing that they cannot be charged and dealt with under the Code of Service Discipline while in office is necessary to ensure that military judges be as free as possible from the interference of the military hierarchy responsible for maintaining the discipline, efficiency and morale of the CAF.[109]

[127] Turning now to external equality or equality before the law of military judges as citizens. This aspect of the respondent's argument can be most accurately illustrated by this extract from its pleadings:

> "Much like how civilian judges can be charged and dealt with through the civilian criminal justice system, military judges are not above the law."[110]

[128] This argument implies that military judges must be assigned a commanding officer so they can be charged and dealt with under the Code of Service Discipline, as otherwise they would fall into a law-free zone. I do not see how such a risk can exist. As explained above, military judges are as liable to be charged and dealt with through the civilian criminal justice system as their civilian counterpart.[111] Military judges are liable to the same standards of conduct in the execution of their duties and in their conduct in general, as evidenced by rules applicable to all federally-appointed judges found in the Canadian Judicial Council, *Ethical Principles for Judges*.[112] The Military Judges Inquiry Committee can refer to these rules to assess the conduct of military judges. It can also refer to standards of conduct applicable to officers in their inquiry, an obligation that recognizes military judge's dual status as judges and officers while

retaining the primacy of the disciplinary scheme enacted by Parliament as a disciplinary process for military judges. Also, military judges remain liable as officers to be charged and dealt with under the Code of Service Discipline once they have left office and even once they have retired from the CAF in relation to an offence committed while serving.

[129] In effect, military judges are subject to more liabilities in law as it pertains to their duties and their conduct on and off the bench than any of their civilian counterparts, even if they are not liable to be tried and dealt with under the Code of Service Discipline while in office. These additional responsibilities relating to conduct are commensurate with anyone's status as a member of the CAF: they too have additional responsibilities and liabilities. With such a net of legal rules applicable to military judges, it is difficult to understand how the respondent can allude to a risk of lawlessness or inequality before the law.

[130] What the respondent appears to be essentially suggesting that it would be inconceivable if military judges were not fully liable under that law the DMP and the Office of the JAG effectively control. This one sentence effectively illuminates how the impugned order can be reasonably perceived as a threat to judicial independence and impartiality. The Order provides a mechanism to subject military judges to a process controlled by agents of the government performing an executive function under the Code of Service Discipline, from complaint to investigation, charge, prosecution and appeals. These agent can effectively isolate a military judge from judicial functions before the intervention of any judicial official. The order fails to consider that judicial functions performed by military judges must be sufficiently independent from government.

(c) Conclusion

[131] Concluding that the judicial role of military judges prevents them from being charged and dealt with under the Code of Service Discipline while in office would not offend the principle of equality before the law as it would be both partial and temporary. It would be partial because they could still be charged in the civilian criminal justice system as any other citizen and their conduct could be reviewed by the Military Judges Inquiry Committee, not only on standards of conduct applicable to the judiciary but also on standards applicable to officers, as interpreted by the judicial officials constituting the Committee. It would be temporary because as for others who cannot be charged and/or dealt with under the Code of Service Discipline while in the position they hold, they could still face military discipline as officers once removed from their position. This would not be unique: the CDS, the JAG, the DMP, the Provost Marshal and possibly the DDCS cannot be dealt with under the Code of Service Discipline while in office.

[132] I fully realize that the impossibility of laying charges against military judges while in office may lead to strictly military offences of a minor nature, hence of insufficient gravity to warrant removal, not being addressed under the Code of Service Discipline. This is a reasonable price to pay to protect the rights of accused to be tried

before an independent and impartial military tribunal. If there is anyone who should be exempted from such an exercise due to the function they occupy it is military judges who can hear and determine the most serious of crimes and impose the most severe of sentences. A reasonable observer would understand that an officer holding the office of military judge must be exempt from being charged under the Code of Service Discipline and, consequently may not be fully accountable for such offences.

[133] Therefore, this Court concludes that the CDS order of 2 October 2019, reproduced at Exhibit PP1-11 in its final form is unlawful to the extent that it grants authority to charge an officer holding the office of military judge, specifically paragraph 1(b) of the impugned order, which renders paragraph 2 of the same order moot.

Fifth and final question: should the plea in bar be granted or are there other appropriate remedies to address any concerns raised by this application?

(a) Introduction

[134] I have concluded that the impugned CDS order undermines an important safeguard - the disciplinary system addressing conduct and fitness deficiencies of military judges – which operates to ensure that the structure of the military judiciary would not give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person. As a result, I concluded that the impugned order is unlawful.

[135] The issue now becomes: What should the impact of these conclusions be on the current proceedings against Master Corporal Pett?

(b) Position of the parties

[136] The applicant requests as remedy that declarations be made, including a declaration pursuant to subsection 52(1) of the *Constitution Act, 1982* to the effect that the disciplinary regime set out in the *NDA* as it applies to military judges is of no force or effect. He also requests a stay of the current proceedings.[113]

[137] The applicant did not target any specific provision of the *NDA* in its application. In any event, I found that military judges are not liable under the disciplinary regime of the Code of Service Discipline. Therefore, there is no remedy required as to the regime itself. The only issue that remains to be decided is what should be the remedy, if any, attached to the ruling that the impugned order is unlawful.

[138] The respondent's position is that the order should be ignored. Consequently, as Master Corporal Pett is tried by an independent and impartial tribunal, the court martial should proceed. At worst, the trial should be adjourned or the proceedings terminated.[114]

(c) Analysis

[139] I agree with the substance of the respondent's argument. Now that I have found that the order is unlawful, the logical impact of that conclusion is that what could have barred the trial from taking place is no longer an obstacle. The trial can therefore proceed.

[140] However, there have been many references to orders in the arguments made by the parties as well as in my analysis of the application. I found a significant difference between an order which does not expressly exclude military judges from its application, as discussed previously, and an order which targets military judges specifically. The impugned order falls into the second category. This needs to be addressed in determining the issue of remedy in the circumstances of this application.

[141] I am concerned of the impact of leaving the order formally untouched on the perception that a reasonable well-informed observer might form as it pertains to the impartiality and independence of this and future courts martial. The emphasis must be placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent.[115] The order, therefore, must be the object of a formal declaration to send the required signal to the legal community and persons subject to the authority of courts martial.

[142] What then is the proper authority to issue such declaration? Subsection 52(1) of the *Constitution Act*, 1982 is concerned with "any law that is inconsistent with the provisions of the Constitution". A CDS order is obviously not a law. This authority is in my view inapplicable to the situation at hand.

[143] Section 179 of the *NDA* is concerned with the powers of courts martial. It provides that a court martial has the same powers, rights and privileges vested in a superior court of criminal jurisdiction with respect to matters necessary or proper for the due exercise of its jurisdiction. It provides the necessary authority for a declaration of invalidity necessary for the Court to have and exercise jurisdiction.

(d) Conclusion

[144] In the circumstances of the charges preferred for trial by Standing Court Martial against Master Corporal Pett, especially this plea in bar application targeting the impugned order as a valid concern pertaining to judicial impartiality, I must, in order to exercise the Court's jurisdiction, make a formal pronouncement declaring that order unlawful and of no force and effect. After doing so under the authority of section 179 of the *NDA*, the application for plea in bar can be dismissed and the Court can exercise its jurisdiction over Master-Corporal Pett.

CONCLUSION

[145] The declaration of invalidity, combined with the findings included in this decision as it pertains to the limited application of the Code of Service Discipline in its current configuration to military judges, ensures that no reasonable and well-informed

observer might form the perception that this presiding military judge and this Standing Court Martial is anything less than an independent and impartial tribunal.

[146] This conclusion on the way a reasonable and informed person would view the matter is made with the understanding that military authorities and their legal advisors conduct their affairs with the utmost respect for the rule of law, hence the authority of the courts. Courts have no means to enforce their decisions. The rule of law rests on the acceptance by the executive of judicial decisions and their application, even if or when it does not suit them. Recognizing the right of appeal which could be exercised, it is expected that military authorities will give effect to judicial decisions pertaining to the application of the Code of Service Discipline.

[147] This is not to say that reactions or lack thereof from the military hierarchy in relation to this decision or the issues it raises may not be considered relevant in any subsequent assessment as to whether a reasonable and informed person would view military judges and courts martial as independent tribunals. I am deciding today a novel issue. My decision on the perception of a reasonable and informed observer takes this novelty into consideration and assumes that discussions will ensue on measures that need to be implemented in the short, medium and long terms to improve the military justice system. Now is a time where judicious choices need to be made to ensure that this system can continue to function for the benefit of all involved.

[148] This ruling is made in response to an application by an accused person alleging the breach of a right guaranteed under the *Charter*. The outcome of this application is not a statement about any sense of superiority or entitlement on the part of military judges. In fact, this decision is not so much about judges than about the right of every member of the CAF charged and tried by a court martial to appear before a judge who they can perceive being just as impartial and independent as any other judge who could find them guilty of an offence and, consequently, sentence them to a range of punishments which may include incarceration.

[149] Offenders sentenced to imprisonment by a military judge eventually serve their sentence in the very same penitentiary or civil prison than another offender sentenced by a civilian judge.[116] They should not be ordered there by a judge offering less than any other judge in terms of impartiality and independence. Persons subject to the Code of Service Discipline are not second class citizens. They are deserving of the same first class justice as any other citizen of this country.

FOR THESE REASONS, THE COURT:

[150] **DECLARES** the order from the CDS dated 2 October 2019 entitled "DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763" to be of no force or effect as it pertains to paragraphs 1(b) and 2, applicable to any disciplinary matter involving a military judge.

[151] **DISMISSES** the plea in bar application.

Dated this 10th day of January 2020, at the Asticou Centre, Gatineau, Quebec

"J.B.M. Pelletier, Commander"
M.J.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Colonel D. Martin and Major M.L.P.P. Germain, Counsel for the Respondent

Major A.H. Bolik and Captain D. Sommers, Defence Counsel Services, Counsel for the Applicant

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Endnotes

[1] *National Defence Act*, R.S.C., 1985, c. N-5, (hereinafter *NDA*).
[2] The exact same application was previously the subject of a notice to my colleague Sukstorf M.J., in relation to the matter of the General Court Martial of Corporal D'Amico, which she has been assigned to preside over. I understand it is currently scheduled to be heard in January 2020.
[3] *R. v. Larouche*, 2014 CMAC 6 at paragraph 6.
[4] QR&O subparagraph 112.24(8)(*a*).
[5] These orders were entered as Exhibits PP1-3 to PP1-12 at the hearing.
[6] *Military Rules of Evidence*, C.R.C., c. 1049.
[7] *R. v. Edwards*, 2019 CMAC 4.
[8] *NDA* subsection 165.21(1).
[9] *NDA* subsection 165.24(2).
[10] *NDA* subsection 165.21(4).
[11] *NDA* subsection 165.21(5).
[12] *NDA* subsection 60(2).
[13] *NDA* section 161.
[14] QR&O article107.03.
[15] NDA sections 18.3 and 18.5.
[16] *NDA* section 161.1.
[17] QR&O article 107.11.
[18] QR&O article 107.12.
[19] See *NDA* section 164 and QR&O article 108.12.
[20] The provision exempting military judges from trial by summary trial were made in the context of a reform which raised the most senior rank that can be tried by summary trial from major to lieutenant-colonel. The provision was enacted by Parliament in June 2013 with Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act* (S.C. 2013, c. 24), but came into force with implementation in the QR&O only on 1 September 2018.
[21] As provided for at paragraph 163.1(1)(b) and section 164.2 of the *NDA*. QR&O article 109.02 provides that the CDS and any officer having the powers of an officer commanding a command are authorized to refer a charge to the DMP.

[22] *NDA* subsection 165.1(1), and sections 165.11 and 165.12.
[23] Department of National Defence, *Director of Military Prosecutions Annual Report 2018-2019*, (Ottawa: Director of Military Prosecutions, 2019), Chapter one.
[24] DMP Policy Directive #016/17 Appointment of Special Prosecutors dated 12 April 2017 and updated 15 December 2017.
[25] *NDA* section 9.1.
[26] *NDA* section 9.2.
[27] Department of National Defence, *JAG Annual Report 2018-19* (Ottawa, Judge Advocate General, 2019), Chapter one online: https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2018-2019/chapter-one-who-we-are-the-office-of-the-judge-advocate-general.html.
[28] QR&O paragraph 4.081(4).
[29] Defence Administrative Orders and Directives (DAOD) 5019-5 subparagraph 3.7a. A similar role is provided for at DAOD 5019-7 on Alcohol Misconduct.
[30] See *NDA* section 139.
[31] See DAOD 5019-2 on Administrative Review.
[32] *R. v. Stillman*, 2019 SCC 40 at paragraph 53.
[33] *NDA* subsection 165(2).
[34] *NDA* subsection 165.19(3).
[35] *NDA* sections 165.191 to 165.2.
[36] *NDA* subsections 167 (2) and 167(6).
[37] QR&O paragraph 111.03(1).
[38] QR&O paragraph 111.03(3).
[39] QR&O paragraph 111.03(4).
[40] *NDA* sections 165.25 and 165.26.
[41] Found at QR&O paragraph 111.02(2).
[42] Applicant's Notice of Application and written arguments (Exhibit PP1-1) paragraphs 5, 15 and 16.
[43] Respondent's written arguments (Exhibit PP1-2) paragraph 20.
[44] *R. v. Lippé*, [1991] 2 S.C.R. 114.
[45] Applicant's Notice of Application and written arguments (Exhibit PP1-1) paragraph 8.
[46] *Lippé*, *supra* note 44, at pages 132-141.
[47] *Valente v. The Queen*, [1985] 2 S.C.R. 673.
[48] *Lippé*, *supra* note 44, *at page 138*.
[49] *Ibid* at page 138.
[50] *R. v. Généreux*, [1992] 1 S.C.R. 259.
[51] *R. v. Leblanc*, 2011 CMAC 2.
[52] *MacKay v. The Queen*, [1980] 2 S.C.R. 370.
[53] *Généreux*, *supra* note 50, at page 296 *(pages 47-48 in the WordPerfect version on the SCC website).*
[54] *Ibid* at page 308 (pages 62-63 *in the WordPerfect version on the SCC website*).
[55] Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, presented to the Minister of National Defence on March 14, 1997 by the Right Honourable Brian Dickson, P.C., C.C., C.D. (Ottawa: Department of National Defence, 1997) (*First Dickson Report*); Canada, Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on Quasi-Judicial Role of the Minister of National Defence*, presented to the Minister of National Defence on 25 July 1997 by the Right Honourable Brian Dickson, P.C., C.C., C.D. (Ottawa: Department of National Defence, 1997) (*Second Dickson Report*);
[56] Commission of Inquiry into the Deployment of Canadian Forces to Somalia. 1997. *Dishonoured Legacy: The Lessons of the Somalia Affair. (*Ottawa: Public Works and Government Services, 30 June 1997) (*Somalia Inquiry Report*)
[57] As evidenced by recommendations 27 and 28 in the *First Dickson Report*, recommendations 1, 4 and 5 in the *Second Dickson Report* and recommendations 40.1 and 40.35 in the *Somalia Inquiry Report*.
[58] Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c.35.

[59] Lamer, Antonio. 2003. *The first independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, an Act to amend the National Defence Act and to make consequential amendments to other acts, as required under section 96 of Statutes of Canada 1998, c.35*. (Ottawa: National Defence, 3 September 2003).(*Lamer Report*)
[60] *Ibid* at page 21, Recommendation 5.
[61] *Leblanc*, *supra* note 51, was rendered on 2 June 2011.
[62] *Security of Tenure of Military Judges Act*, S.C. 2011, c. 22, assented to on 29 November 2011.
[63] *Lamer Report*, *supra* note 58, at pages 27-28, Recommendation 13.
[64] Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, S.C. 2008 c. 29, assented to on 18 June 2008.
[65] *R. v. Trépanier*, 2008 CMAC 3 rendered on 24 April 2008 found that provisions of the *NDA* authorizing the DMP to select the type of court martial to try an accused violated the accused's constitutional right to make full answer and defence and to control the conduct of that defence.
[66] Second Independent Review Authority (Canada), and Patrick LeSage, 2011. *Report of the Second Independent Review Authority of the Honourable Peter G. MacKay minister of National Defence* by the Honourable Patrick J. LeSage, C.M., O. Ont., Q.C., (Canada, December 2011). (*LeSage Report*)
[67] *LeSage Report*, *supra* note 66, page 38.
[68] *Ibid* at pages 37-41, Recommendations 21 and 22.
[69] *Ibid* at pages 41-42, Recommendation 23.
[70] For instance, the Supreme Court of Canada decision in *R. v. Jordan*, 2016 SCC 27 which raised delay concerns to the level of a constitutional obligation and recent proposals by the Canadian Superior Court Judges Association to limit the duration of mandates of chief justices and associate chief justices, a trend compatible with the notion that all judges rank equally.
[71] *Valente*, *supra* note 47, at page 692, paragraph 25.
[72] *Lippé*, *supra* note 44, at page 142 *(page 34-35 in the WordPerfect version on the SCC website)*.
[73] *Lamer Report*, *supra* note 59, at page 21.
[74] *Valente*, *supra* note 47, at page 691, paragraph 24.
[75] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at page 509, paragraph 53.
[76] Respondent's written arguments (Exhibit PP1-2) paragraph 22.
[77] *Ibid* at paragraph 17.
[78] *Lamer Report*, *supra* note 58, at page 25, Recommendation 12.
[79] Respondent's written arguments (Exhibit PP1-2) paragraph 23.
[80] *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716 paragraphs 85 to 92.
[81] *R. v. Cawthorne*, 2016 SCC 32 at paragraphs 23 and 32.
[82] *Généreux*, *supra* note 50, at page 309.
[83] *R. v. Lauzon*, [1998] CMAC-415.
[84] *NDA* section 165.17.
[85] QR&O article 107.12.
[86] QR&O article 107.12.
[87] QR&O paragraph 107.11(2).
[88] *R. v. Dutil*, 2019 CM 3002.
[89] QR&O paragraph 15.01(5).
[90] Respondent's written arguments (Exhibit PP1-2) paragraph 16.
[91] *Lippé*, *supra* note 44, at page 138.
[92] *NDA* subsection 165.31(1).
[93] The conduct of inquiry provisions pertaining to DMP and DDCS are found at QR&O article 101.15, completing the removal for cause provision found in the *NDA* at subsection 165.1(2) for the DMP and subsection 249.18(2) for DDCS.
[94] *Judges Act*, R.S.C. 1985, c. J-1, subsection 65(2).
[95] As found, for instance, in the publication of the Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998).
[96] QR&O paragraph 15.01(5).
[97] *NDA* subsection 165.32(7) and 165.32(8) respectively.
[98] *NDA* subsection 165.21(3).
[99] *NDA* subsection 165.21(5).
[100] Produced at the hearing as Exhibit PP1-4.

[101] *NDA* section 71.
[102] *NDA* subsection 165.24(2).
[103] *Stillman*, *supra* note 32, at paragraph 103.
[104] *R. v. Wehmeier*, 2014 CMAC 5.
[105] Such as a DMP Policy Directive on the Appointment of Special Prosecutors, *supra* note 24.
[106] For instance, General Ray Henault was CDS from 2001 to 2004 prior to being posted as Chairman of NATO's Military Committee. Similarly, Brigadier General Pierre Boutet was seconded to the Department of Veterans Affairs after he had completed his tenure as JAG in April 1998, while still a serving officer.
[107] *NDA* subsections 9(2) and 18(1).
[108] *NDA* subsections 18.3(3), 165.1(2) and 249.18(2).
[109] *Généreux*, *supra* note 50, at page 308.
[110] Respondent's written arguments (Exhibit PP1-2) paragraph 13.
[111] *NDA* section 71.
[112] *Ethical Principles for Judges*, *supra* note 95.
[113] Applicant's Notice of Application and written arguments (Exhibit PP1-1) paragraph 35.
[114] Respondent's written arguments (Exhibit PP1-2) paragraphs 24 and 30.
[115] *Valente*, *supra* note 47, at paragraph 22.
[116] *NDA* subsections 220(1) and 220(3).

ANNEX A

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Chief of the Defence Staff

Chef d'état-major de la Défense

National Defence Headquarters
Ottawa, Ontario
K1A 0K2

Quartier général de la Défense nationale
Ottawa (Ontario)
K1A 0K2

ORDER

DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763

1. I, J.H. Vance, Chief of the Defence Staff, pursuant to subsection 18(1) of the *National Defence Act* and for the purposes of the definition of "commanding officer" contained in article 1.02 of the *Queen's Regulations and Orders for the Canadian Forces*, hereby :

a. revoke the previous designation order of 19 January 2018 with respect to this unit;

b. designate the officer who is, from time to time, appointed to the position of Deputy Vice Chief of Defence Staff (DVCDS) and who holds a rank not below Major-General/Rear- Admiral, to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving a military judge on the strength of the Office of the Chief Military Judge;

c. designate the officer who is, from time to time, appointed to the position of Commandant of the

ORDRE

DESIGNATION DE COMMANDANTS A L'EGARD DES OFFICIERS ET DES MILITAIRES DU RANG QUI FIGURENT A L'EFFECTIF DU CABINET DU JUGE MILITAIRE EN CHEF ID DU SERVICE 3763

1. Je, soussigné, J.H. Vance, chef d'état-major de la défense, en vertu du paragraphe 18(1) de la *Loi sur la défense nationale* et pour l'application de la définition de « commandant » de l'article 1.02 des *Ordonnances et règlements royaux applicables aux Forces canadiennes* :

a. abroge l'ordre précédente du 19 janvier 2018 à l'égard de cette unité ;

b. désigne l'officier qui est nommé de temps à autre au poste de vice-chef d'état-major adjoint de la défense (VCEMAD) et détenant au moins le grade de major général/contre-amiral, d'exercer les pouvoirs et compétences d'un commandant en ce qui concerne toute affaire disciplinaire à l'égard d'un juge militaire qui figure à l'effectif du Cabinet du juge militaire en chef ;

c. désigne l'officier qui est nommé de temps à autre au poste de commandant de base des Forces canadiennes

National Defence / Défense nationale

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Canadian Forces Base (Ottawa Gatineau) and who holds a rank not below Colonel/Captain (N), to exercise the powers and jurisdiction of a commanding officer with respect to any disciplinary matter involving an officer, other than a military judge, or a non-commissioned member, on the strength of the Office of the Chief Military Judge.

(Ottawa Gatineau) et détenant au moins le grade de colonel/ capitaine de vaisseau, d'exercer les pouvoirs et compétences d'un commandant en ce qui concerne toute affaire disciplinaire à l'égard d'un officier, autre qu'un juge militaire, ou d'un militaire du rang, qui figure à l'effectif du Cabinet du juge militaire en chef.

2. The next superior officer in matters of discipline to whom DVCDS is responsible, when acting as a commanding officer referred to in paragraph (b) shall be the Vice Chief of the Defence Staff (VCDS); and

2. En matière de discipline, l'officier immédiatement supérieur, dont le VCEMAD est responsable lorsqu'il agit en tant que commandant visé à l'alinéa (b), est le vice-chef d'état-major de la Défense (VCEMD); et

3. The next superior officer in matters of discipline to whom the Commander of CFB (Ottawa-Gatineau) is responsible, when acting as a commanding officer referred to in paragraph (c) shall be DVCDS.

3. En matière de discipline, l'officier immédiatement supérieur, dont le commandant de la BFC (Ottawa-Gatineau) est responsable lorsqu'il agit en tant que commandant visé à l'alinéa (c), est le VCEMAD.

Le général

J.H. Vance
General

Given at Ottawa, Canada
this 2 Day of October, 2019.

Fait à Ottawa, Canada
ce 2 jour de Octobre, 2019.